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LOWER BURMA SECTION

CONTAINING

FULL REPORTS OF ALL REPORTABLE JUDGMENTS OF
THE LOWER BURMA CHIEF COURT
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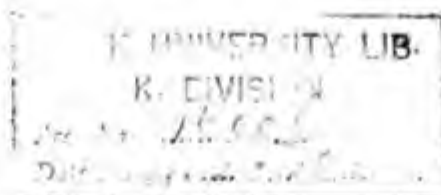
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**THE LEGAL PROFESSION
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9/15/2002

LOWER BURMA CHIEF COURT
1918

Chief Justice :

The Hon'ble Sir D. H. R. Twomey, Kt., I. C. S., Bar-at-Law.

Puisne Judges :

The Hon'ble Mr. Maung Kin, Bar-at-Law.

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—S. 1—Workman cannot be compelled to make thumb impression in Court for identification of impression on agreement 36(1)a

—S. 1—Person undertaking to supply coolies and work with them is workman 36(1)b

—S. 2 — Complainant recovering money under Act is not entitled to recover large fees for advocate 109a

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COMPARATIVE TABLES**TABLE No. I.****9 Lower Burma Rulings=All India Reporter**

LBR	AIR	LBR	AIR	LBR	AIR	LBR	AIR	LBR	AIR	LBR	AIR
54	1918 LB 130	88	1918 LB 22	153	1918 LB 62	179	1919 LB 183	219	1919 LB 153		
56	1916 PC 145	92	" " 63	160	" " 66	185	" " 153	220	" " 81		
60	1918 LB 101	93	" " 86	163	" " 100	186	" " 53	258	1918 " 11		
69	" " 135	103	" " 30	165	" " 58	191	1918 " 1	263	1919 " 151		
71	" " 140	106	" " 64	167	" " 60	205	1919 " 125	266	" " 139		
75	" " 101	103	1919 " 159	169	1919 " 143	206	" " 150	268	" " 40		
77	" " 121	112	1918 " 24	172	" " 145	208	" " 146	273	" " 38		
78	" " 136	114	1917 PC 207	174	" " 144	212	1918 " 15	275	" " 42		
81	1919 " 156	143	1918 LB 122	176	" " 148	217	1919 " 37	277	" " 120		

11 Burma Law Times=All India Reporter.

1918 Lower Burma

BurLT	AIR	BurLT	AIR	BurLT	AIR	BurLT	AIR	BurLT	AIR
1	1918 LB 69	65	1918 LB 100	118	1918 LB 32	156	1919 LB 48	222	1919 LB 51
6	" " 120	67	" " 101	119	" " 119	160	1918 " 114	224	" " 68
8	" UB 28	69	" " 83	121	1917 PC 179	161	1919 " 81	227	" " 8
9	" LB 97	73	" " 140	123	1918 UB 45	192	1918 " 135	229	" " 40
14	" UB 51	77	" " 86	127	" LB 29	193	" " 115	234	1919 LB 47
17	" " 31	84	" " 46	128	" " 96	194	" " 30	236	1918 " 1
19	" " 50	87b	" UB 44	130	" UB 99	197	1919 " 105	246	" " 111
21	1917 PC 207	89	1917 " 1	132	" LB 136	199	1918 " 76	249	1919 " 56
26	1918 UB 30	95	1918 " 28	134	" UB 43	201	" " 48	252	1918 " 139
28	1917 PC 136	97	" LB 7	135	" LB 96	202	" " 129	255	1919 " 102
36	1918 UB 32	98	" " 66	136	" " 7	203	" " 109	257	" " 45
40	" LB 114	100	" " 58	139	" " 138	205	" " 60	258	" " 118
41	" UB 32	102	" " 24	140	" UB 34	207	" " 36	259	1918 " 11
42	" " 46	104	" " 116	144	1919 LB 159	208	" " 110	263	1919 " 125
48	1917 PC 71	105	" " 9	147	1918 " 64	211	1917 PC 101	265	" " 153
54	" " 25	107	" " 121	149	1919 " 39	214	1919 LB 114	266	" " 153
58	1918 LB 63	109	1919 " 75	150	1918 " 131	215	1918 " 15	267	" " 51
59	" UB 53	114	1918 " 62	155	1919 " 44	221	1919 " 46	268	" " 130
63	" LB 50	116	" " 103	156	1919 " 44	221	1919 " 46	268	" " 130

TABLE No. II

A I R 1918 Lower Burma=Other Journals—(Contd.)

AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
1	45 IC 953	35	45 IC 923	71	44 IC 91	114 (2)	11 Bur LT 160
FB	9 LBR 191	36 (1)	43 IC 591	72	45 IC 822	115	39 IC 432
	11 Bur LT 236		11 Bur LT 207	76	43 IC 625		11 Bur LT 193
6	43 IC 536		19 Cr LJ 175		11 Bur LT 199	116	42 IC 763
7 (1)	48 IC 342	36 (2)	43 IC 417	77	46 IC 755		11 Bur LT 104
	11 Bur LT 126		19 Cr LJ 129	81	43 IC 443		18 Cr LJ 1019
	19 Cr LJ 1002	42	44 IC 231		19 Cr LJ 155	119	42 IC 121
7 (2)	47 IC 555	44	47 IC 774	83	47 IC 544		11 Bur LT 119
	11 Bur LT 97	46	48 IC 310		11 Bur LT 69	120	38 IC 203
8	45 IC 914		11 Bur LT 84	86	42 IC 803		11 Bur LT 6
SB	11 Bur LT 227	48	43 IC 588	FB	11 Bur LT 77	121 (1)	42 IC 1007
	47 IC 866		11 Bur LT 201		9 LBR 93		11 Bur LT 107
9	11 Bur LT 105		19 Cr LJ 172	90	43 IC 100		9 LBR 77
	19 Cr LJ 966	50	47 IC 541		10 Bur LT 161		19 Cr LJ 47
10	43 IC 550		11 Bur LT 63	93	46 IC 615	121 (2)	41 IC 143
11	45 IC 926	51	44 IC 239		11 Bur LT 135		9 LBR 44
	11 Bur LT 259	52	45 IC 918	95 (1)	42 IC 175		10 Bur LT 212
9	LBR 259	53	46 IC 609		18 Cr LJ 943	122	18 Cr LJ 767
13 (1)	43 IC 539	59	45 IC 840		46 IC 689		40 IC 86
13 (2)	46 IC 875		11 Bur LT 100	96 (2)	11 Bur LT 128		9 LBR 143
15	47 IC 376		9 LBR 165		46 IC 497	129	10 Bur LT 92
	11 Bur LT 215	59	19 Cr LJ 648	97	11 Bur LT 9		42 IC 326
	9 LBR 212		44 IC 763	100	45 IC 737		11 Bur LT 202
22 (1)	43 IC 519		10 Bur LT 186		9 LBR 163	130	18 Cr LJ 966
SB		60 (1)	45 IC 831		11 Bur LT 65		42 IC 52
22 (2)	43 IC 86	60 (2)	45 IC 847		9 LBR 132		9 LBR 54
	9 LBR 88		9 LBR 167	101	39 IC 132		10 Bur LT 223
	19 Cr LJ 54		11 Bur LT 205		9 LBR 75	131	41 IC 722
24	44 IC 347		19 Cr LJ 655		11 Bur LT 67		11 Bur LT 150
	9 LBR 112	62	43 IC 916	103	42 IC 100	135 (1)	42 IC 839
	11 Bur LT 102		9 LBR 159		11 Bur LT 116		10 Bur LT 165
	19 Cr LJ 331		11 Bur LT 114	104	42 IC 161		9 LBR 69
25	43 IC 684	63 (1)	44 IC 337	FB	9 LBR 69	135 (2)	42 IC 518
26	45 IC 931		9 LBR 92		10 Bur LT 123		11 Bur LT 192
27	46 IC 144		11 Bur LT 58		16 Cr LJ 929	136	40 IC 858
28 (1)	43 IC 448		19 Cr LJ 321	109	42 IC 600		9 LBR 78
	19 Cr LJ 160	63 (2)	44 IC 139		18 Cr LJ 984		11 Bur LT 132
28 (2)	44 IC 247		10 Bur LT 184		11 Bur LT 203	138	42 IC 766
29	48 IC 152	64	43 IC 931	110	42 IC 756		11 Bur LT 139
	11 Bur LT 127		9 LBR 105		11 Bur LT 208		18 Cr LJ 1022
30	43 IC 551		11 Bur LT 147		19 Cr LJ 1012	139	42 IC 950
	9 LBR 103	66	45 IC 734	111	41 IC 749		11 Bur LT 252
	11 Bur LT 194		9 LBR 160		11 Bur LT 246	140	39 IC 154
31	43 IC 455		11 Bur LT 98	113	45 IC 972		9 LBR 71
32	48 IC 182	67	45 IC 738	114 (1)	38 IC 98		11 Bur LT 73
	11 Bur LT 118	69	43 IC 488		11 Bur LT 40	142	42 IC 118
33	44 IC 103		11 Bur LT 1	114 (2)	42 IC 911	144	42 IC 382
34	46 IC 620	70	43 IC 913				

THE

ALL INDIA REPORTER 1918

LOWER BURMA CHIEF COURT

A. I. R. 1918 Lower Burma 1 Full Bench

TWOMEY, C. J., ORMOND, MAUNG
KIN AND RIGG, JJ.

Maung Hme—Plaintiff—Appellant.
v.

Ma Sein—Defendant—Respondent.

Civil Reference No. 1 of 1918, Decided
on 27th March 1918.

Buddhist Law (Burmese) — Divorce — Second marriage without consent is ground for divorce—First wife's right to divorce on this ground is subject to conditions—Partition in such case is same as in divorce by consent.

The chief wife of a Burmese Buddhist may object to her husband taking a second wife, and may claim a divorce if he does so without her consent. Her right however is subject to certain exceptions mentioned in Ss. 219, 232, 265-67 and 311 of the Digest, wherein the husband is allowed to take a second wife when the first wife is barren or has born only female children, or is suffering from certain diseases. [P 4 C1; P 5 C1 & 2]

In the case of such a divorce the property should be partitioned as in the case of divorce by mutual consent: (1872-92) L. B. R. 103 and 5 L. B. R. 87, *Dis. from*. [P 4 C1, 2; P 5 C12]

Rigg, J.—The question referred for decision in this case is whether the chief wife of a Burmese Buddhist is entitled to divorce her husband if he takes a lesser wife without her consent. It will be convenient first to examine the course of decisions on this point or related points. The earliest case is that of *Ma In Than v. Maung Saw Hla* (1), in which the Special Court held in 1881 that the chief wife had no right of objection. This ruling was declared to be still good law in 1909 in *Ma Ein v. Te Naung* (2), but doubts as to its correctness had been already expressed in various cases both in Upper and Lower Burma. In *Maung Kauk v. Ma Han* (3) Mr. Burgess said

that before accepting the rule in *Ma In Than's* case (1) it would be necessary to examine the authorities, as there was much to be said on the other side. In 1893 the same learned Judge said in *Ma Shwe Ma v. Ma Htarg* (4):

"Polygamy is said to be lawful by Buddhist law, but it may be doubted whether this conveys a correct impression unless it is understood in a special or limited sense. The leading principle of Buddhism in this respect is monogamy rather than polygamy."

He went on to express the opinion that allusions to a plurality of wives in most of the Dhammathats referred to Hindu laws and customs rather than Buddhist law. The precise point in issue in this reference has however never been decided in Upper Burma. The decision in *Ma In Than's* case (1) has been questioned in three reported cases since the constitution of the Chief Court in 1900. In *Ma San Shwe v. Po Thaik* (5). Birks, J., discussed this ruling but did not come to any definite conclusion. In *Ma Ka U v. Po Saw* (6) a Full Bench of this Court held that a chief wife could refuse to live in the same house as a lesser wife. Hartnoll, J., dissented from the opinion expressed in *Ma In Than's* case (1), and said that a husband who took another wife without his first wife's consent committed a serious matrimonial fault against her; but he did not come to a finding whether this fault would justify a claim to divorce, as it was not necessary to the decision of the matter in issue. In *Ma Wun Di v. Ma Kin* (7) Adamson, J., said:

4. (1892-96) 2 U B R 145.

5. 2 Chan Toon's L C 165.

6. (1907-08) 4 L B R 340.

7. (1908) 35 Cal 232=35 I A 41=4 L B R 175 (P C).

1. (1872-92) L B R 103.

2. (1909-10) 5 L B R 87=3 I C 715.

3. (1892-96) 2 U B R 48.

"The learned Advocate for respondents raised a question of Buddhist law, as to whether a Burman Buddhist can legally marry a second wife, during the lifetime of his first wife, without her consent. I regret. . . the question does not require a decision in this case. I may say however that the arguments of the learned Advocate, which he has embodied in a very interesting printed pamphlet, appear to me rather to throw doubt on the ruling of the Special Court in *Ma In Than v. Maung Siew Hla* (1). . . than to prove the broader proposition that a second marriage under these circumstances is null and void."

There is no doubt that polygamy is legal in Burma. In *Ma In Than's* case (1), Jardine, J. C., held that in spite of the existence of some texts of the religious law books, the custom of polygamy is so fully established that it lay upon the objector to show that this custom was limited in its application. He further said that even if the religious law was expressly opposed to polygamy, he would hesitate to suppress by judicial decision an institution which is part of the life of the people. He thought that the whole tenor of the *Manugye* was in accordance with the custom of polygamous marriages, and should not be set aside on account of the existence of isolated texts. There are indications, however, that the learned Judge was inclined subsequently to modify the decided opinion he had expressed in *Ma In Than's* case (1). After that decision the *Manu Kunnapa* was translated and at p. 30 of his note on Buddhist Law, Mr. Jardine observes that Ss. 173 and 182 throw some doubt on the right of polygamy. In para. 32 of his second note he says:

"Throughout the *Dhammathat* (*Manugye*) polygamy is treated as lawful but with a feeling that it is a grievance to the first wife."

Captain Forbes says:

"Even if polygamy is indulged in, the general feeling may be said to be against it. The suppression of the first by the second wife is a serious matter."

In *Queen-Empress v. Nga Ne U* (8) Mr. Jardine said:

"I am aware that some Burmans think that a man who has a wife may not marry a second time in her lifetime without her consent. Section 173 of the *Wunnapa* is in favour of this view, but it was not pointed out to the Special Court who held the contrary in *Ma In Than's* case (1)."

In *Ma Wun Di's* case (7) their Lordships of the Privy Council quoted with approval the following observations of the learned Chief Justice:

"It is not forbidden to a Burman Buddhist to
8. (1872-92) L B R 202.

have two wives at the same time, but it is universally conceded that the leading principle of Buddhism is monogamy rather than polygamy, that polygamy is rare and...is considered disrespectful."

There can be no doubt that in Lower Burma the position is that polygamy is tolerated but regarded with disfavour and that there has always been a body of opinion that it is only allowed if the first wife consents. Assuming that the *Dhammathats* only allow it under certain conditions, or penalties I am unable to see why the fact that these penalties have never been enforced in practice, or that it is not possible to point to instances of such enforcement, should preclude this Court from declaring that they exist and can be claimed by the wronged wife. The law to be administered is the Burmese Buddhist Law as laid down in the *Dhammathats*, unless such law has been clearly modified by custom or is repugnant to equity, justice or good conscience. In *Bhagwan Singh v. Bhagwan Singh* (9) their Lordships of the Privy Council pointed out that the judgment in the *Collector of Madura v. Mootoo Ramalinga Sathupathy* (10) gives no countenance to the conclusion that in order to bring a case under the rule of any law, laid down for Hindus generally, evidence must be given of actual events to show that in point of fact the people subject to that general law regulate their lives by it. At p. 423 of the same judgment their Lordships said that the general law should be ascertained by reference to the authoritative text books and judicial opinions, and that when the general law has been established any one living where such law prevails and is applicable must be taken to fall under the general law, unless he can show some valid local tribal or family custom to the contrary. The mere fact that the limitations to the license of having more than one wife have not been observed is insufficient to justify the Courts in holding that the law has been abrogated by custom, especially in a country like Burma, where, as Sir John Jardine himself observes (notes on Buddhist law 3), the system of compromise based on consent and acquiescence almost supersedes custom.

So far had this system of compromise been carried that when British Judges first attempted to ascertain what the

9. (1899) 21 All 412=26 I A 153 (P C).

10. (1867-69) 12 M I A 397=10 W R 17 (P C).

Buddhist law was on any subject, they sometimes found great difficulty in obtaining any information on which a decision could properly be based. It appears to me, therefore, that there is no proof of any custom regarding polygamy which custom overrides the general *awla id* down in the *Dhammathats* or precludes us from examining that law with a view to ascertain its scope and provisions. It is true that in Hindu law, to which to some extent the *Dhammathats* are indebted for their rules, there is no restriction against polygamy and the rules enjoining monogamy have been held to be merely directory and not mandatory (Cowell's *Lectures on Hindu Law* part I, p. 164, Mayne, *Hindu Law*, para. 92, Sarkar's *Lectures*, p. 117). They seem to be of the nature of counsels of perfection rather than absolute prohibitions coupled with a penalty in case of disobedience. But whatever may be the extent to which the *Dhammathats* are indebted to Hindu Law, there can be no doubt that the Hindu law regarding marriage and divorce has been profoundly modified by Buddhism, although the compilers of the *Dhammathats* have in some cases not attempted to distinguish the two systems. Thus the division of the people into castes is recognized by the *Dhammathats* although a distinction is unknown to Burmans. The Courts have always endeavoured to interpret conflicting passages in the *Dhammathats* in such a manner as to conform with the existing sentiments and practice of Burmese society, so far as it is possible so to do without usurping the functions of the legislature. If on examination of the texts, it is found that there is a strong preponderance in favour of restrictions being placed on polygamy, we shall, I think, be taking a proper course in giving effect to those texts in harmony with the prevailing sentiments of the people. I do not attach much importance to the fact that polygamy is recognized in the *Dhammathats* and that much of their matter is occupied with rules for the division of property between various kinds of wives and their children. Such rules are necessary in view of the structure of society existing then and existing now. They are not necessarily inconsistent with rules tending to discourage polygamy.

In *Ma Nhin Boon v. U Shwe Gone* (11)

(11) A I R 1914 P C 97=41 Cal 887 (P C).

their Lordships of the Privy Council said that where the *Manuysa* was not authoritative it should be followed. There is, however, no clear intimation in that *Dhammathat* on the subject of the chief wife's right to object to her husband taking a second wife without her consent. S. 43, Vol. 12 deals with the five kinds of wives whom he put away, but it is evident that putting away is only meant that the husband had the right to take another wife and his first wife was not entitled to object to him. S. 24, Vol. 3, relates to a right of separation when the wife has taken a paramour or the husband a lesser wife, the division of property is well stated, being made as in the case of divorce by mutual consent. In S. 17 of the same chapter a husband whose wife has left him is ordered to wait for one year before he takes another under penalty or loss of the property brought to him marriage and the joint property. But the right of the chief wife to demand a divorce is rather a matter of inference than a clear statement of the existence of such a right. Turning now to the third of the *Dhammathats* (I find that in S. 216, three *Dhammathats* are cited which lay down duties to the wife and one of the duties of a husband, but these texts are only directory. In the passage from the *Dhammathat* given under S. 214 there is a similar prohibition to husbands not to be unfaithful.

In two of the three *Dhammathats* cited in S. 230, a duty on the part of the husband is placed on the same level as a repellant disease and gives the wife a right of divorce. The most important section is No. 256, which contains extracts from eight *Dhammathats* and in no less than six of these a second marriage without the chief wife's consent gives the latter the right to divorce and to retain the whole of the property. These texts seem to me to be very clear and to admit of no doubt as to their construction. In the passage from the *Manuysa* cited in S. 303, divorce is permitted if cruelty is coupled with the taking of a lesser wife, but no argument against the right of a chief wife to obtain a divorce on the ground of a second marriage can be founded on this passage, as most of the other *Dhammathats* quoted in that section give her the right of divorce on the ground of cruelty alone, and this right

has been affirmed in *Maung Po Han v. Ma Ta Lok* (12).

In S. 397 the penalty imposed on a husband for taking a lesser wife is expulsion from the house after being compelled to leave behind even his clothes. In S. 259 an extract is quoted from the *Addasankepa Vanna* of the rule relating to husbands and wives who have been previously married. Here too the wife is said to have the right of divorce if the husband takes a lesser wife and the husband forfeits all claim to the jointly acquired property. As against these authorities the learned Advocate for the appellant has been able to cite only S. 253, which is headed, "A man may marry as many wives as he pleases. But this section does not deal with the case of a man marrying when his first wife objects, and there is no doubt that if she consents, there is no impediment to his taking other wives. The other arguments addressed to us were founded on the existence of the custom of polygamy and its recognition in the *Dhammathats* in the shape of rules for the division of property between more than one wife. These arguments have already been considered in an earlier portion of this judgment. I think that it is clear that the general rule is that the chief wife may object to her husband taking a second wife and may claim a divorce if he does so, her rights is, however, subject to certain exceptions. These are found in Ss. 219, 232, 265-267 and 311 of the Digest.

The husband is allowed to take a second wife when the first wife is barren or has borne only female children or is suffering from certain diseases. In Burmese society a higher value is attached to the begetting of sons than daughters. There is also nothing unreasonable in the exception based on the first wife becoming insane or a leper, maimed, blind or paralysed and thus becoming unable to fulfil the duties of her position. I would therefore answer the reference as follows: Subject to exception of the kind mentioned in Ss. 219, 232, 265-267 and 311 of the Digest, if a Burmese Buddhist takes a second wife without his first wife's consent, she has a right to divorce him. I may add that if she decides to claim the right of divorce, I think that the division of property should, in the absence of any contract to the contrary, be made

(12) (1913) 7 L B R 79=20 I C 674.

as if the divorce were one by mutual consent. This is the rule if the husband commits adultery (S. 230) and is the rule given in *Manugye* where the husband has not only taken a lesser wife but has been cruel (S. 303). In S. 256 a severe penalty is to be imposed according to some of the *Dhammathats*, which are, however not consistent regarding the penalty.

Twomey, C. J.—The question referred does not arise directly in the case which was before our learned colleague. But it does arise indirectly. Under the Special Court ruling in *Ma In Than v. Maung Saw Hla* (1) a head wife has no remedy if her husband takes a lesser wife without her consent. So long as this ruling is in force, it would be inconsistent to give effect to the provisions of *Manukye*, V, S. 17, and let a deserting wife claim a divorce on her husband re-marrying within a year. The learned Judges of the Special Court who decided *Ma In Than's* case (1) apparently considered that the provisions of the *Manukye* debar the Courts from sanctioning any restriction on polygamy among Burmese Buddhists. The pre eminent authority of the *Dhammathat* is still recognised, but its provisions have binding force only where they are free from ambiguity. As Rigg, J., points out, the *Manukye* in addition to the provisions which seem to contemplate unqualified polygamy contains also various passages from which it may reasonably be inferred that the Buddhist law recognises a head wife's right to demand a divorce if her husband takes another wife without her consent. We are therefore justified in turning for guidance to the other *Dhammathats* cited in the *Kinwun Mingyi's* Digest and to the same learned author's *Atthathankepa*, which is the most recent *Dhammathat* of all. These other *Dhammathats* are now shown to leave no room for doubt as to the head wife's right in question. Most of the texts became available only after *Ma In Than's* case (1) was decided.

The Special Court regarded the restriction on the taking of a lesser wife as a doctrine which was not shown to be "popularly accepted so as to extinguish the custom," i. e., the custom of polygamy. The existence of a custom of unrestricted polygamy was not shown in that case. The fuller investigation of the *Dhammathats*, which has now been carried out, makes it clear that the restriction

in question is an incident of polygamy as established among the Burmese Buddhists and in these circumstances the question of popular acceptance does not appear to arise. The texts of the Buddhist law on the subject of polygamy are undoubtedly inconsistent. The Manukye contains various provisions cited in *Ma In Than's* case (1) which take for granted a plurality of wives, while other provisions clearly contemplate that a man should have but one wife at a time. The explanation is that the Burmese Buddhist law is largely of Hindu origin coming from a country in which polygamy flourished without restriction, the law had to be adapted to a non-Indian race which followed the Buddhist religion and in which the position of the wife was essentially different from that of the Hindu wife. Thus the texts in the Manukye and the other Dhammathats which deal with a plurality of wives are probably imported from the ancient Hindu law. Mr. Burgess in *Ma Shwe Ma v. Ma Hlaing* (4) remarked as follows:

"It is a remarkable thing that in S. 81 of the Chapter on inheritance, 10 of Manukye, the only provisions regarding contemporaneous wives and their children should be those in Ss. 37 and 38 which seem to have special reference to Hindu usage."

Ma In Than's case (1) has been the law in Lower Burma since 1881. But it has not been followed in Upper Burma; and it is doubtful whether in Lower Burma husbands have availed themselves to any large extent of the additional license given to them by the ruling of the Special Court. A plurality of wives is becoming more and more a rarity and is regarded socially with disfavour. The tendency towards monogamy has no doubt been accelerated by the annexation of Upper Burma. Before that event polygamy was encouraged by the example of the Burmese Kings and many of the higher officials. In expressing our dissent from the ruling in *Ma In Than's* case (1) and declaring the head wife's right to a divorce if her husband takes another wife without her consent, it is clear that we are only expounding an integral part of the Buddhist law as laid down in the Dhammathats and we need not fear that we are running counter to any cherished custom of the Burmese people. I concur in answering the reference in the terms proposed by my learned colleague Rigg, J.

I agree with him also in holding that the property should be partitioned as in the case of a divorce by mutual consent (in the absence of any contract to the contrary). It would be illogical to exact from the husband who takes a lesser wife a more severe penalty than is provided in the Dhammathats for a husband who commits adultery or who, in addition to taking a lesser wife, treats his head wife with cruelty.

Maung Kin, J.—I concur and have very little to add. Unlimited polygamy is expressly allowed only by three Dhammathats, namely, Kaingya, Kanda and Panam. See S. 253, O'Gale's Digest, Vol. 2. They are, however, not of much authority. Other Dhammathats speak of Polygamy being allowable under certain conditions and penalties and as regards Manukye in particular I agree with Mr. Jardine that, although it treats polygamy as lawful, it does so with a feeling that it is a grievance to the first wife. In addition to the six Dhammathats, cited in S. 256 of the above Digest, which lay down the rule that a second marriage without the first wife's consent gives the latter the right to divorce, we have extracts from three other Dhammathats, namely, Vilasa, Dhammathatkyaw and Manuvannana cited in S. 397 of the same Digest laying down the same rule. Those six Dhammathats and these three others are well known legal works. The other Dhammathats cited in S. 256 couple the taking of a lesser wife with habitual ill-treatment as ground for a divorce at the instance of the aggrieved first wife. The passage cited from Manukye in S. 303 of the Digest would appear to support these Dhammathats. But I do not think that in deciding the points under reference any importance can be attached to the fact that the taking of a lesser wife is thus coupled with cruelty, inasmuch as the Dhammathats agree in allowing a divorce on the ground of habitual cruelty alone. It seems clear that in the passage cited from Manukye in S. 303 of the Digest, the stress is on the husband's cruelty rather than on his incontinence. I am, therefore, of opinion that the taking of a lesser wife must be regarded as an additional ground for a divorce at the instance of the existing wife. As regards the question of partition of property, I would treat the divorce as if it were one by mutual consent for the reason stated by

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the learned Chief Judge, unless there has been a contract to the contrary.

Ormond, J.—I concur in the judgments that have been delivered,
K.N./R.K. *Answer accordingly.*

A. I. R. 1918 Lower Burma 6

PARLETT AND ORMOND, JJ.

Ma Mo—Defendant—Appellant.

v.

Mahomed Backer Hamadance—Plaintiff—Respondent.

First Appeal No. 75 of 1916, Decided on 1st August 1917.

Principal and agent—Registered document is not necessary empowering agent to transfer immovable property worth more than Rs. 100.

There is nothing in the Transfer of Property Act or in the Registration Act to say that an agent to transfer an interest in immovable property worth more than Rs. 100 in value must be empowered by a registered document.

J. A. Maung Gyi—for Appellant.

J. H. Das—for Respondent.

Judgment.—The plaintiff obtained a mortgage decree against the defendant Ma Mo, who was sued through her agent Ma Thet Hnin, her adopted daughter. Ma Mo now appeals. Ma Mo was 81 years of age when she gave her evidence. The mortgage was executed by Ma Thet Hnin on behalf of Ma Mo as her attorney. It is doubtful whether the power of attorney authorised her to execute a mortgage. One of the issues raised was, whether Ma Mo ratified the mortgage by receiving the mortgage money. Mr. J. A. Maung Gyi contends that that issue should not have been raised because the plaintiff does not seek to recover from Ma Mo on the ground of ratification. The plaintiff alleges that the mortgage was made by Ma Mo through her attorney. The written statement denied that authority of Ma Thet Hnin and in consequence the issue was raised. In our opinion that was not altering the nature of the case set up by the plaintiff and was in issue rightly raised. The question then is—Did Ma Mo ratify the mortgage? Ma Thet Hnin and Mr. Thorpe, who was at the time staying in the house of Ma Mo, say that Rs. 15,000 consideration for the mortgage was received at the Registration Office by Ma Thet Hnin and taken by her to the house of Ma Mo and that the next day Rs. 10,400 was paid to U Kin and Ma Yin in payment of a promissory note which had been executed by

Ma Mo, Ma Thet Hnin and her husband Maung Ba On, who died in 1912, the mortgage being dated 7th August 1913. Ma Mo admits that she had executed such a promissory note in favour of U Kin and Ma Yin, and she was unable to say whether these two creditors had been paid off when she gave her evidence.

There is also evidence to show that Rs. 3,000 was paid two days after the date of the mortgage to Ma Thwe in order to redeem a diamond necklace. Ma Mo admits that her debt to Ma Thwe was paid off, but she does not know from where the money came. Ma Thet Hnin says that the balance of the mortgage money, viz. Rs. 1,600 was spent in current expenses. Thus the evidence showed, and there is no reason to disbelieve it, that Rs. 13,400 was paid to creditors of Ma Mo within two days of the date of the mortgage. If so, the probability is that the money was raised on mortgage for that purpose at the instance of Ma Mo. Then there is the evidence of Po We, a broker, who says that in 1914 he was instructed by Ma Mo and Ma Thet Hnin to find a mortgagee who would take over the plaintiff's mortgage at a lower rate of interest. Po We says that Ma Mo told him if the Advocate Ba Thein approved of the document, she would sign it. Ba Thein gives evidence in corroboration and there is no doubt that Ma Mo knew and approved of this intended transfer. If the plaintiff's mortgage had been fraudulently made by Ma Thet Hnin, it is impossible to suppose that she would have brought in Ma Mo for the purpose of getting a fresh mortgage at a lower rate of interest. We are satisfied that the plaintiff's mortgage, executed by Ma Thet Hnin as the agent of Ma Mo, was ratified by Ma Mo. Mr. J. A. Maung Gyi contends that an agent who is only orally empowered is not sufficiently authorised to transfer an interest in immovable property of more than Rs. 100 in value. But there is nothing in the Transfer of Property Act or in the Registration Act to say that an agent for such a purpose must be empowered by a registered document. The appeal is dismissed with costs.

K.N./R.K.

Appeal dismissed.

A. I. R. 1918 Lower Burma 7 (1)

PARLETT, J.

Gnanankannu—Applicant.

v.

Veeravagu—Opposite Party.Criminal Revn. No. 314-B of 1916,
Decided on 12th January 1917.Criminal P. C. (1898), S. 195—False charge
against several persons amounts to separate
offences and can be asked to be accounted
separately—Penal Code (45 of 1860) S. 211.A person who falsely charges several persons
with having committed an offence is guilty of as
many separate offences and there is no improp-
riety in his being called to account under S. 211
of the Penal Code in respect of each of such false
charges. [P 7 C 2]*Gaunt*—for Applicant.*Wiltshire and Bose*—for Opposite Party.

Judgment.—On 31st March 1916 re-
spondent laid information at the police
station that one Poonuswamy Nadar had
caused hurt to him with a dah, and that
applicant and others were present and
abetted the causing of hurt. On 3rd
April he filed a complaint to the same
officer. Applicant and others appeared
in Court and subsequently on 1st July
applicant was discharged. On 10th July
he applied for sanction to prosecute the
respondent for falsely charging him with
an offence under S. 211, I. P. C. On 21st
July the applicant and respondent and
their pleaders appeared and arguments
were heard, and the case was adjourned
for orders on 24th July. Orders were
not ready then, and the case stood over
still the 26th, when sanction to prosecute
was granted. On the same day the Magis-
trate gave judgment acquitting the other
persons accused in the hurt case and
ordering respondent's prosecution for
falsely charging them.

On 2nd August applicant instituted a
prosecution on his sanction and the trial
proceeded till 16th August. On 22nd
August the respondent applied to the
Sessions Court to revoke the sanction and
on 6th October this was done. The ap-
plicant now seeks to have it restored.
The Sessions Judge's reasons for revoking
the sanction were that the interests of
justice will be sufficiently served by the
prosecution of the respondent ordered by
the Magistrate on 26th July and that to
allow the sanction to stand would be un-
duly harassing the respondent in that he
would be twice prosecuted for practically
one offence, and that it was never intended
by the legislature that Courts should be

used for the purpose of gratifying people's
own feelings against other persons. . . . I
cannot agree with the Sessions Judge. It
is not the case that respondent's allega-
tion that he was cut with a dah is en-
tirely false. Having been so cut he falsely
accused Poonuswamy Nadar of cutting
him and applicant and others of being pre-
sent and abetting the cutting. It seems to
me that to falsely charge one person
with being implicated in a crime is not
the same offence as to falsely charge an-
other person with being implicated in the
same offence. The circumstances under
which and the motives from which such
false charges are made may be totally
different, and it appears to me that there
is no impropriety in the offender being
called to account for making each of such
false charges. In the present instance it
does appear that the alleged false charge
as against the petitioner may have been
in some respects on a different footing
from those against the other five persons,
and I do not consider that the prosecu-
tion in respect of the five constituted
sufficient reason for disallowing a prosecu-
tion by the petitioner, though in the event
of both prosecutions ending in conviction
it might be proper to take the sentence
in one into account in passing sentence
in the other. I think there were not
sufficient reasons for revoking the sanc-
tion and I restore it. The trial in Cri-
minal Regular No. 177 of 1916 of the
First Additional Magistrate of Insein
will proceed.

R.N/R.K.

*Order accordingly.***A. I. R. 1918 Lower Burma 7 (2)**

ROBINSON, J.

Official Assignee—Plaintiff.

v.

Mahmed Hady—Defendant.Civil Regular No. 339 of 1915, Decided
on 31st July 1917.**Practice—Judgment**—In deciding finally
judge is not bound by decisions given pre-
viously on certain issues.A Judge who is called upon to decide a case on
the conclusion of all the evidence is not bound by
the previous decision of his predecessor on certain
issues, and can decide them afresh. [P 8 C 1]*Cawasji, Das and Banerji*—for Plain-
tiff.*Giles*—for Defendant.**Order.**—This case came on for hear-
ing last January before another Judge,
who framed the issues. By consent of
parties he heard arguments and decided

the first issue. The case did not come up again till now for various reasons. Mr. Giles now urges that the decision on first issue be re-opened and that I must re-consider that issue. He relies on a ruling of a Bench of this Court, *Ma Nyo v. Ma Yauk* (1), which decides that the Judge deciding the case on the conclusion of all the evidence is not bound by the previous decision on certain issues and can decide them afresh. I am bound by this decision, with which I entirely agree. The only question is, whether the parties having consented to this course it is open to either of them to claim a fresh decision. The question covered by the issue is not an easy one, and it is now said that the translation of the will, the interpretation of which was involved, is incorrect. I feel that I should have to consider and come to a conclusion on this issue in any case, and, therefore, even if the parties were estopped, I should still desire the matter to be argued. I am not bound by the previous decision, but I do not think I should decide adversely to the previous decision if I should have to do so, without hearing Counsel. The whole case must, therefore, be started now on all the issues as amended by me.

K.N./R.K. *Order accordingly.*

(1907-08) 4 L B R 256.

A. I. R. 1918 Lower Burma 8 Special Bench

TWOMEY, C. J. AND ORMOND AND
PRATT, JJ.

Ma Thin Kyu—Applicant.

v.

Mg. Ba Thain—Opponent.

Civil Ref. No. 6 of 1917. Decided on 16th May 1918, made by Divil. Judge, Mandalay, in Civil Suit No. 2 of 1917.

Divorce Act (4 of 1869). S. 10—*Wife having judicial separation can get divorce on further proof of adultery and cruelty.*

A wife who has obtained judicial separation on the ground of her husband's adultery alone is entitled to a dissolution of marriage on proof that her husband has again committed adultery after the separation and has in addition been guilty of cruelty to her after the separation.

[P 9 C 1]

Shaw—for Applicant.

Twomey, C. J. and Ormond, J.—

The petitioner and the respondent are both American Baptist Christians. The petitioner *Ma Thin Kyu* applied in 1914 for dissolution of her marriage with the respondent *Mg. Ba Thain* alias *Johnny Caraw* on the ground of his adultery and deser-

tion. Desertion was not proved, and the Court; therefore, granted only a decree for judicial separation. Subsequently the petitioner applied to the Magistrate for a maintenance order under the Criminal Procedure Code and the respondent was ordered to pay her Rs. 25 a month. She has received only Rs. 59 in all under that order. The petitioner's attempts to recover the amount due to her were thwarted by the respondent, who resigned the salaried post that he held. Not content with this, the respondent went repeatedly to the petitioner's house and abused her and threatened to kill her, his object being to prevent her from enforcing the maintenance order. The evidence shows that the respondent's conduct has seriously affected the petitioner's health and caused a nervous breakdown. In consequence of the respondent's conduct the petitioner applied again for a dissolution of her marriage on the ground of his continued adultery coupled with cruelty. It is shown that the respondent has continued to live in adultery with another woman since the time of the judicial separation, and as regards the alleged cruelty subsequent to the separation, the learned Judge's finding is that although no physical violence was used the respondent's behaviour amounted to legal cruelty. The Divisional Judge, therefore, has granted a decree for dissolution of the marriage and this decree now comes before us for consideration.

The respondent did not oppose the petition in the Divisional Court and he does not appear in this Court, though he has been served with notice. There is no reason to suspect collusion. We see no reason to differ from the conclusion of the Divisional Judge as regards the facts of the case. The continued adultery and the cruelty subsequent to the separation are well established. The only question that arises is one of law, namely, whether a wife who has obtained judicial separation on the ground of her husband's adultery alone, is entitled to a dissolution of marriage on proof that her husband has again committed adultery after the separation and has in addition been guilty of cruelty to her after the separation. The nearest English case that we can find is that of *Green v. Green* (1), in which a wife who had obtained a judi-

1. (1874) 43 L J Mat 6=3 P 121.

cial separation on the ground of her husband's adultery obtained a decree nisi five years later on proof of further adultery subsequent to the judicial separation coupled with cruelty before the separation. The wife in her first petition in that case had not pleaded the cruelty and she asked only for a judicial separation in the first instance because she hoped that her husband would reform. Afterwards she abandoned the hope of his reformation, and asked for a dissolution of the marriage, and the Court then allowed her to revive the cruelty which she condoned in the first instance. Sir James Hannen remarked :

"The husband by his adultery subsequent to the former decree has committed a fresh matrimonial offence, (for the decree of judicial separation is not to be considered as a license to commit adultery for the future), and for this offence, aggravated by the previous cruelty the wife has had no redress. If the failure of the petitioner to charge her husband with cruelty be regarded as equivalent to a forgiveness of it, still cruelty condoned is revived by subsequent adultery and I can see no reason why the husband should be in a better position because he has already been guilty of a wrong which entitled the wife to relief."

The present case differs from the above inasmuch as there was no cruelty before the decree for judicial separation and it is open to argument that the cruelty contemplated in the Divorce law is cruelty committed while the wife is actually living with the husband and that cruelty cannot be regarded as a matrimonial offence when they are living apart from one another under a decree of judicial separation. There is, however, no express authority to this effect, and we are at liberty as in the English case above cited, to treat the cruelty of the husband after the judicial separation as an aggravation of the fresh matrimonial offence involved in the husband's continued adultery. We therefore confirm the decree of the Divisional Court under S. 17, Divorce Act, 1869.

Pratt, J.—I agree that the decree should be confirmed. It seems to me that the facts of the present case are even stronger than in *Green v. Green* (1). Here there is not merely continued adultery after judicial separation, but subsequent cruelty as well. I do not consider that adultery or cruelty on the part of the husband, when living away from his wife under judicial separation, can be held not to be a matrimonial offence.

To take this view would be practically to place the wife in a worse position, after she had obtained a decree of judicial separation on the ground of her husband's misconduct, than she was before.

K.N./R.K.

Decree confirmed.

A. I. R. 1918 Lower Burma 9

PRATT, J.

Po Nyein—Applicant.

v.

Ma Shwe Kin—Opposite Party.

Criminal Revn. No. 265-B of 1917, Decided on 16th November 1917.

Criminal P. C. (1898), S. 488(4)—Burmese Buddhist wife is entitled to maintenance on ground of husband's second marriage if not due to her refusal to live with him.

Ordinarily the fact that a Burmese Buddhist husband takes a second wife might be a good reason for the first wife declining to live with him, unless he provides her with a separate house. Where, however, husband marries a second wife owing to the refusal of his first wife to live with him, but is willing to take back the first wife, the latter is not entitled to maintenance under S. 488(4). [P 9 C 1; P 10 C 1]

Maung Ghi—for Applicant.

W. Po Thit—for Opposite Party.

Judgment.—Applicant has been ordered to pay maintenance for his wife *Ma Shwe Kin*. His case was that there was a divorce but this was not proved. It is clear, however, that owing to incompatibility of temper or other cause they separated and the wife ceased to live under her husband's protection. About seven months after the separation applicant re-married. Respondent declines to return to live with applicant who is willing to take her back, unless he provides her with a separate establishment. Ordinarily the fact that the husband took a second wife might be a good reason for the first wife declining to live with him, unless he provides her with a separate house. In the present circumstances, however, I do not consider the claim is reasonable. Respondent chose to live separately from her husband and there is evidence that when asked to re-join him she declined. She was apparently willing to effect a divorce. By her conduct she could only expect that the natural result would be to force her husband into marrying again. In fact his re-marriage was the natural result of her refusing to live with him and separating from him for a number of months. Applicant is not a well-to-do man, and cannot afford to maintain two separate establishments.

His offer, therefore, to support his wife, if she will resume conjugal relations, is reasonable and I do not consider that she is entitled to maintenance because she elects to live apart from him. She must be prepared to accept the result of her own conduct. I set aside the order of the Magistrate for maintenance of Ma Shwe Kin.

K.N. R.K. *Application allowed.*

A. I. R. 1918 Lower Burma 10

TWOMEY, C. J. AND PARLETT, J.

S. R. M. Meyappa Chetty and others—Appellants.

v.

P. L. N. Narayanan Chetty—Respondent.

Civil Misc. Appeal No. 57 of 1917. Decided on 20th August 1917.

Civil P. C. (1908), O. 40, R. 1—Defendant, original owner, in uninterrupted possession of property—Appointment of receiver is justified on strong grounds only.

In a case of disputed title where the defendant, admittedly the original owner of the property, claims to have been in uninterrupted possession of the property, the appointment of a receiver can be justified only if a strong case is made out. [U 10 C 2]

Keith—for Appellants.

Broadbent—for Respondent.

Judgment.—This is an appeal against an order appointing a receiver in a pending suit. The property in respect to which the receiver has been appointed is in dispute between two Chetty firms, the S. R. M. and S. N. N. firms. The parties in the S. N. N. firm are plaintiff and defendant 4, while the partners in the S. R. M. firm are defendants 1, 2, 3, and 6. It appears that the S. N. N. firm was expressly constituted in 1911 to take over the assets of the S. R. M. firm, which then consisted of defendants 1, 2 and 3. The assets of the S. R. M. firm were transferred by deed, the consideration for the transfer being stated in the deed to be a payment of Rs. 70,000. Subsequently, in 1913 the property in question or all that remained of it was re-transferred to the S. R. M. firm by registered deeds for an alleged consideration of Rs. 30,000 in all. Accordingly, as matters stand the S. R. M. firm have a legal title to the property in question. They alleged that the transfer of 1911 was merely a benami transaction carried out because they were in difficulties with their creditors, and that the subsequent re-transfers of 1913 merely restored the

legal title in respect of their property, the actual possession and control of which they had retained all along. Some colour is given to this contention by the fact that the same person, namely, defendant 5, Ramasawmy Chetty, has been acting as attorney both for the S. R. M. firm and the S. N. N. firm, and it is alleged by the S. R. M. partners that their firm also retained the transfer deed of 1911 and that it was not made over to either of the S. N. N. partners. It is impossible at this stage to say that the documents which were in the possession of defendant 5 were held by him as agent of the S. N. N. firm rather than as agent of the S. R. M. firm.

In order to oust the S. R. M. partners the plaintiff will have to prove that the transfer of February 1911 was a bona fide transaction. It will also be for the plaintiff to prove his allegations of fraud and collusion in respect of the re-transfer of November 1913. The case is one of disputed title in which the S. R. M. firm, admittedly the original owners of the property, claim to have been in possession of the property uninterruptedly and deny altogether the interest of the plaintiff. In such a case the authorities show that the appointment of a receiver would be justified only if a strong case were made out.* The learned District Judge's order does not show any such grounds. The defendants alleged that the Government dues on the lands have all been paid and in that case there is no danger of the lands being sold up for arrears of revenue. It has not been shown that there is any danger of waste or alienation of the property. The actual suit has not proceeded beyond the filing of the plaint. Written statements have not yet been filed by the defendants. As the suit develops sufficient grounds may appear for appointing a receiver, but as the case now stands, we are satisfied that the appointment is not called for. The order of the District Court appointing a receiver is set aside with costs. Advocate's fees three gold mohurs.

K.N. R.K.

Order set aside.

* Woodroffe on Receivers, p. 145.

A. I. R. 1918 Lower Burma 11

TWOMEY, C. J. AND ORMOND, J.

U Zayanta—Plaintiff—Appellant.

v.

U Naga—Respondent.

First Appeal No. 153 of 1919, Decided on 12th February 1918.

Transfer of Property Act (4 of 1882), S. 123 — S. 123 applies to religious gifts by Burmese Buddhist.

Burmese Buddhist religious gifts are not exempted from the operation of S. 123, T. P. Act. Therefore a gift or dedication of a Kyaung is not valid unless registered. (P. 12 C 2)

May Ung—for Appellant.*Villa*—for Respondent.

Twomey, C. J.—This was a suit for possession of a certain pucca Kyaung and site forming part of a Kyaungtaik at Moulmein. In para. 1 of the plaint the plaintiff claimed that the whole Kyaungtaik within the specified boundaries, known as Dammayon Kyaungtaik, belonged to him according to the Buddhist Ecclesiastical law, in other words, he claimed the property as presiding Pongyi Taik-ok or Kyaung-ding in succession to the former Pongyi U Eindasara who is referred to in the proceedings as the Ieper Pongyi. U Eindasara died from 7 to 12 years before the suit, which was filed in July 1915. The plaintiff was a pupil of Eindasara and states that in 1263 B. E., that is about 1901, U Eindasara went through the ceremony known as dwithantaka with him. The effect of this ceremony was to admit the plaintiff to joint ownership of the Kyaungtaik with U Eindasara, so that on U Eindasara's death the plaintiff would become the sole Taik-ok. The plaintiff states that after he had succeeded U Eindasara on the latter's death he in turn admitted another Pongyi U Wunna to joint ownership with him by the dawithantaka method. He afterwards left U Wunna in sole charge and went to Rangoon to study. During his absence the pucca Kyaung building which had been begun in Eindasara's time was completed by the lay donors and these laymen dedicated it to U Wunna in the plaintiff's absence. Subsequently while the plaintiff was still absent from Moulmein, U Wunna discarded the yellow robe and went into the world, but just before doing so he made over the newly built pucca Kyaung to another Pongyi, namely, his uncle U Naga, the defendant. When the plaintiff came back and tried to eject U

Naga, the latter instituted proceedings under the Criminal Procedure Code and successfully resisted the plaintiff, who thereupon brought this suit against him for possession of the brick Kyaung.

P. W. 1, U Ahaba gives evidence as to the dwithantaka ceremony between Eindasara and the plaintiff Zayanta. Witnesses 2 and 3 give evidence as to the latter dwithantaka ceremony between Zayanta and Wunna. The evidence shows that Eindasara presided over the Kyaungtaik up to his death. The actual Myatung that he occupied, first by himself and afterwards with Zayanta, was a wooden building on the site of the pucca building now in dispute and this wooden building has been removed and re-erected at another spot within the Kyaungtaik. The plaintiff says that this wooden building had been given to Eindasara by another Pongyi by a document, but there is no other evidence on this point. Ma Hlaing, P. W. 4, an aged woman who was one of the supporters of the Kyaungtaik, states that when Eindasara died, the supporters telegraphed to Zayanta the plaintiff, who was then absent in Mandalay; that Zayanta then came and presided over the Kyaungtaik in succession to Eindasara and that no one raised any objection but as Zayanta wanted to go away temporarily to continue his studies he invited another Pongyi Wunna to take charge of the Kyaungtaik in his absence. The defendant Naga's witness U Zarita also says that Eindasara was head Pongyi, i. e., Taik-ok, and that afterwards the plaintiff

invited Wunna to come to the small Kyaung, i. e., the old wooden Kyaung and then went away."

Subsequently when the brick Kyaung was about to be dedicated,

"U Wunna went to Rangoon to call the plaintiff i. e., presumably for the purpose of receiving the dedication, but he refused to come."

This witness admits having heard that Eindasara and the plaintiff had performed the dwithantaka ceremony and D. W. 3 Mg. Po Te also states that Eindasara presided in the Kyaungtaik and that plaintiff presided after Eindasara's death. The evidence as to the dwithantaka ceremony between Eindasara and Zayanta is not rebutted and there is no reason to disbelieve it, except that it was not relied upon by Zayanta or mentioned by him in the criminal proceedings under

S. 145, Civil P. C. But even part from that alleged ceremony the fact that Zayanta succeeded Eindasara as presiding Pongyi of the Kyaungtaik appears even from the evidence of the defendant's own witnesses. It is shown by this evidence also that the defendant Naga's donor Wunna had originally come to the Kyaungtaik on the invitation of the plaintiff Zayanta and there is therefore all the more reason for believing the statements of the plaintiff and his witnesses as to the dwithantaka ceremony between Zayanta and Wunna.

It is proved that the brick building was dedicated to Wunna during Zayanta's absence without a registered document. The defendant Naga's claim rests on an unregistered document of transfer written by Wunna on the day he discarded the yellow robe. The transfer was invalid for want of a registered document. But though Naga's title is defective he is in possession and cannot be ejected unless the plaintiff is held to have proved his title. It is clear however that the plaintiff has proved it. Whatever may have been the effect of the two dwithantaka ceremonies, the evidence establishes that Zayanta became presiding Pongyi or Taik-ok in succession to Eindasara and in that capacity he obtained control over the whole Kyaungtaik. The brick Kyaung built within the Kyaungtaik was dedicated to Wunna but Wunna was either subordinate to Zayanta as Taik-ok or else he was joint owner with Zayanta by virtue of the dwithantaka ceremony. Wunna on discarding the yellow robe disappeared and his evidence was not forthcoming. Even if we assume that Wunna himself, in whose name the brick Kyaung was dedicated, could have registered a claim by Zayanta for possession, it must be held that the defendant Naga who merely claims under an invalid transfer from this ex-Pongyi has no title to oppose to the plaintiff's claim as presiding Pongyi of the whole Kyaungtaik. But it must be observed that the gift of the brick Kyaung to Wunna by the lay builders also appears to have been inoperative for want of a registered instrument under S. 123, T. P. Act, which was in force in Moulmein at the time of the dedication.

The District Judge confused dwithantaka with withathagaha which have nothing in common except that they are

both Pali words. He also lost sight of the fact that the plaintiff was claiming as presiding Pongyi of the whole Kyaungtaik and he therefore attached undue importance to the fact that neither the plaintiff nor his predecessor Eindasara had ever lived in the new brick building in suit. He treated the gift of the brick Kyaung to Wunna and the transfer by Wunna to the defendant Naga as valid transfers overlooking the absence in each case of a registered instrument. The District Court's decision is clearly wrong and I will set it aside and grant the plaintiff a decree for possession as prayed, with costs in both Courts. The defendant should be ordered to pay to Government Rs. 630, namely, the amount of court-fees which would have been paid by the plaintiff-appellant if he had not been permitted to sue and to appeal as a pauper.

Ormond, J.—The evidence shows that the plaintiff was the head monk of the monastery after U Eindasara's death in 1907 or 1908. The Kyaung in dispute was completed in 1908 or 1909, after the death of Eindasara, and was dedicated to U Wunna who was then acting as head monk during the plaintiff's absence in Rangoon, and who was joint head monk with the plaintiff. The plaintiff claims possession of the Kyaung by virtue of being the head monk and also under a dwithantaka made between himself and U Wunna. The defendant's title rests upon a gift of the Kyaung made to him by U Wunna in 1911 or 1912. No gift of the Kyaung could be made until the Kyaung had been built. It was not completed until 1908 or 1909, i. e., after S. 123, T. P. Act had been extended to Moulmein. Burmese Buddhist religious gifts are not excepted from the operation of that section and as none of the alleged gifts of this Kyaung were effected by a registered document, each of these gifts was void; namely, the gift or dedication of the Kyaung in favour of U Wunna by the lay donors, the gift of a joint share in the Kyaung by U Wunna to the plaintiff under dwithantaka and the gift of the Kyaung by U Wunna to the defendant.

U Wunna therefore acquired no title to the Kyaung, except as joint head monk with the plaintiff; and U Wunna had no right to hand over the Kyaung to the defendant without the plaintiff's con-

sent. The Kyaung, having been built on monastery land, must be taken to be an addition to the monastery property and the plaintiff as head monk of the monastery is entitled to possession. I concur in the order passed by the learned Chief Judge.

K.N./B.K.

Order set aside.

A. I. R. 1918 Lower Burma 13 (1)

PARLETT AND ORMOND, JJ.

Maund Aung Myat and others—Appellants.

v.

Maung Sin and others—Respondents.

First Appeal No. 9 of 1916, Decided on 31st July 1917.

Administration Suit — Pendency of—Suit by assignee of portion for declaration of his title is maintainable.

An assignee of a portion of the estate of a deceased person can sue a third person for a declaration of his title while a suit for the administration of the estate of the deceased is pending: 10 Cal. 713, Dist. [P 13 C 2]

Ormiston—for Appellants.

Wiltshire—for Respondents.

Judgment.—The plaintiffs in this suit sued for a declaration of their title to their share in the Shamrock Hotel, which they had derived from the administrator of the estate of Ma Sabe. Ma Sabe was entitled to a half share in this Hotel. She died in 1905 and her property was inherited by her sister, Ma Seik, who died in 1908. The plaintiffs filed a suit for the administration of Ma Seik's estate as had not been already administered. That suit is still pending and the District Judge dismissed the present suit on the ground that the plaintiffs' remedy was by filing an application in that administration suit for leave directing either a suit to be brought in the name of the legal representative or appointing a Receiver to sue. The learned Judge relied upon the case of *Oriental Bank Corporation v. Gobinlol Seal* (1). That case lays down the procedure where persons interested in the estate of a testator or deceased, not being the legal personal representatives, seek to recover some portion of the estate. The plaintiffs in the present suit do not claim anything of the kind. The assignments to the plaintiffs were impugned in the administration suit and have been held to be good. The plaintiffs in the present suit did not claim to recover any portion of the estate of Ma Seik or Ma

I (1884) 10 Cal 713.

Sabe, and the fact that the property in question once formed part of this estate does not prevent the plaintiffs from obtaining a declaration of their title. The decree is set aside and the case is remanded to be determined on the merits. There will be a certificate of refund of the Court-fees on this appeal under S. 13, Court-fees Act, and the appellants will have five gold mohurs, costs of this appeal, against the first two respondents.

K.N./B.K.

Decree set aside.

A. I. R. 1918 Lower Burma 13 (2)

TWOMEY, C. J. AND ORMOND, J.

Ma Sein Tin—Appellant.

v.

Ma Pwa and another—Respondents.

Civil Misc. Appeal No. 150 of 1917, Decided on 30th May 1918, against decree of Dist. Judge, Pegu, in Civil Misc. No. 1 of 1917.

Probate and Administration Act (5 of 1818). S. 23—Rival claimants—One having greatest interest is to be preferred.

The ordinary rule is that the grant of Letters of Administration should follow the interest and where the interest of the applicants are unequal, Letters should be granted to applicant whose interest is the greater. [P 14 C 2]

Lentaigne—for Appellant.

Robertson and May Oung—for Respondents.

Judgment.—In this case three applications were made for Letters of Administration to the estate of Ma Shwe Ge, deceased. Two of the applicants Ma Sein Tin and Ma Pwa claimed to be adopted daughters of the deceased and her husband U Maung, who predeceased her; the third applicant Maung Po Kin is the younger step-brother of the deceased. Ma Sein Tin claimed to be sole adopted daughter, but Ma Pwa claimed that both she and Ma Sein Tin had been adopted by Ma Shwe Ge and U Maung. Letters of Administration were granted to Po Kin, the District Judge having found that neither Ma Sein Tin nor Ma Pwa was a keittima adopted daughter of the deceased. As regards Ma Pwa the District Judge's finding is that she was not an adopted child at all. In the case of Ma Sein Tin he found that when her grandmother who had been bringing her up was about to die, she gave Ma Sein Tin unconditionally to U Maung who agreed to take her into his family as a daughter but that nothing was said at the time about her being taken as a keittima daughter with full rights of

inheritance. The following facts were not disputed by Maung Po Kin, namely: that Ma Sein Tin at the age of 4 or 5 was given by her grandmother Ma Min So to Ma Shwe Ge (sister of Ma Min So) with the express consent of her husband U Maung and their son Po Thin, who was then grown up, that Ma Sein Tin lived with U Maung and Ma Shwe Ge up to the time of Ma Shwe Ge's death in 1916, when she was about 18 years old, that she was always treated as a daughter in the family and that she was given jewels and treated in all respects as a rich man's daughter would be treated. It is also admitted that about a year before Ma Shwe Ge's death she erected a bridge near her village and on this bridge she caused a tablet to be affixed stating that it was the work of merit of her husband, herself, her son Po Thin and her grandchildren (* * *) Ma Nyun Thin and Ma Sein Tin. (The Burmese word "Mye" signifies grandnephew and grandniece as well as grandchild. Ma Nyun Thin was a grandchild of Ma Shwe Ge, being the daughter of Po Thin). At the time that this tablet was put up, the persons mentioned in the inscription of Daw Shwe herself and Ma Sein Tin were dead. The admitted facts are sufficient to show that Ma Sein Tin had the status at least of an apatitha child in Ma Shwe Ge's family and that her status was higher than that of the 6th class of children, who are "not entitled to inherit" and mentioned in Manugye, Book, X, S. 81 (vide also Kin-wunmingyi's Digest, S. 17), viz.,

"destitute and hunger-stricken children fed and brought up in the family and known as chata-bhatta parattases."

The claimant Ma Pwa was related as grandniece to U Maung while Ma Sein Tin was a grandniece of Ma Shwe Ge, but there was a marked difference in the position of these two claimants. It is beyond dispute that Ma Pwa was taken into the family when she was 11 or 12 years old in order that she might nurse Ma Shwe Ge, who then lost her sight. She stayed in the family house up to the death of U Maung (about 1913) and then went back to her natural father and having lived with him for a year during which she got married, she went to live in a house next door to Ma Shwe Ge's. This house was occupied by Ma Pwa's mother-in-law Ma Kin. Her name was not mentioned in the commemorative

tablet which Ma Shwe Ge caused to be put up on her bridge at Ywathit.

Neither of the two claimants Ma Pwa and Ma Sein Tin set up a claim to be an apatitha adopted child, but on the undisputed facts as given in the judgment it must be taken that Ma Sein Tin was at least an apatitha child of the deceased Ma Shwe Ge while it is equally clear that Ma Pwa was not. The learned Judge did not consider Ma Sein Tin's position as an apatitha child because no argument was addressed to him on this point. The only question considered by the Judge was whether she was a keittima child or not. But if she was an apatitha child she would clearly be entitled to one-half of the estate as such, there being no natural or keittima children. In that case the claimant Po Kin to whom the Letters of Administration were granted would be entitled to a smaller share than Ma Sein Tin, for he is not the only collateral. The ordinary rule in cases of this kind is that the grant should follow the interest and Letters are granted to the applicant whose interest is the greater. Letters should therefore have been given to Ma Sein Tin in preference to Po Kin.

As regards Ma Pwa's appeal we have declined to hear her counsel Mr. Robertson on the facts. In doing so we have followed the principle laid down in *Ma Tok v. Ma Thi* (1). The District Court has found that Ma Pwa was not adopted. Mr. Robertson contends that Ma Pwa was treated by the old couple in exactly the same way as Ma Sein Tin and that Ma Pwa's status must be regarded as the same as Ma Sein Tin's. We are unable to agree in this view. There is no finding in Ma Pwa's case that she was brought up as a daughter, and it is not open to us to say of Ma Pwa as we have said of Ma Sein Tin that, on the undisputed facts as found by the District Court she was at least an apatitha child. The legal effect of the undisputed facts as found by the District Court is that Ma Sein Tin is an apatitha child of the deceased Ma Shwe Ge while Ma Pwa was not. It follows that Ma Sein Tin had a better right to the Letters of Administration than Ma Pwa. We have already dealt with Ma Sein Tin's preferential right as regards the other claimant Po Kin. On these grounds we dismiss Ma

Pwa's appeal with costs, Ma Sein Tin's appeal is allowed. The Letters of Administration granted to Po Kin will be cancelled and Letters will be granted to Ma Sein Tin on her furnishing security to the amount required by the District Court. In Ma Sein Tin's appeal we consider that each party should bear his own costs of the appeal and in the District Court.

K.N./R.K.

Appeal allowed.

A. I. R. 1918 Lower Burma 15

MAUNG KIN AND RIGG, JJ.

Kathleen Maud Kerwick—Appellant.

v.

Fred. James Rupert Kerwick—Respondent.

First Appeal No. 3 of 1918, Decided on 19th June 1918.

Trusts Act(1882), Ss. 81 and 82—Property purchased by husband in name of wife—Rule of advancement of English law applies to persons of British nationality resident in India—Advancement.

The rule of English law that when a husband buys property in the name of his wife he should be presumed to have done so for the benefit of the wife, applies to persons of British nationality resident in India, and the mere fact that after the purchase the husband continues to manage the property and collect rents is not sufficient to rebut the presumption. [1916 C 1]

Giles—for Appellant.

Higinbotham—for Respondent.

Rigg, J.—The parties in this case were married in 1901. They have two children, Dagmar aged about 14 and Terence aged about 10. The husband is an Assistant Engineer in the Public Works Department, whose pay with allowances does not now exceed Rs. 500 a month. In 1907 he bought a piece of land from Dr. Pedley for Rs. 10,000, and built a house, which he called Kildare, on it at a cost of about Rs. 16,000. He made out a cheque for Rs. 9,000 to his wife who endorsed it over to the vender. The deed of sale of the land was registered in her name. In 1908, he again bought another piece of land built Kerry on it. This land was similarly registered in his wife's name. In 1915, the parties separated after a quarrel. The question for decision in this suit is whether these two houses and pieces of land were intended as a gift to the wife, or whether there is a resulting trust in favour of the husband on the ground that they were merely placed in her name benami in order to evade a supposed rule prohibiting Government

servants from speculating in landed property. The learned Judge on the Original Side found that there was no advancement and decreed the plaintiff's suit for a declaration that the properties were his and should be transferred to his name. The first point for consideration is whether the English law relating to the presumption to be made from the investment of property by a husband in his wife's name is to be applied to the parties or not. The trial Judge describes the parties as English, but thought that because they had spent most of their lives in India, the presumption that would be made by an English Court should not be drawn in view of the fact that the husband paid for the property, managed it and took the receipts. He treated the case on the same footing as a purchase by a Hindu or Mahomedan, and presumed that the transaction in the circumstances was a benami one. Mr. Higinbotham states that he is not prepared either to affirm or deny that the parties are English, but I am of opinion that there is not the slightest reason for supposing that they are not of British nationality. It is inconceivable that if they were not, plaintiff would not have said so and thereby cut away at once one of the main foundations of the defendant's case. By virtue of S. 13 (2), Burma Laws Act, the law to be administered on the Original Side of this Court is the same as would be administered by the Calcutta High Court, and in the present case that would be the common law of England. Mr. Higinbotham contends that Ss. 81 and 82, Trusts Act, 1882 (which is in force in Rangoon), governs the case. He admits that the burden of proof lay on his client in the first instance, as the tenor of the documents was adverse to his claim. But he contends that as soon as he proved the source of the funds for the purchase of the property, and his client's receipt of the rents, the burden shifts. S. 81, Trusts Act, is as follows:

"Where the owner of property transfers or bequeaths it and it cannot be inferred, consistently with the attendant circumstances, that he intended to dispose of the beneficial interest therein, the transferee or legatee must hold such property for the benefit of the owner or his legal representative."

Illustration (d) to that section deals with the case of a gift from a husband to a wife, and says that the presumption in such a case is that she takes the beneficial

interest. The presumption is an inference from the relationship of the parties. I do not think that the enactment of this section was intended to abolish any presumption arising from the personal law of the parties. The question still remains whether the attendant or surrounding circumstances of the case are inconsistent with such a presumption.

In *Gopeekrist Gosain v. Gungapersaud Gosain* (1) their Lordships of the Privy Council declined to import the presumption that a purchase of property by a Hindu father in favour of his son was an advancement, but they did not do so on the ground that such a presumption could in no case be made in India but that it was one that could not properly be applied to Hindus, and that its incorporation would be foreign to and objectionable in a system of law that recognizes the purchase by one man in the name of another, to be for the benefit of the real purchaser. For similar reasons their Lordships have declined to import the English presumption in the case of gifts by Mahomedans. On the other hand the English doctrine of advancement was recognised in *Kishen Koomar Moitra v. Mrs. M. S. Stevenson* (2). The learned Judges said:

"As between the father and daughter, both of English extraction and living under the English law, why should the doctrine of advancement not be considered applicable? If by English law certain rights are secured to a child by the doctrine of advancement, why should the child by living with its parents in this country be deprived of that right? Had litigation arisen between French and his daughter that would have been governed by English law and the doctrine of advancement might have been effectually pleaded by the daughter."

The doctrine was assumed to apply in the case of *Mc Gregor v. McGregor* (3), which was decided by the Recorder of Rangoon in 1898. In S. 39, T. P. Act, there is a reference to a provision for advancement and such an expression could only apply to persons of British nationality. The mere fact that the parties have been educated or have chiefly resided in India cannot affect their personal law and, in my opinion, the burden of proving that the registration of the land on which Kerry and Kildare are built in the name of Mrs. Kerwick was not intended as an advancement lies upon

the plaintiff. The parties lived happily together until January 1915. With the exception of the evidence of the parties themselves, there is very little evidence of facts antecedent to or contemporaneous with the purchase to show whether the intention of the plaintiff was to create a trust or an advancement. Mrs. Kerwick says that she and her husband were on very good terms and that he told her he intended to make provision for her. In para 5 of the plaint Kerwick states that he purchased the properties with the object of making provision for his children. In cross-examination he said that he wished the property to benefit his children not after their death but to help in their education and that he intended to give them to them when they reached a reasonable age. He took out 3 insurance policies one of which was intended for Terence, and in 1912 he bought Kenmare which he admits was intended for Dagmar. Apart, therefore, from Kildare and Kerry, he did make provision for his children which makes it the less unlikely that he made some provision for his wife and the more probable that the property in her name was intended for that purpose.

It is argued that if Kerwick's intention was to benefit his wife he would not have entered into so wild a speculation as house building on borrowed capital. But the same argument would apply with reference to his intention to benefit his children, and it is clear from his own statements that he did not make the purchases as a speculation but as provision for his family. It is also urged that it is improbable that he would borrow money from his sister to benefit his wife.

There is, however, no more improbability in his borrowing from a wealthy sister to benefit his wife than to benefit his children who were very young at the time. On any view of the case Kerwick's financial proceedings are somewhat remarkable. The learned Judge, after reviewing the financial resources of Kerwick, says that it is very unlikely that a man possessed of Rs. 8,000 would borrow Rs. 50,000 to make a present to his wife. He remarks that it is significant that between 1907 and 1912 Kerwick could or at any rate did only repay Balthazar and Son Rs. 4,500, and that at the time of separation his wife did not contend that he had any other sources of income

1. (1865) 4 W R 46=5 M I A 53 (P C).

2. (1865) 2 W R 141.

3. 4 Bur L R 88.

except his salary. I do not think that this passage correctly represents the financial position and dealings of Kerwick. Kerwick admits that he had a banking account with Messrs. Thos. Cook and Son only. In his letter to his wife, Ex. 6, dealing with his financial position and the burden of debts, he says that his salary (inclusive of profits from the houses) is Rs. 515 and that after making certain payments, he will only have Rs. 185 on which to live. He continues:

"The other source from which I sometimes derived a little is at an end, after your and Lend-say's bloodthirsty plans and threats at Father Colombo's house."

Such is his own account of his financial position, but his passbook exhibits a most extraordinary situation. Credits to the amount of Rs. 1,87,000 odd were placed to his account from 1907—15 and vary from Rs. 5,000 in 1909 to Rs. 42,000 odd in 1914. The loans from Balthazar will not account for much of this money. In 1905, the credits are only about Rs. 1,800; the next year they are Rs. 3,200 but when building begins in 1907, they leap up to Rs. 18,000. His banking account does not show that he had Rs. 8,000 in 1907. The money may have been elsewhere but if so, there was no necessity for him to borrow Rs. 8,000 from a sister, or Rs. 12,000 from Balthazar. It is not necessary to enter into Kerwick's financial dealings generally, as they are not really relevant to the case, nor are there the materials on the record for such an examination; but I think it may be said that Kerwick must have thought it possible to raise considerable sums of money, before he commenced building, or he would not have undertaken the ventures. Before he paid off what was due on Kildare and Kerry, Kerwick bought Kenmare in November 1912 for Rs. 17,000 for his daughter, and in the same month he writes to his wife in England and suggests that she should send him a power-of-attorney to enable him to deposit the title deeds of Kerry to help her father. In March 1913, he borrowed Rs. 12,000 for his father-in-law and appears to have taken no security from him for the loan. Mrs. Kerwick admits that her husband treated her generously, and the loan to the father-in-law was certainly a very generous proceeding on the part of a man with such small ostensible means. This loan and the character of his financial pro-

ceedings generally are, I think, a sufficient answer to the contention that a man of his means would not buy two houses for his wife. The parties were on very good terms at the time, and there was no idea that they were likely to separate. So long as they lived together, the rents from the property were their mutual benefit. In these circumstances, it is no more unlikely that Kerwick intended an advancement for his wife when he purchased Kildare and Kerry, than that he would lend her father Rs. 12,000.

It is common ground that Kerwick managed the properties, collected the rents and paid them into his own banking account. This, however, may have been merely an arrangement to suit the convenience of the parties. Mrs. Kerwick was in England much longer periods than her husband, who remitted her £20 a month for the expenses of herself, the two children and a niece. In *Grey v. Grey* (4) the fact that a father received the profits of an estate for his adult son for 20 years, built much and provided materials for buildings, and treated for the sale of an estate, was not held sufficient to rebut the presumption of an advancement arising from the purchase of the property in the son's name.

In the case of English people resident in India, the arrangement made would probably be determined to some extent by considerations of convenience, and I do not think the management of the estate by Kerwick is conclusive evidence that the registration of it in his wife's name was a trust only. The houses were in the name of Kerwick in the Municipal Office at the time of the filing of the suit, but how long they had stood in his name is not clear. Kerwick says that so far as he knew of recent years the tax bills have been made out in his name, and explains that he means for the last two or three years. It would have been easy for him to produce evidence to show that they had always stood in his name. The same considerations as to convenience would apply, if the arrangement was that he should manage them on behalf of his wife. Kerwick explains that the reason why the land was registered in the Registration Office in his wife's name was his belief that he was not allowed to speculate in land, but that in 1912 he found out that there was no rule forbidding officers

to buy a house for themselves to live in but they were only prohibited from buying from natives of India. Cl. 9, of the Government Servants Conduct Rules, 1904 (as corrected up to 1912), allows any Government servant to buy immovable property for residential purposes, and allows members of the Provincial or Subordinate Civil Services to acquire immovable property by purchase with the sanction of the Local Government or the Head of a Department specially empowered to grant such sanction. Kerwick is a member of the Provincial Service. There is no absolute prohibition in the rules against a purchase of house property from a native of India; report of the intention of the officer making the purchase must be made to the Commissioner for his orders. Had Kerwick really consulted the rules (1912), he would have found that he could not purchase Kenmare without permission. Moreover, if his intention was to conceal his operations from his superior officials, why were not the houses also put in his wife's name in the Municipal Office? Until he came into Court, Kerwick never suggested that the houses had been registered benami in order to evade the rules. On 18th November 1912 he wrote to his wife as follows:

"Now, dear, Pa to get on with his business wants some security in the bank and I let him have the house paper of Kerney house, which are now free from debt, to deposit in the Chartered Bank. . . Well as the house is in your name the bank have refused Pa I wanted to draw up a stamped paper for a power-of-attorney giving me full power to sell, borrow money on or to register any transfer of your property. . ."

Further on in the same letter he tells her that he is buying Kenmare and says: "I cannot put this house in your name as you are not here, so see what you have lost." He explains that he was merely joking. The pleasantry is very weak and does not explain the use of the expression "your property." In reply to this letter she sent him a power-of-attorney. Now at the time this letter was written, Kerwick had found out that he was not prohibited from holding property, if his story is to be believed. It is difficult to understand why instead of asking for a power-of-attorney to sell her or borrow on property, he did not ask her for once to re-transfer the houses to his name which would have saved much trouble. He did not make any attempt to have the houses transferred back to his name, but suggest-

ed that if she had been in India the new purchase would have been put in her name also. If the old transactions were benami, the expression "see what you have lost" is meaningless. On receiving the power-of-attorney, he seems first of all to have borrowed Rs. 12 000 on the security of life insurances and then to have repaid the sum by a loan from Balthazar (see Exs. C and Z). The promissory note Ex. C, was signed by him, "Mrs. K. M. Kerwick by her attorney." He says that he borrowed the money from Balthazar on the security of Kerry. The way in which the promissory note, Ex. C, was signed appears to indicate an intention of holding his wife responsible, which is not a very intelligible proceeding if she had no property to meet the debt. In my opinion, Kerwick's contention that he put Kidare and Kerry into his wife's name benami is not even plausible.

In January 1915 the parties quarrelled but decline to disclose the reasons for the estrangement. Mrs. Kerwick's parents had been staying with them at Kerry in 1911 and left the house owing to a quarrel with Kerwick. It is urged that Mrs. Kerwick would not have permitted her husband to send them away if the house had been her own. This however depends on whether she decided to side with her husband or not—either they or her husband had to leave Kerry, and unless she intended to break with him the natural course of events was for the parents to quit. I am unable to see in what way this incident tends to show that she was not the owner of Kerry. Mrs. Kerwick says that when she quarrelled with her husband she threatened to go home and asked him how the house stood. He then gave her Ex. 7, which is a statement of the debt on Kidare and Kerry, the taxes due, insurances, the names of the tenants and the rents. Apparently he is also alleged to have given her Ex. 8, a statement of her father's debt. Kerwick states that he does not remember giving these two papers to her and with reference to the former, he is unable to suggest any reason why he drew it up if it was not for his wife. He thinks he drew up Ex. 8 to assist his memory. If Ex. 7 was intended as a mere aid to his memory, it is difficult to understand why it commences with the information that the papers are with Balthazar (a fact he could not have forgotten) or why there is no mention of Kenmare. Ex. 8

begins, "Pa's loan from Gasper Rupees 6,000." Gasper was the insurance agent. On 1st April Kerwick repaid Balthazar Rs. 12,000 which was made up of Rupees 6,000 repaid by "Pa" and another Rupees 6,000 borrowed from Gasper. It is argued that the words at the end of Ex. 8 "Pa paid Kathleen £ 20" indicate that the note was one for his private information, as, if it was intended for her, the expression would have been "Pa paid you." There is some force in this contention, but it is not conclusive, as he may have made out the account in the more formal manner of inserting the name of the recipient. On the whole, I think the balance of probability is in favour of Mrs. Kerwick's version.

The parties were unable to come to an understanding and on 1st March 1911, a deed of separation was drawn up by a priest. It provides that Kerwick shall pay his wife £ 8 monthly out of his income, and also more if possible, that the father is to keep Terence at school and have him with him during the vacations, a similar arrangement, *mutatis mutandis*, being made for Dagmar. Mrs. Kerwick was to leave for England at once and her husband was to pay her passage. The defendant contends that she accepted so small a sum of £ 8 because it was understood that she was the owner of Kildare and Kerry. She is supported in her contention by Father Colombo, whose evidence, however, has been rejected by the learned trial Judge on the ground that it is probable that Father Colombo's memory is at fault. This conclusion is reached by the learned Judge after consideration of the subsequent conduct of the parties. This portion of the case has been argued very elaborately at the Bar. Both parties admit that something was said about the houses. Kerwick's version of the conversation is that nothing was said about his wife receiving the income from the Rangoon houses, but that Father Colombo did say that £ 8 was too small an allowance, and that when she called attention to the income from the houses he explained that they were heavily mortgaged and brought in very little. There is no mention about the income from the houses in the deed itself, and the omission is noteworthy. The argument to be drawn from it would have been still more forcible if the deed had been drawn up by conveyancer instead of by a young

Italian priest. There is no evidence to show whether the expression "and more if possible" had any allusion to the houses which Kerwick said were heavily mortgaged. Father Colombo says he thinks Kerwick said the property belonged to his wife and that this was the idea he gave him. In answer to interrogatory No. 10, which was as follows:

"Is it not a fact that at the said interview the plaintiff proposed to make the defendant an allowance of £ 8, that you suggested an allowance of £ 12; that the defendant then remarked that the plaintiff had properties in Rangoon which brought the plaintiff an additional income; that the plaintiff then said that after paying taxes and rates and interest on mortgages he got about Rs. 10 a month out of his properties and that he was keeping those properties for the benefit of his children and that if the income from the properties was to be further discussed the plaintiff would break off the discussion?"

Father Colombo replied, "In this particular meeting of which mention is made there was no discussion about any house property. It was only at a subsequent meeting when the deed was signed that a mention was made of the property and it is referred to in answer to No. 11, examination-in-chief."

In answer to the 12th and 13th interrogatories by plaintiff the witness would not swear that there was any claim by defendant to the property or admission by the plaintiff on the subject, but in answer to the 14th question he again said Mrs. Kerwick laid claim to the property. Turning now to Ex. II, written by plaintiff on 15th November, I find the following passage:

"I have remitted to you monthly the sum of Rs. 120 as stipulated in the priestly agreement, and I am remitting Rs. 50 a month as interest on your father's loan of Rs. 6,000 to the money-lender in Rangoon, which ordinarily should go to you to make your monthly allowance, i.e., Rs. 170 (120 plus 50)."

Kerwick explains that this statement means that if he had not had to send the money to the money-lender he would have sent it to her, if she had not claimed the house and her father had paid the debt; and in cross examination he says that he had promised to give her more than £ 8 if possible and intended to carry this out. I do not think on this evidence that the passage in Ex. II read with the 10th interrogatory can be construed into an admission on the part of Kerwick that he was bound to pay her Rs. 50 out of the income from the houses. Father Colombo's memory as to the details of the conversation seems defective. It seems to me most probable that Mrs. Kerwick was dissatisfied with the allowance, and pointed

to the house property income and made some claim to it, whereupon Kerwick said they were very heavily mortgaged and the payments on them absorbed nearly the whole of the income, but that if possible he would pay her more than the £8. Father Colombo's evidence does not amount to much more than that he carried away the impression that Kerwick had settled the property on his wife, an impression that might arise from Kerwick undertaking to allow her more if the interest on her father's loan was paid him, and the houses were let, but Colombo will not swear positively that there was any definite admission or claim as to the ownership. Objection has been taken to the admission of oral evidence at the trial as to the contents of certain letters sent by Kerwick, but not asked for by him, to be produced at the trial.

The Judge ruled that Mrs. Kerwick could be asked her recollection as to the contents of the letters. We are of opinion that the evidence on p. 49 of the record about the contents of these letters is inadmissible, Ss. 32, 65 and 66, Evidence Act, and ruled accordingly at the hearing. In enacting S. 22, Indian legislature followed the rule laid down in *Lawless v. Queale* (5) in preference to that in *Statler v. Pooley* (6). This portion of the evidence was used by the trial Judge to discredit Father Colombo, the trustworthiness of whose evidence I have already discussed. When the deed of separation was drawn up, Dagmar was in England and Terence was sent to school at Mussoorie where he fell ill. Mrs. Kerwick promptly cancelled her power-of-attorney and informed Balthazar of her action. In August Kerwick agreed to Terence being taken to England but refused to allow him to see his mother's parents. Negotiations broke down owing to this restriction, which Mrs. Kerwick regarded as ridiculous. According to the deed of separation Mrs. Kerwick was to go home at once, but her husband seems to have been unable to meet the necessary expenditure (see Ex. 6). In September he wrote to her detailing his difficulties and asking her to leave him a free hand in respect to the houses.

In October (Ex. G) she replied and asked him to sell Kildare and transfer Kerry to her free of debt. In his reply (Ex. H) he did not repudiate her claim to the

houses, although in his cross-examination he stated that he considered the claim an impudent one. He discussed the debts due on the houses and said that Rs. 12,000 had been raised on the mortgage of Kerry for her father. He did not mention the fact that Balthazar had been repaid. Kerry is apparently free from debt to Balthazar. It is clear that whether Kerwick denied his wife's claim subsequently to the separation or not she did not abandon it. It is suggested that she used it merely as a means for bringing pressure to bear on him to let her have Terence. She admits that the real contest was over the boy, and even after the suit had been filed she wrote to her husband and said that "the houses never troubled her." But the argument is a two edged weapon. It is equally open to the defendant to argue that the plaintiff used his right of custody of the boy, to induce her to abandon her claim to the houses. They had been represented to her as being heavily mortgaged and as bringing in a very small income. Her father owed Kerwick money. In these circumstances she was probably willing to waive her rights in the Rangoon property, if an arrangement satisfactory to her was reached about Tenance. I do not think the argument from pressure gives real assistance to either party in this case. No arrangement was reached and in December Mrs. Kerwick's Advocates wrote to Kerwick. The subsequent correspondence between the parties' Advocates throws no light on Kerwick's intention when he bought the property in 1907 and 1908.

The evidence relating to Kerwick's intention is somewhat meagre, but the onus of proof lay upon him and in my judgment he failed to discharge it. I think that the probability is that he intended to make provision for Mrs. Kerwick, just as he was making provision for his children. The letter, Ex. 1, from which the most reasonable inference would be that it was written to the owner of the property, cannot be explained away as a mere jeu d'esprit. It is not until the deed of separation has been signed that Kerwick suggested that the property was not Mrs. Kerwick's and then so far as admissible evidence on the record goes, not until the suit is about to be filed. I have already stated my reasons for believing that Kerwick's explanation

5. 8 Ir L R 385.

6. (1840) 6 M & W 664.

that the property was transferred to his wife benami is untrue. There is practically nothing left in plaintiff's favour, except his management of the property, and this is inconclusive evidence of ownership in a case such as this. I would allow the appeal and dismiss the plaintiff's suit with costs in both Courts.

Maung Kin, J.—I concur in holding that the onus is on the plaintiff of rebutting the presumption that the purchases were by way of advancement in favour of his wife, the defendant. The Indian law on the subject of advancement is contained in S. 82, Trusts Act, which has been made applicable to Rangoon. The section provides:

"Where property is transferred to one person for a consideration paid or provided by another person, and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration."

It will be seen that on the subject of any presumption arising in the case of the transferee being the wife or the child of the person paying the consideration, nothing is stated in the section. The question of advancement or no advancement is left as one of intention, which will have to be proved according to the law of evidence. The same is the case in English law. So in this case the question would be:

"Did the husband intend that his wife should hold the property purchased as trustee for him or that she was to have the beneficial interest therein?"

On whom, then does the onus lie as to the intention of the husband? In England it is easy to answer the question, because a presumption in favour of an advancement to the wife is allowed. In India there is at first sight some difficulty, for we have decisions between Hindus as well as between Mahomedans to the effect that the English presumption of advancement cannot be recognised. The reason assigned in the case of Hindus is their inveterate practice of holding land in the name of another. The principle of the decisions in Hindu cases has been extended to those of Mahomedans, because as observed by their Lordships of the Privy Council in *Moulvie Sayyud Ushur Ali v. Mt. Bebee Ulfat Fatima* (7), though:

"we cannot apply to the decision of a case between Mahomedans . . . any reasons . . . drawn exclusively from the Hindu law. . . it is perfectly clear that in so far as the practice of hold-

ing lands and buying lands in the name of another exists, that practice exists in India as much among the Mahomedans as among the Hindus."

And as regards the Burmans we have the case of *Mecyappa Chetty v. Maung Ba Bu* (8), where the principle was extended by a Bench composed of Sir Charles Fox, C. J., and Parlett, J. The learned Chief Judge observed in his judgment:

"Neither Court had in mind the long line of decisions referred to at pp. 561 and 627 of *Ameer Ali and Woodroffe's Evidence Act* as to the presumption to be made in India when a person purchases property and takes a conveyance in the name of a relation. As far back as 1854 it was decided by the Privy Council that the presumption made in English law that the purchase in such a case was for the benefit and advancement of the person to whom the conveyance is made, does not apply in India, and that the presumption in India is that the purchase is benami and that the burden lies on the person to whom the conveyance has been made of proving that he is entitled to and beneficially interested in the property."

It does not appear that the learned Chief Judge grounds his decision on the same reason as did the Privy Council in the Mahomedan case above cited. It has now come to be stated in text books and judicial decisions that in India a purchase by a husband in his wife's name creates no presumption of gift to her or of advancement for her benefit. I venture to think that the proposition stated in this form is far too wide and embraces cases of persons who were not in view, when the judicial decisions against the presumption of advancement were given. The case of persons of British nationality was clearly never under consideration. The presumption allowed by English law is not a presumption *juris et de jure* but is one of fact and I consider that this presumption is made in English law, not only because the wife is found to be invested with one of the principal incidents of ownership, but also because the husband in putting the property in her name must have had some intention regarding the transaction and the probabilities are that the intention is to confer a benefit upon the wife. I am unable to see why such a presumption cannot be drawn in the present case. Under S. 114, Evidence Act, Courts may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business. in their

relation to the facts of the particular case. There can be no doubt that in the case of persons of British nationality residing in India it cannot be said that they have the inveterate habit of holding property in the name of others. I would, therefore, hold that the English presumption of advancement should in this case be drawn in favour of the defendant. As regards the facts also I am entirely of the same opinion as my learned colleague.

K.N./R.K.

*Appeal allowed.***A. I. R. 1918 Lower Burma 22 (1)****Special Bench**

ORMOND, PARLETT AND ROBINSON, JJ.

Ma Waing—Applicant.

v.

Ebrahim—Opponents.

Civil Ref. No. 2 of 1917, Decided on 7th August 1917, made by Divl. Judge, Meiktila, D/. 9th January 1917.

Divorce Act (1869), S. 16—Decree nisi.

Under S. 16 a decree nisi can be pronounced only by a High Court. [P 23 C 1]

Judgment.—On 8th July 1916 in the Divisional Court, Meiktila, *Ma Waing* obtained a decree nisi for the dissolution of her marriage with *Ebrahim*, which decree has now come to this Court for confirmation. The parties were married as Native Christians on 11th March 1910 at the A. B. Mission, Myingyan, by the Rev. E. Tribolent. Three months before this case the respondent, having become a Mahomedan, married a Mahomedan woman. There is no reason to suppose there was any collusion or connivance. The decree for the dissolution of the marriage is confirmed. The Divisional Judge's procedure was incorrect and has resulted in great delay in affording the petitioner her relief. He should under S. 14, Act 4 of 1869 have pronounced a decree declaring marriage dissolved on 8th July 1916 and have at once submitted his proceedings to this Court under S. 17, and the decree might have been confirmed in January 1917. A decree nisi can be pronounced only by a High Court under S. 16.

K.N./R.K.

*Decree confirmed.***A. I. R. 1918 Lower Burma 22 (2)**

TWOMEY AND PARLETT, JJ.

Deya—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 315 of 1916, Decided on 29th May 1916.

(a) Criminal P. C. (5 of 1898), S. 309 (2) — Judge, after delivery of opinions by assessors, cannot view scene of offence.

Under S. 309 (2) a Sessions Judge is bound to give judgment after the assessors have given their opinions and he is not competent to take into account his observations of the locality where the crime was committed and which is visited by him alone after the assessors have given their opinions. [P 23 C 1]

(b) Oaths Act (10 of 1813), S. 13—Omission of oath intentional—Section does not apply.

Section 13 does not extend to cases where the omission of the oath or affirmation has been intentional. [P 24 C 1]

P. D. Patel—for Appellant.

Parlett, J.—The appellant *Deya* was tried before the Sessions Judge with assessors on charges of having murdered her mother-in-law and of having attempted to murder her sister-in-law by pushing them both into a well. The assessors considered neither charge proved, but the Sessions Judge disagreeing with them convicted her of murder and sentenced her to transportation for life, but stayed the trial of the other charge under S. 240, Criminal P. C.

One of the grounds of appeal is that the Sessions Judge erred in visiting the scene of crime after the assessors had given their opinion and without notice to and in the absence of accused and her counsel. The hearing of the case was concluded and the assessors' opinion was taken on 21st March 1916. In his judgment delivered on 23rd March the Sessions Judge states that on 22nd he visited the locality alone with the record of the case and the plans filed in it but without notice to any one. One of the witnesses in the case happened to be there and pointed out one of several wells there as the one in which the deceased's body was found, and from the plans and the evidence the Judge was satisfied that it was the one. He made certain observations on the condition of the sides of the well, its surroundings and the vegetation growing there, and drew conclusions therefrom adverse to some of the evidence for the defence. In the first place there are admittedly many wells in the neighbourhood, and

there is no proof that the well which the Sessions Judge inspected is in fact the one in which the deceased's body was found. In the next place, the tragedy occurred on 11th December 1915 after recent rain, when the condition of the ground and vegetation would be very different from that on 22nd March after several months' drought. Finally it was not competent to the Sessions Judge to take into account any observations of the locality made by him alone after the assessors had given their opinions. If at an earlier stage he thought that the assessors should view the place, he should have made an order under S. 293, Criminal P. C. and he might himself have accompanied them. But once they gave their opinions it only remained for the Judge to give judgment under S. 309, sub.S. (2). He had no power to do anything further. In my opinion, therefore, that part of the judgment dealing with the Sessions Judge's visit to the spot and his conclusions from what he saw there must be entirely eliminated, and the case must be considered solely on the admissible evidence on the record.

Another ground of appeal is that the Sessions Judge refused to allow appellant's counsel to put leading questions in cross examination to one of the witnesses. The refusal to allow a question to be put in cross-examination merely because it was in form a leading question would be improper, as the Judge cannot abrogate S. 143, Evidence Act. But there is no allegation before us that any such question was in fact disallowed, or what that question was. If that had occurred counsel doubtless would have asked for his question and the order disallowing it to be recorded, but this was not done. All that appears in the record is a note by the Judge at the end of the deposition of this witness, a little girl of eight or nine years of age, in which he says,

"It has been a matter of great time and patience to question her in such a way as not to suggest the answer she might be expected to give and to be sure that she understood the question and meant to say what her answer implied. So far as I am aware, no question which might suggest the answer has been put, and on the whole I am of opinion that the girl understood the questions and at the time when she gave the answers meant to say what she is recorded as having said."

An answer is usually of far less evidentiary value if given in reply to a leading question and the Judge was clearly

anxious to avoid any suggestive questions being put to her even in examination-in-chief. She was cross-examined at great length on two days, and in the absence of any record of a question being disallowed and any specific allegation of that having been done, there appears to me to be no ground for supposing that the cross-examination of this witness was hampered by the Court. The remaining grounds of appeal deal with the evidence in the case, and the chief matter for consideration is the statement of the little girl Sadiya, the only eye-witness of the occurrence. She is a Hindu about eight or nine years of age, and at the conclusion of her examination the Judge noted as follows:

"She was not put on oath, as I am of opinion that she is not of an age to understand the nature of an oath."

Being a Hindu S. 6, Oaths Act, forbade her being put upon oath at all, and the Judge can only have meant that she made no affirmation. The printed heading of her statement shows the word "sworn" crossed out and the word "affirmed" left. This was evidently done by a clerk before she was examined by the Judge, and in view of the Judge's subsequent note I have no doubt that the girl made no affirmation. The Judge quotes S. 13, Oaths Act, as making her statement admissible in evidence. The point is mentioned in the ground of appeal, and though it was not argued at the hearing, I think it must be considered. In *Queen v. Sewa Bhogta* (1) four out of five Judges held that the word "omission" in S. 13 Act 10 of 1873 includes any omission and is not limited to accidental or negligent omissions. This was followed in *Queen Empress v. Shava* (2) by one of two Judges, the other deciding the case without expressing an opinion on that point. In *Queen Empress v. Viraperumal* (3) the two Judges composing the Bench disagreed on the point. There are two Allahabad cases to the contrary effect, *Queen-Empress v. Mara* (4), the decision of a single Judge, and *Queen-Empress v. Lal Sihal* (5) by a Bench of two Judges. In Burma I can only find one decision on the point, *Dwa Nyung v. King-Emperor* (6), in which a statement made designedly with-

1. (1-75) 14 B L R 294.

2. (1892) 16 Bom 359.

3. (1893) 16 Mad 105.

4. (1888) 10 All 207.

5. (1899) 11 All 193.

6. (1893-04) 2 L B R 322.

out oath or affirmation was held to be admissible.

I find considerable difficulty in following the reasoning in that judgment. In the first place, the head-note is misleading, as it shows *Queen v. Sewa Bhogta* (1) and *Queen-Empress v. Shava* (2) as dissented from, whereas they are in fact followed. Next, the learned Judge refers to the latter ruling as dissenting from the former, whereas the one Judge who decided the question expressly concurred with the Calcutta case and differed from the Allahabad case (see p. 366). Again the learned Judge of this Court expresses his concurrence with a passage from the Bombay case which, if read alone, would imply that the deliberate omission to administer an oath or affirmation to a witness is not curable by S. 13, Oaths Act. Moreover, the point is expressly said not to be very material, as there was other reliable evidence of undoubted admissibility sufficient for a decision in the case. Under these circumstances it appears to me that *Pwa Nyun's* case (6) cannot be regarded as a very weighty authority. In my opinion the reasons given in the Allahabad rulings and by Sir Arthur Collins, C. J. in the Madras ruling for not extending S. 13 to cases where the omission of the oath or affirmation was intentional are sound and that the view of the dissenting Judge in *Queen v. Sewa Bhogta* (1) is correct. If the decision of the majority of that Bench were carried to its logical conclusion, it would give rise to a proposition which a Full Bench of the same High Court has more recently described as "at once novel and startling," *Nundo Lal Bose v. Nistarini Dasi* (7).

I am of opinion that the statement of Sadiya recorded at the Sessions trial is not admissible in evidence and it is necessary that her evidence in the case should be taken under S. 428, Criminal P. C., and I would direct the Sessions Judge to summon her before him and after causing her to make an affirmation under S. 6, Oaths Act, to take her evidence in the presence of appellant's counsel. It is desirable that she should be asked to describe as exactly as possible the relative positions and the attitude of herself, her mother and the accused before and at the time of the acts which she alleges against the accused, and also to describe the precise manner in which the accused did

7. (1900) 27 Cal 428.

those acts, and the order in which she did them.

Twomey, J.—I concur.

K.N./R.K.

Order accordingly.

A. I. R. 1918 Lower Burma 24

RIGG, J.

Emperor

v.

U Gyaw—Convict.

Criminal Reven. No. 267-A of 1917, Decided on 24th November 1917.

Burma Forest Act (4 of 1902), S. 31—Rule under, Rr. 22, 98—Licensee to fell timber is liable, on breach of conditions, for acts of his servants.

A licensee or other person permitted to fell timber in accordance with certain conditions under rules framed under the Forest Act is liable to be punished under those rules for the acts of his servants, whether authorised by him or not, and even if the acts are in contravention of his instructions, provided that those servants were acting within the scope of their master's authority and unless the master can show that he acted in good faith and did all that could be reasonably expected of him to prevent the breach of the conditions under which he is permitted to fell the timber. [P 25 C 2]

Gaunt—for the Crown.

Judgment.—U Gyaw has been convicted under R. 98, read with R. 22 of the Burma Forest Act for having felled undersized kamaung trees in contravention of a license issued in the joint names of U Mra Tha Tun and himself. The case was tried summarily and the facts are not as clearly stated as is desirable. They have not, however, been challenged, and the only point argued is whether on the Magistrate's finding, the accused is liable to be convicted of any offence. The Magistrate found that three undersized kamaung logs were cut by coolies employed by the accused; that the accused did not remove the logs (possibly because he had already been fined for a similar offence) and that in any case, whether the cutting was authorised by the accused or not, he was responsible and liable to the punishment prescribed by R. 98.

Rule 22 is as follows:

"No person shall fell cut, girdle, mark, lop, tap or injure by fire or otherwise . . . any teak tree or any other tree of the kinds specified in the Appendix 1 and within the areas therein specified . . . save under and in accordance with the condition of a special agreement with Government or a license, etc. . . ."

This Rule is framed under the powers conferred on the Local Government by S. 31 of the Act. S. 31, is in Ch. 3, which is headed "General Protection of Forests and

Forest Produce." The object of the Forest Act is to enable the Local Government to control the administration of forest areas by declaring some areas to be reserved forest, by regulating the felling of trees and the extracting of forest produce, and by imposing duty to be paid for privileges granted to individuals to trade and work within areas under forest. To secure this control, rules have been framed, and licenses are issued. It is well known that licensees seldom fell trees themselves and employ coolies for such work. The accused probably held a license under Form 3, the 8th condition of which is that any breach of the conditions of the license will render him liable to lose his license and to the punishment prescribed in the Act or the rules made thereunder. In *Shin Gyi v. Emperor* (1) a Full Bench of this Court held that a licensee of liquor shop whose agent or servant permits drunkenness is punishable under the provisions of S. 50, Excise Act. The principle on which the decision in that case proceeded is that the object of the Excise Act would be defeated if a licensee was permitted to excuse himself on the ground that his servants had disobeyed his orders, provided that the servants were acting within the scope of their authority. This principle is very clearly stated in the *Metro-polition Police Commissioner v. Cartman* (2) by Lord Russell, C. J., in the following passage:

"How do they (the licensees) carry on their business? From the nature of the case it must be largely carried on by others. . . . It is true that sometimes the licensee keeps in his own hands the direct control over his own business, but in the great majority of cases it is not so, the actual direct control being deputed to other persons; are the licensees in these cases to be liable for the acts of others. In my opinion they are, subject to this qualification, that the acts of the servant must be within the scope of his employment. . . . It makes no difference for the purposes of this section that the licensee has given private orders to his manager not to sell to drunken persons; were it otherwise, the object of the section would be . . . defeated."

A similar principle was applied in *Strutt v. Cliff* (3), which was a case under the Customs and Inland Revenue Act, 1888, in which case the appellant was held liable for the unauthorised act of his bailiff in bringing back his family

from the station in a milk cart and using the milk cart thus without a license. It seems to me that having regard to the objects of the Forest Act a similar responsibility must be attached to persons felling timber by coolies, otherwise the provisions of that Act would be rendered nugatory. The correct rule seems to be as follows: A licensee or other person permitted to fell timber in accordance with certain conditions under rules framed under the Forest Act is liable to be punished under those rules for the acts of his servants, whether authorised by him or not, and even if the acts are in contravention of his instructions, provided that these servants were acting within scope of their master's authority, and unless the master can show that he acted in good faith and did all that could be reasonably expected of him to prevent the breach of the conditions under which he is permitted to fell the timber.

There is no reason for interference with the conviction in the present case, and the proceedings are returned.

R.N./R.K.

Conviction upheld.

A. I. R. 1918 Lower Burma 25

PARLETT, J.

Maung Po Htaik—Defendant—Applicant.

v.

Maung Sein Bu and another—Plaintiffs—Respondents.

Civil Revn. No. 19 of 1916, Decided on 31st March 1916, from order of Sub-Div. Judge, Kyauktan, D^c. 26th January 1916.

Civil P. C. (5 of 1908), S. 115—Interlocutory order cannot be interfered with except for cogent reasons.

Interlocutory orders will not be interfered with in revision unless for the most cogent reasons and in order to prevent otherwise irreparable injury. [P 26 C 1]

Maung Gyi—for Applicant.

FACTS appear from the following judgment of the Sub-Divisional Judge:

"This suit is instituted by the plaintiff Maung Sein Bu, who bases his claim on a registered deed of assignment. The defendant not only opposes the claim but denies the validity of the assignment. On 14th January 1916, the Advocates on both sides argued the matter. It is issue 6 in the case. For the defendant it was urged that a mere right to sue for damages after a breach of contract is not transferable or actionable. S. 6 (e), T. P.

1. A I R 1918 L B 196=13 I C 81=9 L B R 81 (FB).

2. (1996) 1 Q B D 655=65 L J M C 113.

3. (1910) 27 T L R 14=3 L G R 989.

Act; *Pragi Lal v. Fateh Chand* (1) and *Abu Mahomed v. S. C. Chunder* (2).

The pleader for plaintiff contended that S. 6 T. P. Act, is not applicable to this District (see para. 748, Lower Burma Courts Manual. The question of validity of the assignment is between assignor and assignee, between whom consideration had passed. The Court reserved orders for 18th January 1916. On 15th January 1916, plaintiff applied to amend his plaint by the addition of the assignor Maung Sein Nyun as a co plaintiff. Counsel for defendant opposed the application and further arguments were heard. The application to amend was made in accordance with O. 1, R. 10 (1), (2), Civil P. C., O. 6, R. 17, and with reference to *Ma Gyi v. Ma Yeik* (3), *Gonal Dass Agrawallah v. Budree Dass Sureka* (4), *Krishna Bai v. Collector and Government Agent, Tanjore* (5), *Seshamma v. Chennappa* (6). Two authorities were quoted by defendant, viz., *Bhanu Tukaram Shet v. Koshinath Pandshet* (7), *Sayad Abdul Hak v. Gulam Jilani* (8). Also *Swrie v. Redman* (9) and *Walcott v. Lyons* (10), but these are very old and at any rate it is unnecessary to fall back on English cases when there are sufficient rulings of the Indian Courts. The authorities cited by plaintiff are very clear and the application for amendment is allowed. Under the circumstances, Maung Sein Nyun (the assignor) is added as a co plaintiff and the hearing of the suit will proceed."

Judgment.—Interlocutory orders will not be interfered with in revision unless for the most cogent reasons, and in order to prevent otherwise irremediable injury [*V. V. M. Chetty Firm v. R. M. A. R. Arunachallum Chetty* (11)]. In this case I consider neither consideration existed, for it is stated that the merits of the case are not affected by the addition of the party which is complained of. I decline to interfere and reject the application.

K.N./R.K. *Application rejected.*

1. (1883) 5 All 207.
2. (1909) 36 Cal 345=1 I C 327.
3. (1901-04) 2 L B R 215.
4. (1906) 33 Cal 657.
5. (1907) 30 Mad 419.
6. (1897) 20 Mad 467.
7. (1896) 20 Bom 537.
8. (1896) 20 Bom. 677.
9. (1876) W N 216.
10. (1885) 29 Ch D 584=54 L J Ch 847.
11. (1916) 8 L B R 77=23 I C 876.

A. I. R. 1918 Lower Burma 26

TWOMEY, C. J. AND ORMOND, J.

Hardum Singh and another—Plaintiffs—Appellants,

v.

Mg. Po Htu and another—Defendants—Respondents.

First Appeal No. 36 of 1917, Decided on 30th January 1918.

Evidence Act (1872), S. 92—Outright sale cannot be shown as mortgage—Vendor is entitled to retain possession for unpaid purchase money—Transfer of Property Act (4 of 1882), S. 54.

Where a document is in the form of an outright sale, the executant is precluded from showing that it is in fact a mortgage, but he is entitled to show that the consideration has not been paid, and he is entitled to retain possession until the consideration is paid. [P 27 C 1]

Anklesaria—for Appellants.

Doctor—for Respondents.

Judgment.—By a registered deed of 8th December 1915 the defendant conveyed to the plaintiff the land in suit for Rs. 5,450. The land was let out to tenants. The plaintiff sued for possession and for a declaration that he was the absolute owner. The defence was that the transaction of 8th December 1915 was a benami transaction entered into in order to defeat creditors of the defendant and that the defendant was entitled to rely upon that defence inasmuch as the fraud was not carried out.

Plaintiff in his plaint states that the consideration for this sale consisted of an undertaking to redeem a certain mortgage of Rs. 2,000 on this land, a payment of Rs. 1,620 made to the defendant personally on 14th November 1915, two payments of Rs. 900, Rs. 630 respectively both made on 2nd December 1915 at the request of the defendant to two judgment-creditors of his, and a payment of Rs. 300 on 7th December in respect of interest due on the above mortgage, making in all Rs. 5,450. The payments of Rs. 900, Rs. 630 and Rs. 300 are admitted but the defendant states that he re-paid the Rs. 900 in the following Tabodwe through his tenants, one of whom says he gave 600 baskets to the plaintiff's son and the other 300 baskets. An issue was raised as to whether these items forming the consideration for the purchase were actually paid by the plaintiff. The District Judge found that Rs. 1,620 had not been paid. He also found that the defendant had not re-paid the Rs. 900. We agree with the District Judge in

those findings. The evidence as to the re payment of the Rs. 900 is extremely scanty and if the transaction of 8th December 1915 was in fact a mortgage, as the District Judge seems to think, it is improbable that the defendant would re-pay so soon after the mortgage was taken. On the other hand, if it was an outright sale there would be no debt to be re-paid. The document being in the form of an outright sale, the defendant is precluded from showing that it was in fact a mortgage, but he is entitled to show that the consideration has not been paid. The plaintiff states that the Rs. 1,620 was paid on 14th November at a time when the defendant appears to have been under arrest for a debt, in which case the money could not have been paid at the plaintiff's house. The plaintiff says that on 14th November the price of the land was arranged; he was to redeem the mortgage and to pay only the balance to the defendant and he paid this curious sum of Rs. 1,620 on that date, i.e., long before he could possibly know the amounts that would be due under the decrees that he subsequently paid off for the defendant. The plaintiff took no receipt from the defendant for this alleged payment of Rs. 1,620 but he took the trouble to call three witnesses to testify to the payment. We think it very improbable that the plaintiff would have paid so large a sum without taking a receipt so long before the document was executed, and we agree with the District Judge in his comment as to the absence of the Thugyi and other respectable witnesses at the time of the alleged payment. We find as a fact that that payment was not made. The question then arises, should we in this appeal grant the plaintiff a decree postponing possession until he has paid the balance of the consideration.

Two cases have been cited as authorities to show that the seller is entitled to retain possession until the consideration is paid. These are *Umsidal Motiram v. Dado bin Dhondiba* (1) and *Subrahmanya Ayyar v. Pooran* (2). It is true that defendant did not raise this question as an alternative defence but he does so in the memorandum of appeal. An issue was raised and determined as to whether these items forming the consid-

eration had been paid, and seeing that those facts have been fully gone into and determined we think we should give such relief as is warranted by the facts proved. The decree of the lower Court is modified and there will be a decree for the plaintiff for possession upon his paying Rs. 1,620 to the credit of the defendant into Court (District Court) within three months from this date. The defendant did not raise the point in the lower Court on which his appeal has succeeded and, therefore, he is not entitled to costs on that account. On the other hand the respondent has been successful in this appeal on the question of the transaction being benami. The respondent is, therefore, entitled to his costs to that extent in this appeal, i.e., the difference between the value of the appeal and Rs. 1,620. The order as to the costs in the District Court will stand good.

R.N. (N.K.)

Decree modified.

A. I. R. 1918 Lower Burma 27

PRATT, J.

Ma Sein Phaw—Plaintiff—Appellant.

v.

Mg. Ba On—Defendant—Respondent.Special Second Appeal No. 23 of 1918.
Decided on 9th May 1918.

Buddhist Law (Burmese)—Divorce—Proof of single act of cruelty—Divorce on same terms as on consent should be granted.

Under Burmese Buddhist Law a divorce on the terms of a divorce by mutual agreement may be allowed to a wife on proof of a single act of cruelty on the part of the husband. [P 25 C 11]

P. N. Chari—for Appellant.*Tun Jung*—for Respondent.

Judgment.—Appellant sued for a divorce on account of her husband's cruelty and obtained a decree in the Township Court. In the District Court the decree was reversed, the District Judge holding that the conduct of the defendant-respondent did not amount to cruelty and relying on *Mi Pa Du v. Maung Shwe Bank* (1). That there was cruelty is abundantly clear. The husband admitted kicking her on the back and when appellant made her complaint to the Thugyi, her cheeks were red from the injuries she received. I fail to understand how the Additional Judge of the District Court found there was no cruelty. In *Maung Po Han v. Ma Ta Lok* (2) Twomey, J., held that under Burmese

1. (1877-78) 2 B.M. 517.

2. (1901) 27 Mad 29.

1. (1872-95) L.B.R. 607.

2. (1913) 7 L.B.R. 79=20 I.C. 674.

Buddhist law a divorce on the terms of a divorce by mutual agreement may be allowed to a wife on proof of a single act of cruelty on the part of the husband. The ruling was based on the extracts from Vol. 12 of the Manugye and other Dhammathats quoted in S. 303 of the Kin Wun Mingy's Digest. I consider appellant is entitled to a divorce as by mutual consent. The decree of the Township Court will be restored and plaintiff-appellant will be granted costs throughout. Court-fees due by appellant will be recoverable from respondent-defendant.

K.N./R.K.

*Decree restored.***A. I. R. 1918 Lower Burma 28 (1)**

ROBINSON, J.

Ma Yu—Applicant.

v.

G. D. F. Coloquhoun—Respondent.

Criminal Revn. No. 261-B of 1916, Decided on 27th September 1916, from order of Second Addl. Mag. Rangoon, D/- 10th August 1916, in Criminal Misc. Trial No. 56 of 1916.

Criminal P. C. (5 of 1898), Ss. 488, 489—Maintenance order in favour of daughters can be cancelled when they are able to maintain themselves.

Where a father is ordered to make an allowance for the maintenance of his daughters, but it is subsequently found that the daughters have become qualified to maintain themselves, the order may be discharged notwithstanding that the daughters are desirous of continuing their education or are reluctant to work for their living.

[P 28 C 2]

Order.—There were two applications before the Magistrate under S. 489, Criminal P. C.. The present petitioner had obtained an order under S. 488 in 1909 that respondent should pay Rs. 35 per mensem as maintenance for his wife and two daughters. She applied on 18th May 1916 that the amount be raised to Rs. 147-3-0 per mensem. Respondent applied on 4th July 1916 that the maintenance for petitioner be reduced to Rs. 15 per mensem and that the order for maintenance of his two daughters be revoked on the ground that they were no longer unable to maintain themselves. Both applications were decided by one order, revision of which is now sought. The Magistrate ordered respondent to pay Rs. 35 per mensem for his wife. He held respondent need not pay any maintenance for his daughters. The sole question is whether they are within the meaning of the expression in S. 488 "unable to main-

tain themselves." Mr. Hamlyn urges that there is no proof that they are able and he goes so far as to urge that even if they are able but desire instead to continue their education or if they are not willing to maintain themselves they are unable to do so. Further that if they are able but cannot get work they are "unable." These young ladies are 16 and 18 years old nearly now. Their mother deposes to their educational qualifications. She states her younger daughter wants to read up to the B. A. and go on for medical work and that she does not want to work in any department or shop, but that if she works now she could earn Rs. 30 or 40 a month. She stated her elder girl was "reluctant to work." She wants to give her a high education before she begins to work. "She can now earn Rs. 20 or 25 per mensem if she now works." Evidence has been given that girls of these ages are taken in some firms and I have no doubt that if they chose, these two could earn money and support themselves. I cannot accept Mr. Hamlyn's view of the meaning of the section and no ground of revision has been made out. The application is dismissed.

K.N./R.K.

*Application dismissed.***A. I. R. 1918 Lower Burma 28 (2)**

RIGG, J.

Maung Thin—Appellant.

v.

Na Zi Zan—Respondent.

Special Second Appeal No. 56 of 1916, Decided on 7th December 1916.

Evidence Act (1 of 1872), Ss. 74 and 83.—Value of survey maps—They are not conclusive—In absence of contrary evidence they may be presumed to be correct.

Survey maps are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible and valuable evidence of the state of things at the time they were prepared. They are not conclusive and may be shown to be wrong; but in the absence of evidence to the contrary they may be judicially received in evidence as correct when made: 30 Cal 291 (P. C.), *Foll.*

[P 29 C 1]

*Broadbent—for Appellant.**Maung Po Han—for Respondent.*

Judgment.—The appeal in this case has been argued with the appeals in cases Nos. 57 and 58. Aung Min sold the appellant some land on which the respondents in these appeals have houses, and the appellant sued for ejectment. The question for decision in each case is whether the land used for house sites was

so used by permission of Aung Min who claims it as owner. The only evidence that Aung Min owned the land and gave permission to the respondents to occupy it is his own statement, coupled with the survey map, which shows the land as Aung Min's property. With reference to survey maps, their Lordships of the Privy Council said in *Jagadindra Nath Roy v. Secy. of State* (1) that they were

"Official documents prepared by competent persons, and with such publicity and notice to persons interested as to be admissible and valuable evidence of the state of things at the time they were prepared. They are not conclusive and may be shown to be wrong; but in the absence of evidence to the contrary, they may be judicially received in evidence as correct when made."

In the present case a reference to the map shows that the houses have been built at the apex of a holding shown as Aung Min's, where a P. W. D. road begins to cross the railway line. There is evidence to show that the respondents have encroached on that road. The total area in dispute only amounts to a fraction of an acre in extent, and it would be very easy for a mistake to occur in a map dealing with a holding which terminates in the manner Aung Min's does. On the other hand, there is the evidence of aged and respectable elders which goes to show that the disputed sites have been occupied by various persons for years and were originally waste land. There is not the slightest evidence that Aung Min was paid any rent for the sites. In the circumstances, I have no doubt that the judgment appealed against was correct. The appeal is dismissed with costs.

K.N./R.K. *Appeal dismissed.*

1. (1903) 30 Cal 291=30 I A 44 (P. U.)

A. I. R. 1918 Lower Burma 29

YOUNG, J.

Official Assignee—Plaintiff—Appellant.

v.

Mahomed Hadi—Defendant—Respondent.

Civil Regular No. 339 of 1915, Decided on 29th January 1918.

Civil P. C. (1908), O. 40, R. 1—Administrator, insolvency of—Receiver should be appointed.

Where a person, who holds certain property partly in his personal and partly in a representative capacity as an administrator, becomes an insolvent, his personal share in the property vests in the Official Assignee and the latter, as trustee for the creditors of the insolvent, is en-

titled to have a receiver appointed of the whole of the property till the share of the creditors is determined. It is immaterial that the bodies for whom the insolvent holds the property as administrator are content to leave their shares in his hands.

[P2001]

Cowasjee and A. B. Banerji—for Appellant.

Giles—for Respondent.

Order.—This is an application by the Official Assignee for the appointment of a receiver to collect the rents and profits and take charge of a certain property until further orders. The property in question is at present being held by the respondent partly in his personal and partly in a representative capacity as administrator *de bonis non*. In his personal capacity the respondent is an insolvent, and, therefore, his personal share vests in the Official Assignee, who sued the insolvent as heir and as administrator for the determination of his share and its delivery to him. The Official Assignee obtained a decree on the 23rd August 1917. The insolvent has appealed and by consent the taking of the accounts has been stayed pending the hearing of the appeal without prejudice to this application for a Receiver. The insolvent states that he is keeping accounts and this is not denied, nor is any mismanagement alleged. The suit was filed at the end of 1915 and no decree was passed for nearly two years. During the whole of this time the Official Assignee was content to leave the management of the property in the hands of the administrator and never applied for a receiver. The respondent has been in possession for nearly forty years, and so far as the papers before me show, has managed it without giving cause for complaint; and none of the persons or bodies for whom he is administering join in the application. The Official Assignee is joint tenant with the administrator to the extent of the insolvent's personal share. As such he is entitled to be protected from waste, but none is alleged. The sole ground for the application appears to be his insolvency.

Johnson, In re, Steele v. Cobham (1). shows how loth the Court is to allow an insolvent to manage another's estate. It was an administration action brought by a creditor against an administrator who subsequently became in his personal capacity insolvent. A receiver was appointed

1. (1866) 1 Ch 325=11 L T 242.

apparently as a matter of course, on the ground that the Court could have no confidence in the insolvent. There, however, the administrator became insolvent on the 18th January 1866, and the plaintiff in the administration suit took out a summons at once. Here the insolvent was adjudicated on the 7th August 1912, and no application was made till the 21st December 1917, and though the Official Assignee sued in 1915, to have the insolvent's share defined and partitioned and prayed for a receiver, no application was ever made in the suit till now. *Hopkins, In re, Dowd v. Hawtin* (1), is an authority to the same effect, but there also action was taken as soon as the administrator became insolvent. If similarly prompt action had been taken by the Official Assignee my course would have been plainer, but when the beneficiaries have been content with his administration for nearly forty years, are content with it still despite his insolvency, and when his creditors as represented by the Official Assignee have despite the same fact, been content with his management for nearly six years, the same matter is less easy. On the whole, however, I do not see I can allow him to continue managing a property, an undefined portion of which belongs to his creditors except with their consent. He manages for the Official Assignee who is a trustee for the creditors and is, therefore, a trustee for them himself and as lessor. Master of the Rolls, said in *Hopkins, In re, Dowd v. Hawtin* (2), it is not fit that a man who is a bankrupt should continue to be a trustee without the consent of the cestuique trust. These did consent up till now, but do not consent any longer and there is nothing more to be said. They are entitled to have their share protected; what their share is it is impossible to determine at present. Till it is determined, they have rights over the whole and there must, therefore, be a receiver of the whole despite the fact that the charities and other bodies for whom the respondent holds as administrator are content to leave their shares in his hands. The application must, therefore, be allowed with costs, two gold mohurs.

K N / R K. *Application allowed.*

2. (18:2) 19 Ca D 61—20 W R 601.

A. I. R. 1918 Lower Burma 30

ORMOND, J.

S. P. S. Chokkappa Chetty—Appellant.

v.

S. P. S. R. M. Ramon Chetty—Respondent.

First Appeal No. 124 of 1915, Decided on 9th August 1917.

Civil P. C. (1908), Sr. 11 and 13—Res judicata—Foreign judgment is subject to same condition as one of Court in British India.

A foreign judgment is subject to the same conditions as to res judicata as a judgment of a Court of British India and, therefore, such a judgment in order to be res judicata in a subsequent suit must be the judgment of a Court which is competent to try the subsequent suit: 6 Bom. L. R. 98 Rel. on. — [P 31 C 2]

J. R. Das—for Appellant.

Lentaigue and Chari—for Respondent.

Judgment—The plaintiffs sued in the District Court of Pegu for partition of a money-lending business which their father, defendant 1, carried on in that district as being joint family property. The father claims it as his own business. Defendant 2 is a son of defendant 1 and defendant 3 is a grandson. The parties are, therefore, the sons and grandsons of defendant 1. The District Judge gave the plaintiffs a decree and the father now appeals. The parties have their domicile in Konapet in the Pudukottai State, and previous to this suit the plaintiffs had obtained a decree in the Chief Court of Pudukkottai declaring that these parties formed a joint Hindu family, a decree for partition of the properties in Pudukkottai and a declaration that this money-lending business in Pegu was also joint family property and that the plaintiffs were entitled to partition of this business; but the Pudukkottai Court held that it had no jurisdiction to make the partition of property in Pegu. The District Court held that the finding of the Pudukkottai Court that the family was a joint Hindu family and the finding that there was joint family property in Pudukkottai was res judicata, but that the finding that this business was a family business was not res judicata. The District Court found as a fact that this money-lending business was part of the joint family property. The father was precluded from giving evidence to show that the family was not a joint family.

Funds for this money-lending business were obtained from an "Oor" account, which means literally 'big house' and probably means "home" account, and funds from business were also remitted to that account. The funds of that account are family property. If the finding of that Court as to this is *res judicata* in the present case, there can be no doubt that this money-lending business also forms part of the joint family property. The question, therefore, is whether the finding of the foreign Court is *res judicata* in the present suit. S. 11 of the Code which deals with *res judicata* says that the first Court, the decision of which is sought to be *res judicata* in a subsequent suit, must be a Court competent to try such subsequent suit. The judgment of the Puddukottai Court is a foreign judgment. S. 13 of the Code, which deals with the conclusiveness of a foreign judgment, says:

"A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title."

except in certain specified circumstances. The case of *Pruthisingji Devisingji v. Umedisingji Sangaji* (1) shows that a foreign judgment is subject to the same conditions as to *res judicata* as a judgment of a Court of British India, and therefore, must be the judgment of a Court which is competent to try the subsequent suit. In the case of *Moghal Fatima v. Amir Hasan Khan* (2) this question was raised under the new Code. In that case the Judges of the High Court of Allahabad held that the decision of a Court, to be *res judicata* in a subsequent suit, must be the decision of a Court that was competent to try the subsequent suit, and that the question of the effect of a foreign judgment can only properly be raised in proceedings based upon the foreign judgment—i. e., that S. 13 applied only to such proceedings. Upon appeal to the Privy Council their Lordships did not see their way to reverse the decision and dismissed the appeal without giving reasons. The Puddukottai Court was not competent to try the present suit which related to property in Pegu. In my opinion, S. 13 of the new Code has not altered the law. The words, "a foreign judgment shall be conclusive," mean that a foreign judgment shall be

taken to be a final and conclusive judgment, i. e., the findings shall not be called in question in any other proceedings as not having been properly made in the foreign suit. It is a final and conclusive judgment for all purposes, whether for bringing a suit upon the foreign judgment or for the purposes of *res judicata* but the word "conclusive" does not render a foreign judgment of greater effect than a final and conclusive judgment of a Court in British India. I would set aside the decrees and remand the case to be re-tried; the evidence already taken to be evidence in the case and award, ten gold mohurs, to the appellant in accordance with the result.

K.N./R.K.

Appeal allowed.

A. I. R. 1918 Lower Burma 31

MAUNG KIN, J.

J. E. Campbell—Appellant.

v.

Maung Po Nyein—Respondent.

Special Second Appeal No. 179 of 1916,
Decided on 24th August 1917.

Registration Act (1908), S. 21—Registration of document presented without map is ineffective.

The registration of a document without the map referred to therein is ineffective: 18 Cal 556, *hel. on.* [P 31 C 1]

Aung Din—for Appellant.

Sin Hla Aung—for Respondent.

Judgment.—The first point to consider is whether the defendant's deed of sale, Ex. 1, gives valid title to the land he now claims. The document describes the land sold to the defendant as containing two plots of certain holdings. Dimensions are given but no boundaries; the map referred to in the document is not filed and none was presented for registration. Such a document cannot be registered under S. 21 (1) and (4), Registration Act, and although the document was as a fact registered I would hold, following the majority of the Full Bench of the Calcutta High Court in *Baij Nath Tewari v. Sheo Sahay Bhagut* (1), that no registration of it has been effected within the provisions of that Act. The document therefore gives the defendant no title to the land he claims under it. That result follows by reason of the operation of S. 54, T. P. Act. Furthermore, even if it could be held that the defect is a mere error in procedure which is saved by S. 87, Registration Act, all that can be

1. (1903) 6 B.M. L. R. 8.

2. (1916) 36 I C 710 (P.C.).

1. (1891) 18 Cal 556.

held is that the defendant got under it so much land out of the holdings concerned, but we shall be at a loss to find where the land begins and where it ends. Therefore no survey made with the document as the basis will serve any useful purpose. I am therefore of opinion that the evidence of Maung Po E, witness 1 for the defendant, who merely ascertained the area of the land fenced in by the defendant, is of no value. But the plaintiff cannot succeed on the weakness of the defendant's case but must depend upon the strength of his own. I think that the lower appellate Court was right in relying on the evidence of Maung Shwe Zin who is a competent surveyor. The witness measured out the ground in the presence of a Land Record Inspector and his evidence shows that he had some tangible basis to go on in preparing the map he produced showing the encroachment as alleged. As pertinently remarked by the learned Judge of the lower appellate Court, the accuracy of the map was a matter exceedingly easy to check. Moreover, there is nothing to contradict Maung Shwe Zin's evidence. As I said before, Po E's evidence is useless. In my judgment the plaintiff has succeeded in proving his case. The appeal is dismissed with costs.

K.N./R.K.

*Appeal dismissed.***A. I. R. 1918 Lower Burma 32**HARTNOLL, OFFG. C. J. AND
TWOMEY, J.*E. N. M. K. Chetty—Applicant.*

v.

*Chartered Bank of India, Australia
and China and another—Respondents.*Civil Revn No. 98 of 1913, Decided on
5th January 1914.Civil P. C. (1908), O. 21, Rr. 60 and 61—
Scope of enquiry stated.

Order 21, Rr. 60 and 61, lay down the lines on which the investigation of claims preferred to properties under attachment should proceed. The Court should consider whether at the time of attachment the property was in the possession of the judgment-debtor as his own property, and not on account of any other person or in trust for him. If this entails a consideration of the bona fides of a sale in his favour set up by the objector or the legal effect of the deed of conveyance including the circumstances of its registration, such matters should be gone into.

[P 32 G 2]

*Mac Donnell—for Applicant.**Ormiston—for Respondents.***Hartnoll, Offg. C. J.**—The respondents had many decrees against the

Chetty firm of K. P., and in execution of such decrees attached certain immovable properties. The applicant firm applied for removal of the attachments, alleging that they had purchased the properties by registered deed of 23rd June 1912 and since then had been in possession. Respondents contested the application and alleged that the sale was a bogus one. The District Judge would not in his judgment consider whether the sale was a genuine one, nor did he come to any definite finding as to who was in possession at the time of the attachments. He said:

"It is quite possible that it may ultimately be found that at the time of the attachment some of the properties were in the possession of the K. P. firm and some were not."

He went on to say:

"It seems to me quite possible that the K. P. firm may have had some attachable interest in at any rate some of the properties, if not in all of them."

He refused to remove the attachments and considered that a regular suit should be brought. It seems to me that the District Judge has not dealt with the case according to law. O. 21, Rr. 60 and 61, lay down the lines on which his decision should have been based. He should have considered whether at the time of the attachments the K. P. firm was in possession of the properties or any of them as its own property and not on account of any other person, or whether the properties, or any of them when attached, were not in possession of the firm, or that being in possession of the K. P. firm, they were in its possession not on its own account or as its own property but on account of or in trust for the appellant firm. If this entailed a consideration of the bona fides of the sale, or the legal effect of the deed of conveyance including the circumstances of the registration of it, such matters should have been gone into. I would set aside the order of the District Court and remand the case back to it to deal with it according to law, namely, on the lines set out by me. I allow applicants the cost of this application—three gold mohurs. I set aside the order passed by the Court as to costs. Costs in that Court will abide the result of the further investigation now ordered.

Twomey, J.—I concur.

K.N./R.K.

Order set aside.

A. I. R. 1918 Lower Burma 33

PARLETT, J.

Maung Htat and others—Appellants.

v.

Maung San Dun and others—Respondents.Special Second Appeal No. 47 of 1916,
Decided on 19th January 1917.(a) Stamp Act (1899), Art. 35, Exemp. (a)
—Agricultural leases are exempt.An agricultural lease is exempt from stamp
duty under exemption (a), Art. 35, Sch. 1, Stamp
Act. (P 33 C 2)(b) Stamp Act (1899), Art. 13—Agreement
in writing by tenant not to alienate crops
till rent is paid is hypothecation of moveables
and is liable to stamp duty.A document which gives the landlord the sole
right over the whole crop until the rent is paid
and in which the tenants agree not to alienate or
otherwise do away with the crops without his
consent until such payment, is an instrument
evidencing an agreement relating to the hypothecation
of moveable property by way of security
for the repayment of a future debt and as such
is liable to stamp duty chargeable on a bill of
exchange under Art. 13 (b), Sch. 1, Stamp Act.
(P 34 C 1)(c) Transfer of Property Act (4 of 1882),
S. 100—Rent charge on crops—Remover's
liability extends to crop actually removed
and not whole crop.Where the landlord has a charge for rent on the
crops, a person removing the crops with notice of
the charge is liable for the difference between the
amount of the rent due and the quantity of the
crops not removed, and not for the whole of the
crops removed. (P 34 C 1)*Maung Gyi*—for Appellants.*R. N. Burjorji*—for Respondents.

Judgment.—The appellants sued to recover 700 baskets of paddy or its value, Rs. 875, due as rent from their tenants Maung Lu Gale and Ma Hsin Zi, and obtained a decree against them against which there was no appeal. They joined the present respondents as defendants, because they alleged that they had removed respectively 100, 500, 50 and 50 baskets of paddy from the tenants land knowing that appellants had a charge upon the whole crop until their rent of 700 baskets had been paid. The Court of first instance found on the evidence that the respondents had removed these quantities of paddy with notice that appellants claim a charge upon it, and granted decrees against them for these quantities of paddy or their values Rs. 125, Rs. 625, Rs. 62-8-0 and Rs. 62 8-0, respectively. These decrees were reversed upon appeal and the appellants now ask for their restoration. The respondents have contended that they had no notice of appellants'

charge on the paddy, and further that as far as respondent 2 Po Lun is concerned, the proceeds of the paddy he took have been paid to appellants 1 and 3 in satisfaction of a decree of theirs against their tenants, defendants 1 and 2 in this suit. As regards the first point there is no room for doubt that appellant 3 took his lease to the land and warred the respondents against removing the crop as he had a charge thereon for rent.

As regards the second, it appears that appellants 1 and 3 got a decree against Lu Gale and Ma Hsin Zi in another suit, in which they had attached certain of their property before judgment, and respondent 2 Po Lun gave a security bond for the due payment of the decrees and costs in order to obtain release of the property from attachment, and he subsequently paid up the amount of the decrees and costs. This no doubt gives him a right to sue Mg. Lu Gale and Ma Hsin Zi for the money he paid, but it is no defence to the present action. We come now to the main points in the case. The District Judge held that inasmuch as plaintiffs admitted that after the respondents had removed the paddy some 100 to 500 baskets still remained on the land, there could be no claim against respondents for a greater quantity of paddy than the difference between the rent due, 700 baskets, and the quantity remaining, viz., 100 to 500 baskets. In my opinion this view is correct and the respondents cannot in the aggregate be held liable for more than 200 baskets of paddy, the difference between 700 and 500 baskets. Apportioned between them according to the gross amounts they took the quantities for which each is liable are the following: 1st respondent 29 baskets; 2nd respondent 113 baskets; 3rd respondent 14 baskets; 4th respondent 14 baskets.

The Divisional Judge however held that under the document sued upon plaintiffs could in no case recover more than Rs. 320, and as the paddy remaining after respondents had removed what they took was admittedly worth this sum or more, plaintiffs could recover nothing from the respondents. The document sued upon is a lease for nine months at a rental of 700 baskets of paddy for that period. So far as it is a lease it is exempt from stamp duty under exemption (a), Art. 35, Sch. 1, Stamp Act 1899, the tenants being

cultivators. The document, however, gave the appellants the sole right over the whole crop until the rent was paid, and the tenants agreed not to alienate or otherwise do away with the crops without appellants' consent until the rent was paid. It was therefore, an instrument evidencing an agreement relating to the hypothecation of moveable property by way of security for the repayment of a future debt, and as such was liable to the duty chargeable on a bill of exchange under Art. 13 (b), Sch. 1, Stamp Act, 1839; see Entry No. 80 in Government of India Finance Department Notification No. 3616, Ex. C, dated 16th July 1909, (Burma Stamp Manual, Part 14, p. 9). Now the document actually bears an eight annas stamp and under the article referred to above this would have been sufficient to cover a sum of Rs. 600, and under S. 26, Stamp Act, no more than that sum is claimable under it. The value of the 200 baskets of paddy for which the respondents are liable is, however, only Rs. 250, and that amount is recoverable under the document. I, therefore, reverse the decree of the Divisional Court and instead grant appellants decrees as follows, with costs in all Courts, against San Dun for 29 baskets of paddy or Rs. 36-4-0; against Po Lun for 143 baskets of paddy or Rs. 178-12-0; against Young Zaung for 14 baskets of paddy or Rs. 17-8-0; and against Maung Ba U for 14 baskets of paddy or Rs. 17-8-0. The respondents will get 2 gold mohurs advocate's fee in this Court.

K.N./R.K.

Appeal allowed.

* A. I. R. 1918 Lower Burma 34

Rigg, J.

Ma Mya—Appellant.

v.

Mg. Shwe Ban—Respondent.

Second Appeal No. 20 of 1918, Decided on 28th June 1918, from decision of Dist. Judge, Henzada, in Appeal No. 140 of 1917.

* Buddhist Law (Burmese) — Divorce — No judicial separation — But order under S. 488, Criminal P. C. operates as such — Child born after maintenance order — Burden of proof of access is on wife — Presumption under S. 112 is inapplicable — Evidence Act (1 of 1872), S. 112—Criminal P.C. (5 of 1898), S. 488—Effect.

In Buddhist Law there is no such thing as a judicial separation, but an order under S. 488, Criminal P. C., until it is rescinded, is for all practical purposes the same thing as an order

for judicial separation and if, while the order is in force, a child is born to the wife the onus is shifted on to her of proving access. The rule laid down in S. 112, Evidence Act, is inapplicable to such a case, inasmuch as the order under S. 488, Criminal P. C., practically puts an end to the continuance of a valid marriage. [P 35 C 1, 2]

Halkar—for Appellant.*Sin Hla Aung*—for Respondent.

Judgment.—*Mg. Shwe Ban* sued his wife *Ma Mya* for divorce on the ground of adultery. Both the lower Courts found adultery proved. *Ma Mya* was *enclave* at the time of the institution of the suit. The Judge of the trial Court held that as *Ma Mya* was living separately from her husband at the time the child was conceived, the onus lay upon her to prove that the child was legitimate. The District Judge did not deal directly with the question of onus of proof, but found it was not proved that *Mg Shwe Ban* had had access to his wife since their separation, and thought that the circumstances of the case were such as to remove the legal presumption of access during marriage. Both Courts have concurred in disbelieving almost all the evidence produced by the parties to show on the one side that adultery had taken place, and on the other that *Shwe Ban* had had access to his wife under circumstances that led to a strong presumption that they had resumed cohabitation. The history of the case previous to the present proceedings is briefly as follows. The parties were married in 1912, and in October a child was born. There were disagreements between them in 1913, but they were patched up and it was not until January 1914 that she finally left him. In May she applied for maintenance for herself and child and was successful. She alleged cruelty and neglect and the case was fought out with considerable ill feeling. Orders were passed by this Court in August 1914. *Shwe Ban* next prosecuted her for bigamy, and was again unsuccessful. In the meantime he had taken another wife. *Mya* left *Henzada* and lived at *Ingabu*, which I am informed is about 5 hours by launch from *Henzada*. Her case is that she came to *Henzada* each month to get the maintenance ordered and that on some of these visits, *Shwe Ban* had sexual intercourse with her. It is argued that whether the evidence about her meeting him on these occasions is believed or not, the presumption arising out of the continuance of the

marriage must prevail, unless Shwe Ban can show that the parties had no access to each other at any time when the child could have been begotten. S. 112, Evidence Act, is as follows:

"The fact that any person was born during the continuance of a valid marriage between his mother and any man... shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten."

In English Law the presumption in favour of legitimacy prevails even if the parties are living apart, unless they have been divorced or a judicial separation has taken place. In *Hetherington v. Hetherington* (1) the facts were that the husband had been convicted of an aggravated assault on his wife who obtained an order from the Justices of the Chester Ward Division of the County of Durham that she should no longer be bound to cohabit with him, that he should pay her ten shillings a week and that she should have the custody of the children. Sir James Hannan, in delivering judgment on an appeal against the order on the Justices refusing to vary the order on the ground of the wife's subsequent adultery said:

"There is no doubt that from the time that such an order is made—which is equivalent to a judicial separation and the ancient divorce a mensa et thoro—the parties are authorized to live apart, and from that moment all the presumptions which exist in the case of married persons as to access and the legitimacy of children are reversed. If a child is born more than nine months after the separation, it is presumed to be illegitimate unless it be shown as a matter of evidence that the husband and wife have come together again."

An order passed under S. 488, Criminal P. C., entitled the wife to live apart from her husband, and in the present case there was never an attempt to set aside that order since 1914. The parties in this case are Buddhists and in Buddhist Law there is no such thing as a judicial separation, but an order under S. 488, Criminal P. C., until it is rescinded, is for all practical purposes the same thing as an order for judicial separation. Ma Mya could not be compelled to live with Shwe Ban unless he filed a suit for resumption of conjugal rights. In the circumstances, I think that there was really no continuance of a valid marriage, the parties were at arms' length and were living separately with the sanction of an order of the Court. The onus then shifts

on Ma Mya to prove access and both Courts have held that she has failed to prove it. The appeal is dismissed with costs.

R.N.J.R.R.

Appeal dismissed.

A. I R. 1918 Lower Burma 35

TWOMEY, G. J. AND MAUNG KIN, J.

U Awbatha—Appellant.

v.

U Thu Dathana and others—Respondent.

Second Appeal No. 24 of 1916, Decided on 13th March 1918.

Buddhist Law (Burmese)—Ecclesiastical—Question how to be determined, stated.

Question of Buddhist Ecclesiastical Law which came before the Civil Court must be determined not merely by the canonical text of the Vinaya, i. e., the Pāṭiśaw, but the Atthagatha and other commentaries must also be considered and the provisions of the Dhammathats should also be taken into account as throwing a valuable light on the established custom of the country.

[P 35 C 2; P 36 C 1]

Waithere—for Appellant.

Maung Oung—for Respondents.

Judgment.—It is agreed in this case that the decrees of the lower Court must be set aside and that the case must be remanded to the District Court in view of the decision of the Full Bench in Civil Reference No. 1 of 1916. According to that decision it is clear that question of Buddhist Ecclesiastical Law which came before the Civil Court must be determined not merely by the canonical text of the Vinaya, i. e., the Pāṭiśaw, but that the Atthagatha and other commentaries must also be considered and the provisions of the Dhammathats should also be taken into account as throwing a valuable light on the established custom of the country. The Upper Burma ruling *Nga Po Thin v. U Thi Hla* (1), on which the judgments of the lower Courts are based, proceeded entirely on the canonical texts, and the decision of the learned Additional Judicial Commissioner as to a gift by a monk of a monastery and site requires reconsideration in the light of Civil Reference No. 1 of 1916. The decrees of the lower Courts are set aside and the suit is remanded to the District Court for disposal in accordance with the above remarks under O. 41, R. 23. The District Judge will re-determine the preliminary issue and any other questions of Buddhist Ecclesiastical Law that arise.

1. (1887) 12 P D 112=56 L J P 78.

1. (1910-13) A I R 1914 U B 6=23 C U 157=1 U B R 183.

in this case, paying regard to the commentaries and Dhammathats as well as the canonical text of the Vinaya. A certificate will be granted for the refund of the court-fee on the memorandum of appeal under S. 13, Court-fees Act. Costs of this appeal will follow the final result.

K.N./K.K.

*Case remanded.***A. I. R. 1918 Lower Burma 36 (1)**

TWOMEY, C. J.

Ramanath Pandaram—Applicant.

v.

V. Karupana Tevar—Respondent.

Criminal Revn. No. 204 of 1917, Decided on 28th October 1917, against order of 1st Add. Magistrate, Rangoon, D/- 6th July 1917.

(a) *Workman's Breach of Contract Act* (13 of 1859), S. 1—*Workman cannot be compelled to make thumb-impression in Court for identification of impression on agreement.*

Cases under the *Workman's Breach of Contract Act* are judicial proceedings and the workman is in the position of an accused. He cannot therefore be compelled to make a thumb-impression in Court, for the purpose of identifying his thumb-impression on the agreement. [P 36 C 1]

(b) *Workmen's Breach of Contract Act* (13 of 1859), S. 1—*Person undertaking to supply coolies and work with them is workman.*

A person who undertakes to supply coolies and to work along with them is a "workman" whether the meaning of S. 1, *Workmen's Breach of Contract Act*, and the fact that he is under similar contracts with other people during the same period does not take him out of the definition of "workman."

Order.—The Magistrate erred in requiring the accused to make his thumb-impressions in Court when his advocate objected. Cases under the *Workmen's Breach of Contract Act* are judicial proceedings and the workman is in the position of an accused. The remarks of Parlett, J., in *Maung Po Nyun v. Mutu Kurpen Chetty* (1) apply mutatis mutandis to this case also. The finger expert's evidence must therefore be disregarded as inadmissible. But, apart from the finger print evidence, I think Ex. A was proved by the complainant's sworn statement taken together with the admissions of the accused that he did borrow money from the complainant and did sign such a document, though he contends that it was at an earlier date than the date of Ex. A. The document, Ex. A, bears date 5th May 1916. The accused says he borrowed Rs. 750 in 1914 and that the balance

which remained due out of this sum was paid off for him in 1915 by Subramonian and his clerk. But the receipt, Ex. 1, does not show what money was paid off by Subramonian and the signature on it is denied by the complainant. The genuineness of the receipt has not been established beyond doubt. Subramonian and his clerk say the original documents signed by the accused and the other persons mentioned in Ex. 1 were not given up at the time, as the complainant professed to have lost them. The Magistrate was justified in rejecting this explanation, not only because it is *prima facie* improbable but also because Subramonian's cross-examination showed him to be anything but an impartial witness and the document Ex. 2 which he produced showed that the accused is heavily indebted to him. I cannot find that the Magistrate was wrong in deciding that the accused really took Rs. 700 as an advance in May 1916 and that he then executed Ex. A.

Nor can I accept the view that accused does not fall within the category of workman in the Act. The terms of the two contracts, Exs. A and 1, indicate that he was to work himself with the coolies that he undertook to supply. The fact that he was under two similar contracts during the same period is not sufficient to take him out of the category of workman. The application is dismissed.

K.N./K.K. *Application dismissed.***A. I. R. 1918 Lower Burma 36 (2)**

MAUNG KIN, J.

C. S. Appa—Accused—Appellant.

v.

M. P. Maricar and another—Complainants—Respondents.

Criminal Appeals Nos. 88 and 89 of 1917, Decided on 30th March 1917, from orders of Western Sub. Divl. Magistrate, Rangoon, D/- 30th January 1917.

(a) *Penal Code* (1860), S. 500—*Person makes gifts to charities to incite public contempt are defamatory.*

To say of a person that he makes gifts to certain funds not out of charity but from self-advantage is defamatory if the words used incite public contempt and ridicule. [P 37 C 1, 2]

(b) *Penal Code* (1860), S. 500—*Fair comment must be based on facts and not opinions expressed on invented facts.*

A fair comment must be based upon facts and a writer is not entitled to invent facts, and express his opinions upon such invented facts. Nor can the conduct of a public man or of a person in his public character be assailed as dishonest

simply because the writer fancies such conduct is open to suspicion. [P 40 C 2]

(c) Penal Code (1860), S. 500 — Libel — Justification and denial of, is not permissible.

An accused justifying his libel cannot both deny as well as justify it. [P 41 C 1]

Ginwalla—for Appellant.

Lentaigne—for Respondent.

Judgment.—*Criminal Appeal No. 88 of 1917.*—The defamatory matter complained of is contained in a leading article which appeared in its issue of 20th October 1916 in the Rangoon *Vartaman*, a Tamil bi-weekly newspaper published in Rangoon, of which the accused, C. S. Appa, is the Proprietor, Editor, Printer and Publisher. The article purports to be an essay on "Donations." It is in reference to the the war gifts made by Indians, Hindus, Mahomedans and other races. It states that the donors have many objects in view but that loyalty is generally the object. Then comes a short dissertation as to how gifts should be made. The writer splashes about with such a platitude as that relating to the right hand not knowing what the left does. Then the writer proceeds to say:

"1. Now as the gifts made by our people are all made in connexion with the war, let us consider if they are made with the full consciousness that they are made only with a consideration for charity and without hoping thereby for any personal profit thereafter. It will be seen that in these, three-fourths are with a desire for some self-advantage. 2. We have also heard that some having collected money from many people for the Government make the gifts in the shape of money or otherwise in their own names without publishing the names of those who paid the money to them. What is the reason of this? Is it not better to give what they can instead of their getting fame and name from the Government with other's property? Government does not ask us to give what we cannot bear. They ask their subjects to contribute according to their means of their own freewill and not otherwise. 3. This being so, some with the object of getting a name that they have made gifts for the war take their photographs and give them for exhibition in bioscopes. It will be clearly seen that this is also for getting a name and not out of any loyalty. These gifts are not made with a consideration for charity as mentioned above."

The numbering of the paragraphs in the above extract is by me. The question is whether it contains any defamatory matter. Regarding para. 1 the question may be put thus: If you say of A that he makes gifts to the War Funds not out of charity but for some self advantage, can your words be said to be defamatory? The answer will depend upon what we understand to be the opinion of the people re-

garding a person who does such a thing. I venture to think that the people would look upon him with contempt and would hold him up to ridicule. If that is a right conclusion, the words are defamatory. In my opinion, therefore, para. 1 contains defamatory words and if they can be taken as referring to the complainants, the accused would be liable to be punished. As to para. 2, we shall have to settle first what it means. Mr. Ginwalla contends that it means that some persons collect subscriptions and send the whole amount collected without giving the individual subscribers. If he is right, then there is no imputation which might be taken exception to. But Mr. Lentaigne argues that in the words:

"make the gifts in the shape of money or otherwise in their own names without publishing the names of those who paid the money to them,"

the words "make the gift" are important and serve as a guide as to what the whole passage means. Moreover, the words he says are preceded by the other words, "some having collected, etc.," so that the passage means that some, having collected moneys from others, make gifts of them in their own names without disclosing the fact that they have been collected from others and thus making it appear that they are the donors. I think counsel for the prosecution is right. I can see nothing equivocal in the meaning of the passage.

If this view is correct there is no dispute that the passage contains defamatory words for, there can be none more despicable than a person who collects money from other people and then makes a gift of it in his name in order to lead people to believe that the money given is his. Such person is guilty of a false pretence of a most contemptible character. Para. 3 also bears, in my opinion, a defamatory meaning. Mr. Ginwalla contends to the contrary. He says all that the passage can be taken to convey is that those who exhibit their photographs on the cinema screen are vain people, who thereby make a boast of their charitable acts, whereas gifts should be made in such a way that the left does not know what the right hand does. If the passage conveys only this, there may be nothing to complain of. But in my judgment it means more. It means that these vain people (if that is the innuendo intended)

make the gifts in order to gain name and fame but "not out of any loyalty." The emphasis is on "not out of any loyalty." I think the exhibitors are thus held up to ridicule. I do not say that the readers will take it that the loyalty of these people is doubted, but I do say this that the meaning is that, whereas at the present time it is considered right and proper to make contributions to the War Funds and thereby express loyalty to the Government, these men (the exhibitors) are attempting to get name and fame under the cloak of loyalty. The exhibitors are thus brought into contempt and rendered ridiculous. I think it right to say in passing that the writer of the article will not be justified in saying that they are vain people, unless they were responsible for the exhibition. The next question to consider is, what do all these passages taken together mean? It is contended by Mr. Ginwalla that those who make gifts in connexion with the war for self-advantage referred to in para. 1 are not the same as those who exhibit their pictures on the cinema screen and who are referred to in para. 3 as those who make gifts towards the war not out of loyalty but in order to get name and fame.

Nor is the second passage, which deals with those who collect money from others and send it in as their own, in any way connected with the 3rd passage. On the other hand, Mr. Lentaigne contends that the whole of the paragraph means that the exhibitors had made gifts towards the war for self-advantage, such as name and fame and not out of loyalty and that they for that end had given other people's money as if it were their own. What Mr. Ginwalla means by this contention is that there are some who make gifts for self-advantage, others who give other people's money as their own and again others who are vain enough to boast of their gifts by showing their pictures on the cinema screen, the motive of these being not loyalty but the getting of name and fame. The controversy centres round the words: "This being so" at the beginning of para. 3. Mr. Ginwalla says that they refer to the immediately preceding sentences in para. 2 and not to the other preceding sentences, while, on the other hand, Mr. Lentaigne contends that the words refer to the two preceding sentences in para. 2. I think there again

counsel for the prosecution is right. Before we come to the words, "this being so," we find the writer has been directing his attention against those who strut in borrowed feathers and after saying that there are such people in para. 2 gives his own opinion of how gifts should be made by asking a question (which is the first of the two sentences referred to by Mr. Lentaigne):

"Is it not better to give what they can instead of their getting fame and name from the Government with other people's property?"

He then gives his reason for the idea involved in the question, by saying that the Government does not ask people to give what they cannot. After that he goes on, "this being so, etc." If the paragraph beginning with the words, "this being so," is read as referring only to the preceding sentence, the reader will be at a loss to find any logical connection between the sentence and the paragraph. But if the reader takes the words as referring to the two preceding sentences, the logical connection between them and the paragraph becomes absolutely clear. The meaning of the writer in that case is this:

"It is not right for people to give other's property as if it was their own for the Government does not want the people to give more than they can, yet there are some people who will do this sort of thing in order to get name and fame. This being so, that is, what I have said as to the existence of such people being correct, I find some of them exhibiting their pictures on the cinema screen."

I have thus shown the connection between the paragraphs in the above extract. I think an additional reason is afforded by the words near the end of the article, which are contained in the statement that if these gifts were made out of charity, they would be made without vain and pomp and without getting fame and name out of others' charities. This statement shows the cloven foot. It makes it clear and beyond all doubt that the writer directs his attention against the men who exhibited their pictures on the screen posing themselves as men who had made war gifts, while the truth was their gifts were of other people's money. The next question is, who are the individuals referred to? The prosecution says that M. P. Maricar and Syed Ibrahim were the persons referred to. In deciding this question all the circumstances of the case, the occasion of the writing, the relationship between the parties, the

people for whom the article was written and the like must be taken into consideration. As stated before, the article appeared in the issue of the Rangoon Varthaman dated 20th October 1916. In July it was announced that His Excellency the Viceroy of India would visit Burma in the following December and a committee was formed at Rangoon to collect money to provide funds for welcoming His Excellency; M. P. Maricar and Syed Ibrahim who are Chulias were authorized to collect money from their community and they did so. M. P. Maricar had by 20th October collected Rupees 1,071 including Rs. 501, his own contribution, and he had sent to the bank that sum to the credit of the Viceroy's Reception Fund with a list of the subscribers attached and had written to say:

"some of my subscribers who have promised have not as yet paid. I shall send the balance collection as soon as I get from them with another list for same."

The list he sent to the Bank was not published in any of the local newspapers. On 21st September 1916, M. P. Maricar and D. K. Syed Ibrahim formally handed over to His Honour the Lieutenant-Governor a motor ambulance with. Major Kirkwood through whom these gifts were made, suggested to the donors that they should have their photographs taken and put in as an inset to the photographs of the ambulances and that the whole should be made into a lanternslide for the purpose of exhibiting the pictures at a coming cinema show in aid of the Red Cross. Major Kirkwood says that he made the suggestion because he thought it might encourage other philanthropists to do likewise. The photographs were screened at a Red Cross performance at the Empire on 4th October and also at the Elphinstone on 18th October, where there was a performance in aid of the Burma War Fund. On 4th October 1916, Syed Ibrahim sent Rs. 1,151 to the Bank to the credit of the Viceroy's Reception Fund together with a list of the subscribers. Syed Ibrahim says that there was a balance of the subscriptions to the Viceroy's Reception Fund, but at the request of the subscribers he kept it with him for the purpose of contributing it to one of the War Funds and that on the night of 18th October in front of the Elphinstone he spoke to Major Kirkwood about it. He is corroborated in this by the Major and

on 20th, the day the article complained of appeared, he sent Rs. 2,599 to the Major for the purpose of the Red Cross. The evidence establishes beyond all doubt that the only pictures of donors to the War Funds exhibited at any of the cinemas in Rangoon up to the 20th October were those of Maricar and Syed Ibrahim.

Now the article refers at the beginning to the gifts made "by Indians, Hindus, Mahomedans and other races," and after a little homily about the right hand and the left hand in the matter of charity descends from the general to the particular in the passage beginning with the words: "Now as the gifts came by our people." The learned Magistrate held that "our people" meant the Tamil Chulia community. I do not think it is right to go so far as that. But I think that, as the paper is in Tamil language and is meant to be read by the Tamil-speaking communities, the words may fairly be said to refer to the Tamil speaking races and we may take the gifts dealt with as those made by the members of the Tamil speaking communities. I have held that the passage which are complained of as containing defamatory matters are all connected and are directed against those contributors who had their photographs screened at the cinema. Maricar and Syed Ibrahim are members of a Tamil speaking community, and as it is certain that no contributors' pictures other than those of Maricar and Syed Ibrahim had been screened at any of the cinemas at Rangoon, the vain and pompous persons referred to in the article are Maricar and Syed Ibrahim. The accused's defence is that the article is true and was written in good faith for the public good without any malice whatsoever; it was not directly or indirectly aimed at either Maricar or Syed Ibrahim in any wise or at all. It was only a warning conveyed to the public and to those who collect moneys and do not account for the same.

Now at first sight this defence clearly shows a confusion of ideas but on a careful consideration it appears to be as explained by Mr. Ginwalla before me. Mr. Ginwalla explains his defence as being based upon the following matters: (1). The subscription lists for the Viceroy's Reception Fund were to be returned on the 15th August. (2). Up to the date of the article no list of subscribers had been published in any newspaper, though it

was the usual practice in Rangoon to publish lists of subscribers with the amounts they subscribed. (3). The accused did not believe that the collectors he had in his mind when he wrote the article, could have misappropriated the sums they had collected; and upon these matters, he came to certain opinions and he expressed them bona fide believing them to be correct. The accused inferred from these facts that the moneys which must have been collected by the time the article was written had been given without publishing the names of the subscribers in any newspaper. He stated what he honestly thought must have happened. Whether his opinion is correct or not is immaterial. The defence is in fact a fair comment upon matters of public interest. The limits of fair comment on matters of public interest may be gathered from the observations of two of the learned Judges who took part in the decision of the case of *Merivale v. Carson* (1). Lord Esher, M. R., observed:

"Every latitude must be given to opinion and to prejudice, and then an ordinary set of men with ordinary judgment must say whether any fair man would have made such a comment . . . mere exaggeration or even gross exaggeration would not make the comment unfair. However wrong the opinion expressed may be in point of truth, or however prejudiced the writer, it may still be within the prescribed limit. The question with the Jury must consider is this: would any fair man, however prejudiced he may be however exaggerated or obstinate his views, have said that which this criticism has said?"

Bowen L. J., observed as follows:

"It must be assumed that a man is entitled to entertain any opinion he pleases, however wrong, exaggerated, or violent it may be, and it must be left to the jury to say whether the mode of expression exceeds the reasonable limits of fair criticism. . . . The writer would be travelling out of the region of fair criticism . . . if he imputes to the author that he has written something which in fact he has not written."

We may quote other Judges also. It is not because a public writer

"fancies that the conduct of a public man is open to the suspicion of dishonesty, he is, therefore, justified in assailing his character as dishonest: Per Cockburn, C. J., in *Campbell v. Spottiswoode* (2)."

"A comment cannot be fair which is built upon facts which are not truly stated." Per Kennedy, J., in *Joynt v. Cycle Trade Publishing Co.* (3).

"A personal attack may form part of a fair comment upon given facts truly stated, if it be warranted by those facts, in other words, in my view, if it be a reasonable inference from those facts: Per Lord Atkinson in *Dakhye v. Labouchere* (4), quoted with approval by Cozens-Hardy, M. R., and Fletcher Moulton, L. J., in *Hunt v. Star Newspaper Co. Ltd.* (5)."

"It (a fair comment) does not mean that a man may invent facts, and comment on the facts so invented in what would be a fair and bona fide manner on the supposition that the facts were true If the facts as a comment upon which the publication is sought to be excused do not exist, the foundation of the plea fails: Per Cur. in *Lefroy v. Burnside* (6), quoted in *Fraser's Torts*, 7th Edn. p. 128".

I think I have shown sufficiently that a fair comment must be based upon facts and that the writer cannot invent facts and express his opinions upon such invented facts. Nor can the conduct of a public man or of a person in his public character be assailed as dishonest, simply because the writer fancies such conduct is open to suspicion.

What have we in this case?

The accused says that the subscription lists had not been published at the time of the article although they should have been before 15th August, but he believed that the collectors could not have misappropriated the moneys which he thought must have been collected by the date of the article. So he thought that the moneys collected must have been sent in but from the fact that he had not seen any lists published in the newspapers, he came to the conclusion that the collectors must have sent in the moneys in their own names without letting the public know who the subscribers were. On the slender foundation that the subscription lists had not been published up to 15th August when it was notified the moneys must be sent in, he built up all his fancies and it is plain to me that none of these fancies are warranted by the facts he went on. I do not think that any reasonable man would have said what the accused said in the article, simply because he finds that the subscription lists which were due on 15th August had not been published by that date. Moreover, we find it proved that Maricar and Syed Ibrahim had sent in subscription lists for part of

1. (1888) 20 Q B D 275.

2. (1863) 3 B & S 769.

3. (1904) 2 K B 292.

4. (1905) 2 K B 325n.

5. (1905) 2 K B 309.

6. (1879) 4 L R 1r C L 556.

*See 9th Edn. p. 163—Ed.

their collections long before the date of the article. It is, therefore, highly probable that the accused went on rumours circulated by irresponsible persons without ascertaining whether they were true. If he had made any attempt to verify the rumours by going to the Treasurer of the Viceroy's Reception Fund, he would have received information showing that the rumours were not wholly, if at all, true. I am unable to find any evidence on the record to show that he had from any one at all any information about the doings of Maricar and Syed Ibrahim, upon which he acted. In my opinion he had, from a slender foundation drawn an inference from which his wild fancies led him to other inferences, wholly unjustifiable, of sordid motives attributed to the two generous donors. For these reasons I think the defence put forward by Mr. Ginwalla fails.

Mr. Ginwalla affirms that his client's defence was not justification and that the learned Magistrate has grievously erred in thinking that to be the defence. There is abundant authority for saying that an accused justifying his libel cannot both deny as well as justify it: he could not be heard to say: "I am charged with calling B a knave; I say I never said it, but if I did I was right." Notwithstanding this and notwithstanding the fact that the accused's case as made out by him in his examination by the Magistrate and his written statement that he did not directly aim at either Maricar or Syed Ibrahim in any wise or at all, the cross-examination was directed to show that they were guilty of dishonest motives which justify the accused's condemnation of them. The accused may say that he is not responsible for the way in which the defence was conducted on his behalf and that all that he could do was to instruct his advocate as to the facts of his case and leave it to the advocate to do what he thought necessary with a view to secure an acquittal for his client. That may or may not be so, but he is certainly responsible for the facts he supplied and the calling of witnesses. He called witnesses to show that the charges were true, if applicable to Maricar and Syed Ibrahim. There were at least two witnesses by whom an attempt was made to show that Maricar received certain amounts but that he had not accounted for them. If the article

was not intended to aim at Maricar, what was the object of bringing forward such witnesses? Again where was the necessity for, or the relevancy of, the cross-examination to show that the complainants were not men deserving of public esteem? Facts upon which such a cross examination was based must have been supplied by the accused. Again, what was the reason for calling for the records of the case in which Maricar figured in other Courts? Was it to annoy and harass him or was it to shame him before the *cansile* who thronged the precincts of the Magistrate's Court, whenever the case came up for hearing, as remarked by the Magistrate? I will say nothing about the form of the apology, for it is only fair to say in regard to it that it must be held to be the work of his legal advisers.

I think the accused's conduct in regard to his defence aggravates his original offence. As regards Syed Ebrahim the fact that the sum of Rs. 2,999 was sent after the article appeared was made much of and when a witness gave evidence about the subscription list Ebrahim sent in on the 4th October, a question was asked as to whether the list bore any date as much as to say that if it bore no date, there was no guarantee that it was sent in before 20th October, the date of the article. This question was put in spite of the fact that the receipt was granted for the amount of the list before the date, 3th October. I am satisfied that Syed Ebrahim did not send the balance, namely, Rs. 2,999 to Major Kirkwood for the benefit of the Red Cross, because the charge made in the article being true, he wished to get out of it. He had intended, as requested by some of the subscribers, to send it to some War Fund and on 18th October, two days before the article, he had consulted Major Kirkwood as to the best way of disposing of it. I shall now deal with the article which appeared in the same paper on 23rd September, about a month before the article herein complained of. On that article the writer praised the complainants to the skies for making the gifts of motor ambulances. The learned Magistrate rightly describes the expressions used as being amusingly fulsome. Now any reasonable person would naturally ask the question, what is the reason of the Editor for changing his views about the complainants and attacking them

what had happened between the Editor and his victims during the interval? The learned Magistrate thinks that the accused is open to the gravest suspicions as to his motives. What does Maricar say? He says that the accused had, during the said interval, been trying to get money from him but did not succeed, hence the attack. To meet this accused says:

"Ob, he is saying all this to give colour to his case against me. I was not at Rangoon on one of the dates he says I saw him".

The accused produced a witness to show that he was away. I think the witness need not be taken serious notice of. There is on the record a letter (Ex. 1) written by accused to Maricar. It reads like that of a man who by means of it makes an appointment with the addressee in order to knock something out of him. There appears to me a studied attempt about it to hide the real object of the writer. Until some satisfactory explanation is forthcoming as to the change of attitude on the part of the accused towards the complainants, and there is none, I must hold under the circumstances that the accused was actuated by unworthy motives in writing the article complained of. An Editor found guilty of such unworthy motives ought not to be treated with leniency, especially when he shows on his being brought to account a savage and cruel desire to bring more shame on the heads of his victims. For these reasons I decline to interfere with the conviction. The sentence passed by the learned Magistrate was six months simple imprisonment and a fine of Rs. 500. Considering that in respect of the same article the accused was also awarded in the case brought by Syed Ebrahim a similar punishment of which the imprisonment must take effect after the expiration of the term of imprisonment in this case, I am of opinion that the sentence of imprisonment is excessive. I shall, therefore, reduce the sentence of imprisonment to three months simple imprisonment and let the fine stand with all the directions made by the Magistrate in regard thereto. The appeal is dismissed with the variation in the sentence of imprisonment as stated above. I should not have passed a sentence of imprisonment, if it was not for the sordid motives with which the article was written.

In Criminal Appeal No. 89 of 1917.

This appeal was heard along with

Criminal Appeal No. 88 of 1917. For the reasons stated in my judgment in the latter appeal I find that the article complained of was defamatory of Syed Ebrahim and that the accused was rightly convicted of defamation. I reduce the sentence to three months' simple imprisonment and let the fine stand with all the directions of the Magistrate thereto.

K.N./R.K.

Sentences reduced.

A. I. R. 1918 Lower Burma 42

ORMOND, OFFG. C. J. AND PARLETT, J.

Abdul Bari Chowdry—Appellant.

v.

M. Joakin—Respondent.

First Appeal No. 63 of 1915, Decided on 8th March 1917.

Contribution — Joint liability — Surety is not liable to contribute.

Where the Chairman of a Company under an agreement very beneficial to himself financed the Company with money borrowed from a third person and at the request of the latter some of the Directors executed a pro-note as sureties, whereby, along with the Chairman, they made themselves jointly liable for the payment of the loan:

Held: that the sureties were not liable to contribute to the sum realised by the creditor from the principal. [P 43 C 2]

N.M. Cowasjee & Halkar—for Appls.

N. M. Burjorjee and Banurji—for Respondent.

Judgment.—The plaintiff is the Receiver of the Estate of Ashan Ali who died in December 1908. Ashan Ali was the promoter and Chairman of the Bengal Steam Navigation Company. The defendants were three of the Directors of the Company. On 1st July 1908 Ashan Ali and the 3 defendants executed Ex. N, a pro-note for Rs. 75,000 in favour of a Chetty. The Chetty obtained a decree for the balance due on that pro-note, which was Rs. 50,000 (Rs. 40,000 principal and Rs. 10,000 interest), against Ashan Ali and other 3 defendants. He realised from the estate of Ashan Ali Rs. 32,000-10-3 and the plaintiff now sues the 3 defendants for $\frac{2}{3}$ ths of that sum by way of contribution. His case is that the pro-note was executed on behalf of the Company which has no assets. The defendants' case is that they executed Ex. N as sureties for Ashan Ali. The plaintiff obtained a decree on the Original Side of this Court, and the defendants now appeal.

Ashan Ali was a banker and financed the Company under an agreement with

Company, which was very beneficial to himself. On 3rd April 1906 he borrowed from the Chetty under a pro-note Ex. 1 Rs. 10,000 and on 12th April 1906 he borrowed from the Chetty upon a pro-note Ex. 2 Rs. 70,000; and that Rs. 80,000 was used for the purposes of the Company. On 1st January 1907 Ashan Ali by his pro-note Ex. 3 in favour of the Chetty renewed the two pro-notes Ex. 1 and 2. In the Company's books there are entries of 7th January 1907 which would show that the Company received on that date Rs. 80,000 from the Chetty and that the Company had paid Rs. 80,000 to Ashan Ali. On 4th March 1907 a Director wrote to Ashan Ali on behalf of the Company asking him to pay this Rs. 80,000 debt owing by the Company to the Chetty as he had sufficient funds of the Company in his hands to do so, and on 18th May 1907 the request was repeated. On 21st April 1908 the Company paid off Rs. 5,000 of this debt to the Chetty. On 1st July 1908 Ex. N was executed because the Chetty required payment from Ashan Ali; and in the Company's books entries in an account with the Chetty on that date would show that the amount borrowed on the pro-note in 1st January 1907 was paid in full and that Rs. 75,000 was borrowed by the Company on a pro-note from the Chetty. After the death of Ashan Ali between 23rd March 1909 and 7th July 1909 the Company paid to the Chetty Rs. 35,000 on account of principal owing under Ex. N.

It is clear that before Ex. N, Ashan Ali was alone personally liable to the Chetty for the money borrowed by him. The Chetty was never a creditor of the Company and he never agreed to accept the Company as his debtor. The entries in the Company's books are to that extent misleading. The defendants, no doubt, know of the entries in the Company's books of 7th January 1907, but there is nothing to show that they did not realize the actual position, viz, that the Company was not in fact liable to the Chetty but that the Company had agreed with Ashan Ali to pay, on his behalf to the Chetty direct, the amount owing on his pro-note. It would be doubtful, after the Company's letters of 4th March and 18th May 1907, whether Ashan Ali, if he had paid the Chetty, could have claimed to be repaid by the Company. But assuming

that he could have done so, the fact that the Company had promised Ashan Ali to pay this debt of his to the Chetty, and the fact that the defendants with Ashan Ali jointly executed Ex. N in favour of the Chetty, would not show, in the absence of an express agreement to that effect, that the defendants undertook to share with Ashan Ali his ultimate loss in the event of his paying his debt to the Chetty and not being able to recover it from the Company. When the defendants executed Ex. N they promised the Chetty to pay Ashan Ali's debt. The Company's debt to Ashan Ali was a separate and distinct matter, and there is nothing to show that the defendants, by agreement with Ashan Ali signed Ex. N as if it were the renewal of a debt due by the Company to the Chetty when Ex. N was executed. Ashan Ali was a wealthy man whereas the Company was in a moribund condition.

The defendants, although they were some of the Directors of the Company, had a personal liability for the debt for the renewal of which the pro-note was executed. There was little risk in standing surety for Ashan Ali, but an almost certain loss if they undertook personal liability on behalf of the Company. The renewal of the old debt was at the instance of the Chetty to whom Ashan Ali was alone liable. Prima facie the defendants would merely be sureties to the Chetty for Ashan Ali's debt; and the entries in the Company's books are not sufficient to show that the defendants executed this pro-note on behalf of the Company. The entries in the Company's books of 1st July 1908 do not carry the case any further for the plaintiff. It is clear that the Company's method of book-keeping was that when a pro-note was renewed it was entered as if the old debt was paid off and a fresh sum borrowed. The effect of those entries would merely be this: that the Company, having undertaken to pay the debt on behalf of Ashan Ali to the Chetty direct under the old pro-note, undertook to do the same under the renewed pro-note. And the payment of Rs. 35,000 by the Company to the Chetty in 1909 would be in pursuance of that agreement. We allow the appeal and dismiss the plaintiff's claim with costs in both Courts.

K.N./R.K.

Appeal allowed.

A. I. R. 1918 Lower Burma 44

TWOHEY, C. J. AND MAUNG KIN, J.

Bank of Bengal, Akyab—Plaintiff—Appellant.

v.

Aung Tha Hla and others—Defendants—Respondents.

First Appeal No. 111 of 1917, Decided on 6th May 1918, against decree of Dist. Judge, Akyab, in C. S. No. 276 of 1916.

Transfer of Property Act (4 of 1882), Ss. 78 and 79—Failure of 1st mortgagee to retain title deeds does not give priority to subsequent mortgagee—Registration is notice.

A subsequent mortgagee who has wilfully abstained from the obvious course of searching in the registration office cannot obtain priority over an earlier registered mortgage merely on the ground that the latter did not call for the title-deeds and retain them in his control.

[P 46 C 2]

*Giles—for Appellant.**N. M. Cowasjee and Lambert—for Respondents.*

Judgment.—In July 1910 the defendant respondent Mg Tha Baw deposited the title-deeds of certain agricultural lands with the Bank of Bengal, Akyab, as security for advances made to him by the Bank from time to time. His indebtedness to the Bank fluctuated from month to month. On 29th April 1914, he cleared his account with the Bank by two payments of Rs. 5,000 each but he allowed his title-deeds to remain in the possession of the Bank and on 23rd May 1914, he took a fresh advance of Rs. 10,000. From that time onward his indebtedness to the Bank continued up to the date of the suit, the amount fluctuating between Rs. 10,000 and Rs. 62,500. The Bank admittedly during the whole period of their dealings with Mg. Tha Baw up to May 1916 made no enquiries as to the freedom of the property from encumbrances either at the Akyab Registration Office or at the Sub-Registration Office of the sub-district in which the lands were situated. It therefore entirely escaped the notice of the Bank that on 21st May 1914, i. e., during the period when he was temporarily free from debt to the Bank, Mg. Tha Baw executed jointly with his wife a mortgage of certain of his lands to Rai Gyaw Thu and Co., a firm of money-lenders at Akyab, and that this mortgage was duly registered at the Sub-Registration Office at Myohoung where Tha Baw lives. This registered mortgage included some of the lands of which the title-deeds were with the Bank. The principal money secured by this re-

gistered mortgage was Rs. 30,000 but of this amount only Rs. 4,000 or Rs. 5,000 consisted of new money, the remainder representing sums due on a previous mortgage of 1911 to Rai Gyaw Thu & Co and on certain promissory notes. When taking this mortgage the company did not call for the title deeds of the lands but were satisfied with the production of some tax receipts and with the mortgagor's assurance that the property mortgaged by him was free from encumbrances, as in truth it was.

The Bank sued Tha Baw in this suit, 276 of 1916, for Rs. 20,557 due on two promissory notes, and in the four connected suits Nos. 277, 278, 279 and 281 they sued him for various sums due on other promissory notes; and in each of these five cases the bank prayed for a mortgage decree against the property of which they hold the title deeds. Rai Gyaw Thu & Co. as subsequent mortgagees were joined as co-defendants in all these suits. Mortgage decrees have been granted in favour of the bank but the District Court has ordered in each case that as regards the property mortgaged to the bank on 21st May 1914 the mortgage of the bank shall rank after the registered mortgage. The bank appeals on the question of priority. The District Court after referring to the authorities has held on the one hand that the registration of the company's mortgage was not tantamount to notice to the Bank of the Company's mortgage, but the Court decided on the other hand that the company had failed to do all that a reasonable and prudent man would have done in omitting to call for the title-deeds. But the Court also decided that the bank had been wanting in prudence in abstaining from enquiry as to encumbrances before starting the fresh series of advances to Tha Baw, i. e., on 23rd May 1914. And the learned Judge's conclusion is that:

"As neither of the two creditors can be said to have done all that a reasonable and prudent man would have done to secure his position things must lie as they fall and as regards the items of lands in dispute between the bank and the company the company has priority."

The learned counsel for the appellant supports the District Court's decision that registration is not tantamount to notice, but argues that the latter part of the judgment is in the nature of non sequitur for it imputes blame to the bank for omitting to do what the earlier part

of the judgment shows to be unnecessary. We are asked to hold also that Rai Gyaw Thu and Co. were guilty of gross neglect within the meaning of S. 78, T. P. Act, in not demanding and looking after the title deeds, as their omission to do so left the mortgagor in a position to hold himself out as unencumbered owner of the property. Mr. Cowasjee for the respondent Company contends that S. 78, T. P. Act, does not apply and that the Court should be guided only by the provisions of Ss. 79 and 80. S. 80 prevents the bank from acquiring priority in respect of advances except in the case provided for in S. 79, and that the section is clearly inapplicable because no maximum was expressed to be secured by Tha Baw's mortgage by deposit of the title deeds with the bank. But S. 80 does not override S. 78. S. 80 merely prevents the bank from getting priority by tacking its subsequent advances to any prior advance. It does not prevent the bank from getting priority for its subsequent advances by showing that it was induced to make such subsequent advances through the fraud, misrepresentation or gross neglect of the prior registered mortgagee. No question of fraud or misrepresentation has been raised in this case. The question to be decided is whether in the circumstances described above the Court should impute gross neglect to Rai Gyaw Thu & Co. and whether such neglect on their part was a proximate cause of the bank's action in advancing money to Tha Baw from 23rd May 1914, onwards.

In England in former times a mortgagee who left the title deeds with the mortgagor was liable to forfeit his priority even if there was no imputation of negligence. But this is not the present state of the law. In *Northern Counties of England Fire Insurance Co. v. Whipp* (1), a much less rigorous rule is laid down. According to that case the Court will not postpone the prior legal estate to the subsequent equitable estate on the ground of any mere carelessness or want of prudence on the part of the legal owner. Fry, L. J., remarked that the omission to use ordinary care in enquiring after or keeping title deeds may be, and in some cases has been, held to be sufficient evidence that the owner of the legal estate has assisted in or connived at the fraud which has led to the creation of

a subsequent equitable estate without notice of the prior legal estate. But it appears that the English Law now imposes no duty to be careful as between an earlier and a later mortgagee and that the priority of the former can be displaced only where he has assisted in or connived at the fraud committed on the latter. It is obvious that in a country where compulsory registration of assurances is universal, the possession of title deeds is of less importance as a badge of title than in England where registration is enforced only in certain limited areas. It would be unreasonable, therefore, to construe S. 78, T. P. Act, as involving a more stringent rule than that now enforced in England. Moreover, what may in England amount to gross neglect sufficient to render the first mortgagee responsible for the fraud committed on the second mortgagee, should not necessarily be regarded in the same light where the first mortgage is registered under a system of compulsory public registration. Mortgages are frequently effected in this country without production of title deeds, the mortgagees depending on the words of their mortgagors as to freedom from previous encumbrances and trusting to registration of their mortgages to protect them as regards future encumbrances.

The bank in this case acted as if there was no Registration Act in force in this country and as if the mere possession of the title deeds conferred an impregnable title on the bank. The bank continued to advance large sums of money month after month to Tha Baw without ever attempting to ascertain whether any encumbrance on the property was registered. On the question whether registration of a mortgage is notice thereof to the whole world the Indian High Courts are not unanimous. The Bombay High Court has held that registration is notice: see *Balmakundas v. Moti* (2). The Allahabad High Court in *Churaman v. Balli* (3) held that where a deed of sale had been registered, a subsequent mortgagee who failed to search the register was guilty of gross negligence in not so doing and could not be treated as a bona fide mortgagee without notice. The Madras High Court until recently held that registration was not notice: vide *Damodara v. Soma-*

1. (1883) 26 Ch D 482=53 L J Ch 629.

2. (1891) 18 Bom 444.

3. (1887) 9 All 591.

sunāra (1), *Shan Maun Mull v. Madras Building Co.* (5) and *Madras Building Co. v. Rowlandson* (6), but the later judgment in *Rangasami v. Annamalai* (7) shows a marked change of opinion on the subject. It was held in that case that the failure of a prior mortgagee to obtain the title deeds from his mortgagor did not in the circumstances of the case amount to gross negligence within the meaning of S. 78, T. P. Act, and that in considering what amounts to gross negligence on the part of the prior mortgagee one of the circumstances to be taken into account in this country is that a universal system of registration is established by law. The decision of Jenkins, J., in the Calcutta case of *Manindra Chandra Nandy v. Troyluckho Nath Burat* (8) contains an expression of opinion showing that the learned Judge was in favour of the Bombay practice, by which registration is regarded as notice. He said:

"The existence of gross negligence must be determined according to the circumstances of each case, and one of the circumstances to be taken into consideration here is the fact that in this country a universal system of registration exists. Registration is prescribed by Statute, and he, who registers his deed promptly, reaps the reward of life, ease, and diligence in the security and priority he thereby gains."

He also cited the remarks of Lord Cairns in *Agra Bank Ltd v. Barry* (9) beginning with the words:

"This has never been decided with regard to a Registration Act such as that prevailing in Ireland that negligence in not asking for the title deeds or not taking up the title deeds shall postpone... security?"

Jenkins, J., said that though the circumstances of that case differed from those with which he had to deal, the Lord Chancellor was enunciating a general principle which furnished a useful guide on the point which called for his decision. It was a case in which, as in the present case, the subsequent mortgagee had neglected to search for prior encumbrances in the Registration Office. This case has not been followed by the Calcutta High Court in the later case of *Nanda Lal Roy v. Abdul Aziz* (10), in which that Court reaffirmed the rule which had hitherto been followed in the Calcutta High Court that registration is not per se notice. It is

clear, however, that there is now a preponderance of authority in the Indian High Courts in favour of the view that a subsequent mortgagee who has wilfully abstained from the obvious course of searching in the Registration Office cannot obtain priority to an earlier registered mortgagee merely on the ground that the latter did not call for the title deeds and retain them in his control. The appeal is, therefore, dismissed with costs. The decision in Civil First Appeal No. 111 of 1917 governs also Civil First Appeals Nos. 112, 113, 114 and 115. These four appeals are, therefore, also dismissed with costs.

K.N./R.R.

Appeal dismissed.

* A. I. R. 1918 Lower Burma 46

ROBINSON, J.

J. G. Buchanan—Plaintiff.

v.

S. C. Mall—Defendant.

Civil Regular No 190 of 1916, Decided on 23rd March 1917.

* Contract—C. I. F.—Contract of sale of good with German Firm before war—Delivery of bill of lading and insurance note after outbreak of war—Trading prohibited—Ship seized—Contract is rendered void and dissolve—Documents are not valid and effective and buyer is not bound to pay—Contract Act (9 of 1872). S. 65.

Sometime before the outbreak of war A entered into a contract with B, at Rangoon. Under the contract A was (i) to buy certain goods in Germany; (ii) to obtain a contract of affreightment to Rangoon; (iii) to take out a policy of insurance; and (iv) to ship the goods in July 1914. B, on his part agreed to buy these goods from A for a price which was fixed c. i. f. Rangoon. A performed his part of the contract and on 12th August 1914 caused to be presented to B for acceptance a bill of exchange covering the price, etc., of the goods and payable 90 days after sight. Along with the bill of exchange were tendered the bill of lading, invoice and insurance note. B refused to accept the bill of exchange as well as the documents of title, (inasmuch as the war having broken out on 4th August the ship containing the goods was seized by the Belgian Government and trade with Germany was prohibited by the Royal Proclamation, dated 5th August 1914:

Held: that the Royal Proclamation rendered the contract abortive and illegal and so void; (2) that the effect of the outbreak of the war was that the contract of affreightment was dissolved; (3) that A was bound to tender and B was entitled to get valid and effective documents by which B could recover what might be lawfully recovered under such documents, but as A did not and could not tender such documents in respect of the contract of affreightment B was entitled to refuse to pay against them.

[P 48 C 1]

4. (1889) 12 Mad 429.

5. (1892) 15 Mad 268.

6. (1890) 13 Mad 383.

7. (1904) 31 Mad 7.

8. (1893) 2 C W N 750.

9. (1874) 7 H L 137.

10. (1916) 43 Cal 1052=34 I C 115.

Clifton—for Plaintiff.

Mhta—for Defendant.

Judgment.—Plaintiff and defendant entered into a contract whereby plaintiff bought 18 tons of German tool or faggot steel. The price was fixed per ton c. i. f. Rangoon, shipment to be in July 1914. Plaintiff obtained a contract of affreightment by the SS. "Schildturn," whereby the goods were to be shipped and carried from Bremen to Rangoon and the goods were so shipped. Plaintiff also arranged a contract of insurance. In accordance with the contract plaintiff drew a bill of exchange on defendant payable 90 days after sight with interest added. On 12th August 1914 plaintiff caused the bill of exchange to be duly presented to the defendant for acceptance through the Mercantile Bank of India, Limited, and with it were tendered the bill of lading invoice and insurance note. Defendant refused to accept the bill of exchange and plaintiff now sues him for the price of the goods, etc. War having broken out on 4th August 1914, the SS. "Schildturn" was seized by the Belgian Government at Antwerp. Defendant pleads the Royal Proclamation on 5th August 1914 and urges that as the bill of lading was a German bill to plaintiff's order the contract has become void. It is not denied that the bill of lading is a German bill of lading. The contract of affreightment was with a German firm. Plaintiff urges that he has done all that he had to do under the contract, that the outbreak of war would only affect an executory contract and that the goods, though in a German ship, were to be delivered to a British subject at a British port. He says that the risk thus became the defendant's risk and that he is entitled to be paid.

I have tried the issue as a preliminary issue. I have been referred to certain recent authorities, *Duncan, Fox & Co. v. Schrempf & Bonke* (1). The decision was affirmed on appeal, *Duncan, Fox & Co. v. Schrempf & Bonke* (2). The goods in this case were to be delivered in Germany and further performance of the contract would have involved a trading in goods destined for the German empire in violation of the Royal Proclamation of 5th August 1914. This authority need not be referred to further. The next case

is that of *Arnold Karberg & Co. v. Blythe, Green, Jourdan & Co.* (3). This involved two contracts for the sale of beans to be shipped from Chinese ports to Naples and Rouen. Payment was to be net cash in London on arrival of the goods at port or discharge in exchange for bills of lading and policies of insurance, but not later than three months from date of bills of lading. The beans were shipped in July 1914 on German vessels which on the outbreak of the war entered ports of refuge in the east. At the expiration of the three months the sellers tendered to the buyers, the shipping documents, in one case a German bill of lading and an English policy of insurance, in the other both the bill of lading and the policy of insurance were German. The buyers refused the tender and were held entitled to do so. This decision was affirmed, *Arnold Karberg & Co. v. Blythe Green, Jourdan & Co.* (4).

This decision was followed by Mr. Beaman J., in *Marshall & Co. v. Naginchand Phulechand* (5). Lastly in *Cama & Co. v. K. S. Shah* (6) of this Court Sir Charles Fox, C. J., took the same view. Having regard to this mass of authority I need only briefly record my findings, full authority for which can be found in the cases referred to above and in the rulings referred to in them. By the contract entered into plaintiff undertook to buy the goods, to enter into a contract of affreightment to Rangoon, which will be evidenced by a bill of lading and to take out a proper policy of insurance. The defendant undertook to pay as settled by the contract against these documents. When this has been done the plaintiffs as sellers will drop out, but they must supply defendant with a bill of lading and a policy which are still subsisting and can be enforced. Now here the contract of affreightment was made with a German subject with reference to a German ship and the effect of the outbreak of the war was that the contract of affreightment was dissolved. The result was that the shipper was no longer bound to continue the voyage and there was no force left in the bill of

3. (1915) 2 K B 359=84 L J K B 1673.

4. (1916) 85 L J K B 665.

5. (1917) 37 L C 644.

6. (1916) 33 L C 96.

1. (1915) 1 K B 365=84 L J K B 730.

2. (1915) 3 K B 355=84 L J K B 2206.

lading by which defendant could compel him to do so or to recompense him. It is not sufficient to say that the policy of insurance was with an English subject, for defendants are entitled to have the contract carried out by plaintiff before they pay, and that plaintiff could not do.

The Royal Proclamation of 5th August 1914 forbids the obtaining from the German empire or from any person resident therein any goods, wares or merchandise: it also forbids the trading in any goods, wares or merchandise coming from the said empire or from any person resident, carrying on business or being therein. If the contract had remained good, the effect would only have been that to pursue it defendant might have had to enter into contractual relations with a German subject or subjects. The proclamation, by forbidding trading in goods coming from the German empire as these did, rendered the contract abortive and illegal and so void. Plaintiff was bound to tender and defendant was entitled to get documents that were valid and effective, documents by which he could recover what might lawfully be recovered under such documents. Plaintiff did not and could not tender such document in respect of the contract of affreightment and this being so, defendants are entitled to refuse to pay against them. The suit, therefore, fails and is dismissed with costs.

K.N./R.K. *Suit dismissed.*

A. I. R. 1918 Lower Burma 48

MAUNG KIN, J.

A. S. Shaik Dawood—Applicant.

v.

A. Mahomed Ebrahim—Respondent.

Criminal Revn. No. 133-B of 1917. Decided on 8th August 1917, from order of Dist. Magistrate, Rangoon, D/- 21st May 1917.

(a) Criminal P. C. (1898), S. 250—Accusation found to be false—Case comes within S. 250.

There is no reason why a case in which the accusation is found to be false should be considered as being outside the scope of S. 250, Criminal P. C. : 5 Bom. L. R. 128, *Foll.*

[P 50 C 1]

(b) Criminal Trial—Duty of complainant—Facts showing innocence of accused known by complainant during trial—Complainant must verify and if true must inform Court.

Where during the course of a trial facts come to the notice of the complainant which if true would prove the innocence of the accused, it

is his duty to investigate those facts, and if he finds them to be true to inform the Magistrate accordingly. [P 49 C 2]

Order.—The applicant has under S. 250, Criminal P. C., been ordered to pay Rs. 50 compensation to the respondent for bringing a frivolous and vexatious accusation against the latter. This application is made for a revision of that order. The grounds are as follows: (1) that in view of the fact that before issuing process the learned Magistrate examined three witnesses of the prosecution and fully informed himself of the nature of the charge and inspected the account book through which your petitioner hoped to establish his case and then issued process against him, it was not consistent to afterwards classify the complaint as "frivolous and vexatious" and to award compensation, (2) for that the logical effect of the Magistrate's findings that there is a possibility of the respondent's innocence and hence his discharge, is inconsistent with the complaint being either frivolous or vexatious, (3) for that the words "frivolous and vexatious" have definite meanings and the learned Magistrate overlooked them, (4) for that however desirable it may be to economise the time of the Courts of Justice and because time was wasted in this case in the learned Magistrate's opinion, your petitioner submits that it was not a reason for awarding compensation, (5) that the learned Magistrate not having finished writing his order when your petitioner's advocate appeared, he should have given him an opportunity of being heard against making the order.

The charges against the respondent were: (1) that on 21st August 1916 he bought Rs. 65-4-0 worth of certain drugs from Galliara & Co. of Rangoon on behalf of his master, the applicant, and failed to enter them in the books of the shop or account for the same to the applicant, and that the goods never arrived at the applicant's shop, (2) that on 21st October 1916 the respondent bought on behalf of the applicant two bags of coirenda from M. C. Bham for Rs. 24-9-9 and also a bag of betel nuts from Hajee Kader Fakir Rowther, both of Rangoon, but the said goods were not entered in the applicant's books nor were they brought to his shop. All that the applicant proved was that the res-

pondent did buy the aforesaid goods from the aforesaid persons and that such goods are not shown in his books, further that it was part of the respondent's duty to enter them, or have them entered in the books and that at the end of every day accounts were looked into when the respondent would be present according to the practice in vogue in the shop. The applicant's point was that an inference should be drawn from these facts that the goods though bought in his name had been misappropriated by the respondent. The learned District Magistrate held that the books did not appear to be properly and regularly kept and the circumstances of the case are not such that the books are infallible proof of the goods not having been brought to the shop. He also held that the fact that according to the practice of the shop the respondent would be present at the end of the day, when the accounts were gone over again, was not in any way against the respondent and that there is no proof that he would notice the omission in the accounts regarding the goods. I think the learned Magistrate is right in holding these views. The result of these views is that it is impossible to get a conviction against the respondent on the evidence afforded by the applicant's books.

Of course these views do not necessarily lead one to the conclusion that the case brought against the respondent is false. If there was nothing more in the case brought against the respondent it might be held that action could not be taken under S. 250, Criminal P. C., but I notice, and the Magistrate has noticed, that the representative of Galliara & Co. says he despatched his durwan to take the goods from his shop to the applicant's shop. Bham also says that applicant's coolies took away the goods from his shop, while, on the other hand, Kader Fakir Rowther's man does not know who took the goods away from his shop. The learned Magistrate has pertinently remarked that the evidence of the representative of Galliara & Co. and Bham indicates that the goods would in the natural course of business have been delivered at the complainant's shop, so that the fact that former's durwan is not called by the prosecution justifies the presumption that if he was called his evidence would go against them. It was the business of

the prosecution to call him and they had ample opportunity of calling him. Though the applicant believed his case to be true at first he should subsequently have made proper inquiries from his coolies and the durwan of Galliara, and if he found that his belief had been proved to be untrue, it would be his business frankly to tell the Court that he had made a mistake. Suppose he paid no attention to the information given by Galliara's durwan and Bham's man, that would argue recklessness on his part, not caring to see whether the information could be true. That would argue malice on his part against the respondent.

Suppose he did inquire into the truth or falsity of this information and it turned out to be true, the fact that he did not bring that to the notice of the Court would show unwarrantable malice on his part. If the information turned out to be untrue he could have brought that forward in evidence and thereby strengthened his case very much indeed. I think his omission to call either of these two men must be taken to go hard against him. Thus the conclusion that the prosecution was frivolous and vexatious becomes justified. I do not think there is anything in the first ground mentioned above, because the materials which were placed before the Magistrate before process was issued were such as to justify the issue of process but not necessarily a conviction. I think that in saying that the time of the Court was wasted in the trial of such cases as this, the learned Magistrate only meant to point out the results of such folly on the part of complainants, but it is not put forward as a reason for the action he took under S. 250, Criminal P. C. As regards the fifth ground, I do not think the case has been prejudiced at all by his Advocate not having been heard.

The learned Magistrate classes the case as "false", and I was referred to the case of *Emperor v. Asha* (1), which rules that the provisions of S. 250 under consideration apply only in the case where the charge is frivolous or vexatious but not where the charge is false. A similar ruling was come to in *Parst Hajra v. Bandhi Dhauk* (2), but both these cases were distinguished from in *Emperor v. Bai Asha* (3).

1. (1904) 4 Bom. L. R. 615.

2. (1931) 28 Cal. 251.

3. (1931) 5 Bom. L. R. 123.

where the Full Bench ruling of the Calcutta High Court in *Beni Madhab Kurmi v. Kumad Kumar Biswas* (4) was followed. In the latter case it was held per curiam, Prinsep, C. J., dissenting, that there is no reason why a case in which the accusation is false should be considered as being outside the scope of the section. For the above reasons I am of opinion that the order of the Court below is justified, and this application is dismissed.

K.N./R.K. *Application dismissed.*

4. (1903) 30 Cal. 123 (F.B.).

A. I. R. 1918 Lower Burma 50

TWOMEY, C. J. AND ORMOND, J.

Arracan Co. Ltd.—Defendants—Appellants.

v.

H. Hamadane & Co.—Plaintiffs—Respondents.

First Appeal No. 157 of 1917. Decided on 14th February 1918.

Deed—Construction—Contract of sale of rice to be delivered from some specified mills—Condition to absolve defendants in case of accident to mill—Condition was for benefit of defendant and he was not bound to go to other mill in case of accident to his mill from which rice was supplied and accepted—Defendant was not liable for non-delivery.

Defendant contracted to sell a certain quantity of rice to the plaintiff, and the contract gave the seller the right of delivering the milling of seven specified firms. One of the clauses of the contract absolved the defendant from liability in case of accidents to machinery, etc. It appeared that the plaintiff agreed to accept the milling of the defendant's mill, but before the delivery was completed the mill was burnt down. Plaintiff sued the defendant for damages for non-delivery of the balance.

Held: (1) that the clause giving the option to the defendant to deliver the milling of any of the specified firms was inserted for the benefit of the defendant and that the latter could not be compelled to deliver from all the mills;

(2) that the clause relating to accidents to machinery referred to the mill from which delivery was to be taken or was being taken and that that mill having been burnt down, the defendant was absolved from giving or completing delivery of so much of the rice as remained undelivered under the contract. (P 51 C 1)

Lentaigne—for Appellants.

N. M. Cowasji—for Respondents.

Judgment.—The defendants in *Rangoon* agreed to sell to the plaintiff 10,000 bags of rice, delivery to be taken "ex hopper in April 1916 at Moulmein" date at sellers' option. The contract was in writing, upon one of the defendants' *Rangoon* printed forms of "rice sale notes."

The plaintiff took delivery of 6,442 bags from the defendants' mill at Moulmein up to 26th April, when the mill was burnt down and the deliveries under the contract ceased. The plaintiff sued for damages for breach of contract in not delivering the balance. The defendants rely upon Cl. 16 of the contract: . . . "Accidents to machinery, strikes or sickness of millhands or coolies always excepted." Cl. 18 gives the sellers the right of delivery under the contract the milling of seven specified firms, some of which have no mill at Moulmein, and the defendants' mill is not included. No evidence was taken at the hearing and there is nothing in the contract to show that the defendants had a mill or were entitled to give delivery of their own milling. But the plaintiff in his plaint says that "in terms of the said contract the defendants delivered to the plaintiff 6,442 bags," and the learned Judge on the original side has assumed that the contract was for the defendants' milling. He gave the plaintiff a decree on the ground that Cl. 18 applied not only to the defendants' mill, but to the other mills mentioned therein as well; and that the defendants were bound to deliver from these other mills if they could not deliver from their own mill. Cl. 16 is in the interest of the seller and absolves him from giving delivery, if prevented from doing so by a breakdown in the mill *Mr. Lentaigne* for the defendant-appellant contends that Cl. 16 refers to the defendants' mill. *Mr. Cowasji* for the plaintiff-respondent contends that Cl. 16 would not operate to absolve the seller from giving delivery, until all the mills mentioned in the contract had broken down which in effect means that Cl. 16 applies only to the last surviving mill.

If the contract had stated that the defendants were selling their own milling the defendants would not have been under any obligation to deliver their own milling. They could have selected any one or more of the mills mentioned in Cl. 18; and having communicated to the buyer their election to deliver the whole or a portion of the rice from one of those mills, the contract would have to be read as if the buyer had expressly agreed to buy that quantity of rice of that milling; and the buyer could not require the seller to give him any other milling. If A agrees to buy rice from B of X milling "ex hopper" and gives B the right of deliver.

ing, under the contract, Y milling, and if B elects to give Y milling, A cannot compel B to give delivery of Y milling. And the fact that delivery of Y milling has, after B's election has been communicated to A, become impossible, does not alter the case. Under the contract, the seller is entitled to say that he will give delivery from one mill only. The learned Judge was in error in construing Cl. 18, which is clearly inserted for the benefit of the seller, as if it imposed an obligation upon the seller to deliver, in certain circumstances, from all the mills. Cl. 16 clearly refers to the mill from which delivery is to be taken or is being taken; and means that if that mill breaks down, the seller is absolved from giving or completing delivery of so much rice as the buyer would have had to take from that mill if it had not broken down. The clause absolves the seller from anticipating and providing against a breakdown in the mill from which delivery is to be given. In the present case the plaintiff accepted a milling notice on the defendants' mill. It must be taken, therefore, that the parties had agreed that the defendants should be at liberty to give delivery under the contract from their own mill and the milling notice has been taken to have been in respect of the whole quantity of rice. Cl. 16, therefore, applies to a breakdown of machinery in the defendants' mill which actually occurred, and the defendants are absolved from any further delivery. The appeal is allowed and the plaintiff's claim is dismissed with costs in both Courts.

K.N./R.K.

Appeal allowed.

A. I. R. 1918 Lower Burma 51

MAUNG KIN, J.

Maung Nge—Appellant.

v.

Maung Zin Ba and another—Respondents.

Second Appeal No. 102 of 1916, decided on 15th March 1917.

Buddhist Law (Burmese)—Succession—Not mere non-attendance on sick bed but positive act destroying natural affection is required for exclusion.

Mere non-attendance on a deceased during his or her illness is not sufficient to exclude those who would ordinarily inherit from him or her. The law requires that on the part of the person sought to be excluded, there must be conduct such as constitutes an intention on his part to destroy the natural tie between him and the deceased.

[1952 C 1]

*Ba Dun—*for Appellant.*Pa Han—*for Respondents.

Judgment.—The respondents are brother and sister and the appellant is their brother. They had another sister, Ma Thi, who is dead. The respondents were older and the appellant younger than Ma Thi. On her death, the respondents sold the appellant for their respective shares in the property left by her. The appellant set up his daughter, Ma Saw Mya, as an adopted daughter of the deceased and Ma Saw Mya was added as a party defendant. The parties then went to trial on the following issues:—(1) Whether Ma Saw Mya was an adopted daughter of Ma Thi or not; (2) To what share is each of the parties entitled? The contest was concentrated on the first issue, but in the evidence it appears that the appellant and Ma Thi were not on speaking terms for some considerable time owing to a law-suit they had between them. It also appears that Ma Thi, who had been ailing for four or five years past, apparently not seriously, for witnesses say that she was ill off and on, took ill seriously one day and died the same day. The trial Court held that Ma Saw Mya was not adopted and that as the appellant had neglected to assist Ma Thi during her illness, he was not entitled to inherit. But it proceeded to say that appellant's daughter and a daughter of one of the respondents so assisted and the funeral obsequies were performed out of Ma Thi's money and it thought, apparently because of these latter facts, that the appellant and the respondents should share the estate of Ma Thi equally. The lower appellate Court held that the appellant's claim was extinguished through failure to attend on the deceased during her last illness but allowed the decree of the trial Court to stand, as the respondents had not appealed. It also held that Ma Saw Mya was not adopted by Ma Thi.

Ma Saw Mya has not appealed. The appellant now urges that he being the younger brother of Ma Thi and the respondents being her elder brother and sister he excludes them and that the lower Courts were wrong in not giving him the whole of the property. It has been urged before me by the learned Counsel for the respondents that the appellant was not on speaking terms with the deceased for some considerable time before her death owing to a law-suit between them, that

he did not attend on the deceased during her illness and that he did not contribute towards the expenses of the funeral and that these facts clearly show that the fraternal relationship between them had been intentionally and deliberately severed by the appellant. We are not in a position to know who was in fault with regard to the litigation, to whom was solely due the fact that the sister and brother were not on speaking terms. If the sister was in fault and to her was solely due the estrangement between them, the appellant cannot be blamed. It must be remembered that Ma Thi had not the right to exclude her brother by any conduct on her part towards him. It must be shown that the appellant was guilty of conduct which in law is sufficient to exclude him. In other words, he must be proved to have forfeited his ordinary right by his own misconduct.

If Ma Thi was to blame for the estrangement we cannot expect the appellant to be at her bedside during her illness, especially as she took ill suddenly and died. It is not denied that he went to the house after her death. As regards the funeral expenses, it seems no one contributed towards them and they were paid, as has been rightly held by the trial Court, out of Ma Thi's property. I am unable to hold that mere non-attendance on a deceased during his or her illness excludes those who would ordinarily inherit from him or her. The law requires that on the part of the person sought to be excluded there was conduct such as constitutes an intention on his part to destroy the natural tie between him and the deceased: See the cases of *Maung Chit Kywe v. Maung Pyo* (1) and *Maung Sein v. Maung Kywe* (2). For the reasons given above I am unable to hold that the appellant could be excluded at all. The result is that he is entitled to the whole of the estate. As the younger brother of the deceased he excludes the respondents, her older brother and sister. The appeal is allowed with costs.

K N./R K.

Appeal allowed.

A. I. R. 1918 Lower Burma 52

ORMOND AND PRATT, JJ.

D. Badri Dass—Defendant—Appellant.

v.

Chetty Firm of O. A. M. K. and another.—Respondents.

First Appeal No. 156 of 1916. Decided on 19th March 1918, against the decree of Dist. Judge, Toungoo, in Civil Regular No. 14 of 1915.

(a) Registration Act (16 of 1908), S. 17—Memorandum of securities handed over to equitable mortgagee need not be registered.

A document merely reciting what securities are handed over to an equitable mortgagee is a memorandum and not a mortgage and does not require registration. [P 52 C 2]

(b) Presidency Town Insolvency Act (3 of 1909), S. 17—Suit by secured creditor—No permission is necessary.

A secured creditor of an insolvent can bring a suit to realise his securities without the leave of the Court under S. 17. [P 52 C 2]

Bilimoria—for Appellant.

Connell—for Respondents.

Judgment.—The plaintiff Chetty Firm O. A. M. K. of Rangoon sued Badri Dass of Toungoo and the Official Assignee as representing the firm mark S. V. A. R. on an equitable sub-mortgage of 24th September 1914. The plaintiff obtained a decree in the District Court and Badri Dass now appeals.

The District Judge has carefully considered all the facts. The defence raised one or two legal points which we will now deal with: First, the equitable sub-mortgage was by the deposit of a mortgage-deed made by Badri Dass in favour of the S. V. A. R. Firm and the deposit was made by the mortgagee with the plaintiff in Rangoon. It was accompanied by a document Ex. B and the question is whether that document is merely a memorandum or whether it should be construed as a mortgage. That document merely recites what securities were handed over at that time to the plaintiff. We are satisfied that it is a memorandum and not a mortgage and, therefore, it does not require registration; secondly, it is contended that the suit is not maintainable because no leave has been obtained under S. 17, Presidency Insolvency Act. The case of *B. N. Lang v. Heptullabhai Ismailjee* (1) is an authority to show that a secured creditor can bring a suit to realise his securities without the leave of the Official Assignee. The defence of Badri

(1) (1892-39), U B R 184.

(2) (1907-09) 4 L B R 291.

Dass on the facts is that he had paid up the balance due on this mortgage to S. V. A. R. and that he had not received notice of the equitable sub-mortgage. Rs. 10,000 was due on the mortgage by Badri Dass when this equitable sub-mortgage was made, i. e., on 24th September 1914. He alleges that on 4th April 1915 he paid to Oodayappa, the agent of the S. V. A. R. Firm in Rangoon, Rs. 4,500 in cash and handed him over a promissory note on which Rs. 5,500 was due which had been executed by S. V. A. R. in favour of Lalchand Rupmull, who in turn had sold the note to Badri Dass' uncle Hardyal and liability under it was taken over by Badri Dass. Beyond the entries in the book of Badri Dass and Hardyal there is no documentary evidence to support this settlement or payment to S. V. A. R. On previous occasions when Badri Dass had made payments in respect of this mortgage such payments were endorsed on the mortgage. On this occasion he took no receipt and he did not get back the mortgage-bond.

His explanation of that is that when the mortgage was made in favour of S. V. A. R. the title-deeds of the property were also handed to that firm and when this settlement was made in Rangoon the title deeds were handed back but the mortgage deed was in Toungoo; that Oodayappa gave him (Badri Dass) a letter to Vellassami, the agent of the S. V. A. R. Firm in Toungoo, directing him to hand over the mortgage-deed to Badri Dass. Badri Dass says he went to Toungoo and showed the letter to Vellassami, that Vellassami said he would give him the mortgage deed and Badri Dass thereupon handed him the letter and Vellassami subsequently said he had lost the mortgage-deed. Badri Dass, therefore, parted with the letter without receiving the mortgage-deed. Vellassami and S. V. A. R., deny the whole of this story and it is almost impossible to believe that Badri Dass would have parted with that letter without receiving the mortgage-deed. No written demand was made for the mortgage deed until 10th May, more than a month later. The plaintiff alleges that he gave notice to Badri Dass a day or two after 24th September and that Badri Dass paid three instalments of interest to the plaintiff through one Perianan, the agent at Toungoo of the firm of C. R. V. V. C. T. The

plaintiff had no branch at Toungoo and Perianan must have been known to Badri Dass as having no business connexion with the S. V. A. R. Firm. Badri Dass alleges that he made these payments to Vellassami. Perianan alleges that they were made direct to him by Badri Dass on behalf of the plaintiff.

Perianan has entered two of these payments in a temporary loan account book and two letters are put in Exs. J and K, written by Perianan to the plaintiff explaining what arrangements Perianan had made with Badri Dass for the repayment of this mortgage. The District Judge has disbelieved the case set up by Badri Dass and has believed the plaintiff's case as to notice having been given to Badri Dass. We agree with the view the District Judge has taken of the case. The appeal is dismissed and the plaintiff will have his costs against the appellant of this appeal.

R. N. R. K.

Appeal dismissed.

A. I. R. 1918 Lower Burma 53

YOUNG, J.

E. Y. Mamsa Bros.—Plaintiffs.

v.

A. E. Sallayjee and another—Defendants.

Civil Regular No. 144 of 1917, Decided on 3rd July 1918.

(a) Evidence Act (1872), S. 115—Act or deed must not be ambiguous—Act when ambiguous explained.

Just as an estoppel cannot be created by an ambiguous document, so too it cannot be created by an ambiguous act. (P 57 C 1)

A mere deposit of title-deeds with a banker or a Chetty is ambiguous and may be either for custody or by way of mortgage, and the ambiguity is not eliminated by showing that the depositor is also a debtor of the depositor. (P 57 C 1)

(b) Contract Act (1872), S. 172—Promissory note.

A promissory note may be the subject of a pledge.

Das and Ginnwala—for Plaintiffs.

Connell, Campagnac and A. B. Banerji—for Defendants.

Judgment.—Messrs. E. Y. Mamsa Bros., the plaintiffs in this suit, claim that on or about 2nd January 1917 they lent the now insolvent Chetty firm of T. A. R. A. R. M. the sum of Rs. 25,000 and assert that to secure the debt Kaderasen, the agent of the firm, deposited with them by way of pledge and equitable sub-mortgage (a) two pro-notes dated 30th August 1915, under which defen-

dant 1 A. E. Sallayjee promised to pay the Chetty firm Rs. 9,000 and Rs. 20,000; and which they allege the Chetty firm endorsed in blank, (b) the title deeds of House No. 84, 29th Street, which they allege that Kaderasen had stated had been deposited with his firm to secure the repayment of the Rs. 29,000. The house in question at the time of the loan was vested in Sallayjee as executor of his father, and he was originally sued in both capacities and the other heirs were also joined. At the hearing however the claims against the other heirs and against him as executor were waived and he was sued in his personal capacity only, for a declaration that plaintiff was entitled to the rights of a sub-mortgagee in respect of his share in the house in question. The Official Assignee was also sued as representing the insolvent estate of T. A. R. A. R. M. At first this officer contended that the suit as against him must be dismissed, on the ground that the leave of the Insolvency Court had not been obtained, but abandoned the plea having regard to Cl. 2, S. 17, Presidency Towns Insolvency Act.

Originally also the plaintiff had claimed that he was entitled only to the rights of an equitable sub-mortgagee in respect of the house or rather defendant 1's share in it, but at the hearing he prayed leave to amend by claiming a pledgee's rights in respect also of the two pro-notes, a request which was consented to by the defendants, provided it was understood that the suit was not converted into (a) a suit on the pro-notes, (b) a suit for a declaration with regard to the house, but remained only a suit for a mortgage decree with however an added claim as regards the pledged pro-notes. The 1st question therefore to be considered is whether the plaintiffs lent the Chetty firm the sum of Rs. 25,000 as alleged. (Issue No. 2, Pt. No. 1). Kaderasen, to whom they say that they lent it, has absconded and cannot be found; but they produce (a) the pro-notes which they allege that he gave them, (b) their books, and (c) show corresponding entries in the insolvent's books. Mr. Connell, who appeared for Sallayjee, objected that these last were unproved and were in any event not evidence against him. At this stage it is inconvenient and unnecessary to discuss this objection, as the plaintiffs' evidence without them is suffi-

cient. It consists of plaintiff's own books which are in order and the statement of Sallayjee's own witness, Lutchman Chetty, who admits that the pro-note was executed by Kaderasen, and as he is his brother, he should know. This first point must therefore be found in plaintiffs' favour. (Issue No. 2, Pt. No. 1). The next question (Issue No. 2, Pt. No. 2) is whether Kaderasen deposited, (a) Sallayjee's two pro-notes, Exs. C and D, (b) the title-deeds, with intent to secure the repayment of this debt of Rs. 25,000. I will take the two pro-notes first. In support we have, (a) the plaintiffs' oath, (b) their possession of the title-deeds and pro-notes (c) an entry in Kaderasen's alleged books.

Plaintiff's own books do not support his story that there was a deposit at the actual date of loan; their cash book entry under the heading "details" says simply "Paid on a pro-note made," and says nothing of any deposit by way of security.

The principal of the firm explains the omission by stating that he is a hardware merchant and had not lent money in this fashion before and did not think it necessary to enter the additional details. The insolvent's books, Exs. J-1 and K-1, however, set out the whole transaction in full detailing the deposit both of the pro-notes and the title-deeds but they are alleged to be unsatisfactory. It appears that when the T. A. R. A. R. M. firm began to get shaky, some of his creditors went and seized some or all his books and on 14th March 1917, Kaderasen with one Mahomed Ismail Ariff made over for safe custody certain books, whether restored or never taken does not appear, to Mr. Bilimoria, Barrister-at-law, one of the partners of Messrs. B. Cowasji & Co. He in due course when Kaderasen was adjudicated handed them over to the Official Assignee and it is in one of these books that these entries are found given up by Kaderasen to Mr. Bilimoria, kept by the latter in a locked drawer till made over to the Official Assignee, and written in part by Kaderasen himself as admitted by his brother Lachman. The suggestion apparently is that Kaderasen was preferring the plaintiff. Another objection taken to the books is in relation to the Rs. 29,000 owed by Sallayjee to the Chetty, no entry of which is to be found at any rate on the date on which it would be expected to appear. It is

admitted that there had been a running account between him and the Chetty firm that this was closed and a sum of Rs. 29,000 found to be due from Sallayjee for which he gave the 2 pro-notes, Exs. C and D.

At this time Lachman was agent and he swears that when he gave over charge in October 1915 Kaderasen took over the debt. Curiously enough, however, it is not entered in the new agent's books at any rate under the date of 30th August 1915, which is the date on which the 2 pro-notes were taken. The only books produced, however, are day books and a book called the balance book. The ledgers seem to be missing: possibly it was the ledgers that were taken by the angry creditors. Anyhow they are not here to supply a clue to the cash books, and it is possible that the entry relating to the 2 pro-notes was made on some other date: this ought not, I presume, to have occurred but the notes were taken at a time when one agent was making over to another and there may have been some confusion and if the ledgers were found, or the cash books searched more fully, the entries might be found on a different date. Another point alleged against Kaderasen's books is that Sallayjee produces a pro-note Ex. 10 for Rs. 12,000, dated 1st February 1917, which purports to be signed by Kaderasen and which he swears was signed by him and which Lachman identifies as being in his hand, which also is not entered in the books produced, and on these grounds Mr. Council urges that the books and Ex. J-1 and K-1 are not to be relied on. But suppose they are not to be relied on, does it make any difference? We are dealing only with what Kaderasen did, and I must hold that the entries in J-1 and K-1 books surrendered by Kaderasen himself and containing entries in his own hand constitute admissions that at some period or another he deposited with Mamsa both the pro-notes and the title-deeds.

These admissions corroborate and are corroborated by the fact that the documents themselves are in the possession of the plaintiff.

It may be that Kaderasen deposited them after the loan, but that makes no difference, provided that he deposited them to secure the debt, and for this we have Kaderasen's own admission corroborated

by plaintiff's possession. I think it quite possible that they were deposited after the loan and quite possible that they were deposited within less than 3 months of his insolvency, but if so, though the deposit might be void as against the Official Assignee he has never moved. It could not be void under S. 53, T. P. Act, as I have found that Kaderasen actually owed Rs. 25,000 to plaintiff and the only person who could object to his paying or securing the repayment of his debt would be not other creditors but the Official Assignee. The 4th issue must, therefore, be decided in the negative. Mr. Council also urged that that the books are not evidence against him, but they would have been evidence against Kaderasen if he had not become insolvent and as he has, are evidence against the Official Assignee, and it is he and not Sallayjee who is really concerned in the case so far. Sallayjee certainly owed Kaderasen at one time Rs. 29,000 and repaid certainly Rupees 4,000 and possibly Rs. 10,000, but cannot get out of the fact that he owes Kaderasen at least Rs. 13,000 and possibly Rs. 25,000.

He must pay either the Official Assignee or Mamsa, and it matters little to him which of these two has recourse to the securities if he fails to do so. The only question is whether Kaderasen had power to pledge the pro-notes and sub-mortgage the title-deeds. Now it does not seem disputable that the pro-notes may be the subject of pledge: of, in England Bills of Exchange Act, S. 27 (3), Halsbury's Laws of England, Vol. 2, para. 845. *Peacock v. Puseell* (1), and in India *Osmond Beeby v. Khilish Chandra Acharya* (2) and Bhashyam's Negotiable Instruments Act, p. 65, and as between the plaintiff and the Official Assignee I must hold that Kaderasen did as a fact pledge the notes with the plaintiff to secure his own debt. The next question is whether he also validly sub-mortgaged the house property. This transaction stands on a different footing from that of the pro-notes, inasmuch as the house was not Kaderasen's own property as the pro-notes were and unless Kaderasen acquired an interest in the house, which he could in turn mortgage, the sub-mortgage can only be valid by calling in aid the principle of estoppel.

1. (1853) 143 E R 630.

2. A I R 1915 Cal 13=26 I C 284=41 Cal 771.

The plaintiff first of all endeavours to prove that the property was equitably mortgaged by Sallayjee to Kaderasen and if so, of course Kaderasen could equitably sub-mortgage it.

The evidence, however, shows that the title-deeds were originally deposited with the Bank of Bengal in 1903 to secure an overdraft of Rs. 25,000 by T. A. R. A. R. M. and withdrawn about 1906, vide Exs. 6 and 8. The latter of these exhibits which were written by Lachman ended as follows: "We agree to take back and deliver the said grant to you whenever you want it." There is nothing in this from which a deposit by way of mortgage can be spelt; on the contrary the language is inconsistent with such an idea, and Lachman tells us that the transactions between his firm and Sallayjee were then small. Later on we know that there was a mutual account between the parties and there is no evidence that Sallayjee's side was secured. Lachman in fact denies it. We know that this account was closed in 1915 and that a balance was struck and Rs. 29,000 was found due from Sallayjee for which he gave pro notes and though it might be reasonable to suppose that at this time it was arranged between T. A. R. A. R. M. that the nature of the bailment should be changed, Lachman tells us that this was not done. He also adds that if it had been done it would have been noted in the books if the usual practice of Chetties had been followed. He says that he would also have noted the fact on the pro notes. He is defendant's witness, but none of these statements were cross examined to and if plaintiff relies on J1 and K1 as he does, he cannot say that though Kaderasen borrowed on a mortgage he did not enter the details of the security given, and if so, it seems probable that when he lent upon a security he would also have made a note of the securities taken.

Admittedly the plaintiff has not made a thorough inspection of the books, and it may be that if he had done so and found the entry of the Rs. 29,000, he would have found also an entry of the deposit: but he has not done so and I must take things as I find them *de non apparentibus et non existentibus eadem est ratio*. Clearly the title-deeds were not originally deposited to secure a loan, and when they were taken back

from the Bank there was no idea of anything but a deposit for safe-custody, vide Ex. 8. Lachman also tells us that the nature of the bailment was not changed in his time and there is no written evidence of any subsequent change. It is, however, very easy to change the nature of a deposit and Sallayjee's conduct is more than suspicious: he never sent a written demand for their return, even when he changed his Chetty or when the Chetty closed his business and was in hiding from his creditors. Sallayjee knew where he was and says he went to Kaderasen and asked for his deeds every two or three days, thereby showing that he appreciated the importance of getting them back into his own hands. He says the Chetty kept putting him off and that he trusted him and so made no written demand.

I cannot accept this story and can only understand Sallayjee's inaction on the supposition that at some time or another it was agreed that the deeds should be retained as security, either when the notes were taken or that later when the Chetty began to be pressed for money, he in turn pressed Sallayjee and in default of payment made Sallayjee agree to give the title-deeds as security. There was no absolute necessity for Kaderasen to have noted in his books that on such and such a day Sallayjee consented that the title-deeds should no longer be held in safe custody but as security for the repayment of the two pro-notes, in my mind the omission to note or rather the failure to produce such note in the books is outweighed by Sallayjee's own conduct which is I think inconsistent with the idea that he still had power to demand their return. I must, therefore, answer the first issue by saying that the title-deeds were not originally deposited with T. A. R. A. R. M. for the purpose of creating an equitable mortgage, but that later on the bailment was changed, and I must also hold that both notes and title-deeds were mortgaged to plaintiffs by Kaderasen. It is not contended that the mortgage was valid to anything beyond Sallayjee's interest, or that the sub-mortgage is valid to any larger extent, and to this extent I must hold it valid. Under these circumstances, it becomes unnecessary to consider the question whether Sallayjee's conduct in depositing the title deeds with the Chetty estopped him from denying

that they were deposited by way of equitable mortgage, but if I had to decide it my answer would be in the negative.

Just as an estoppel cannot be created from an ambiguous document, cf. per Lord Watson in *Colonial Bank v. Cady* (3), so too can it not be created from an ambiguous act. A deposit of title-deeds especially with a Banker or Chetty is ambiguous and may be either for custody or by way of mortgage, and the ambiguity is not eliminated by showing that the depositor is also a debtor. My answer to issue 3, is therefore, in the negative. It remains to consider the remedies to which plaintiff is entitled. This as regards the mortgaged documents depends on the state of the account between the original mortgagor Sallayjee and his mortgagee Kaderasen. The plaintiff tells a curious story of his having given the pro-notes back to the Chetty on 10th January 1917 and 17th January 1917 after the deposit to enable Kaderasen to receive and endorse payments of two sums of Rs. 1,000 by Sallayjee.

He further says that he himself never got these payments and that he did not care as the notes were still good for the amount that he had advanced upon them. It may be so, but mortgagees are not usually so benevolent as to consent to the diminution of their security and it seems to me at any rate more probable that the notes and, therefore, the title-deeds also were not deposited by Kaderasen with the plaintiff at the time of the loan on 2nd January 1917, but at some date subsequent to 17th January, this being the date of the last endorsement of payment. If so, as the Chetty was adjudicated insolvent in Madras on 16th April, the deposit may have been void as against the Official Assignee. It is a matter of suspicion and the Official Assignee never having thought fit to raise the question the point is immaterial, except that the plaintiff has to admit that the notes represent in his hands only a debt of Rs. 25,000 with interest at 6 per cent., there being no mention of interest in the pro-note given by Kaderasen to himself. Sallayjee, however, goes further and claims that he made a further payment of Rs. 12,000 on 1st February 1917 to Kaderasen in respect of the loan and that it should also be taken into account, though the payment is not endorsed on the note. Sallayjee, how-

ever, admits that he took a pro-note with interest at 3 per cent. per mensem for the amount which is obviously inconsistent with the idea that it was a repayment of the loan, and as we are dealing with the statement of account between Kaderasen and Sallayjee, I do not think he can be heard under S. 92, Evidence Act, to plead that it was not a loan but a part repayment.

His story, moreover, is very weak, and I should come to the same conclusion on it and apart from S. 92. He admits that whenever he made the prior repayments Kaderasen brought him the notes to show that they were still in his possession and unnegotiated and that the payments were endorsed thereon, but says that on this occasion he did not do so saying he was in a great hurry for the money and had forgotten to bring the notes. The two lived quite close together and I think that Sallayjee, who admittedly had not the money with him, would have said that while he was getting the money, Kaderasen must go back get the notes; or alternatively have taken, if as he says he trusted his word, a receipt and not a pro-note. He tries to explain his omission by saying that he did not know how to make out a receipt, but even if this rather improbable excuse be accepted, he had his manager with him who admits that he knew how to write such a document. Both admit that their suspicions were aroused and the most I can find in their favour is that they neither accepted nor rejected the Chetty's story that he still had the notes in his possession and were willing to cancel the note and treat it as a repayment if he showed his story were true by bringing back the notes, but safeguarded themselves in case it was false by taking a pro-note at 3 per cent. interest. This is really Sallayjee's own story for he says that finally the Chetty said he would give him a pro-note for the amount and take it back when he brought the pro-notes. In other words it was at best a conditional re-payment, and if the condition was unfulfilled it was a loan at 3 per cent. The condition never was fulfilled, and it remains a loan at 3 per cent. for which Sallayjee can prove against Kaderasen's insolvent estate, but not against Mamsa. Lastly, if the notes were duly endorsed in Mamsa's favour, I do not see how he could in any event plead this payment to Kaderasen as an answer

to Mamsa's claim, for Mamsa though only a pledgee, would by the endorsement become a holder in due course of a negotiable instrument. The note for Rs. 20,000 was admittedly endorsed by Kaderasen, but the endorsement of the note for Rs. 9,000 which by reason of the repayments had become a note for Rs. 5,000 is not satisfactorily proved.

Apparently it had been pledged at some earlier date to one A. M. B. Khorasanee at a time when Kaderasen was away and it only purports to be endorsed by one Sunderam Pillay, attorney of Kaderasen. It is admitted that this man did hold a power of attorney from Kaderasen, but there is no proof of his signature. I do not know that this would make any difference with regard to the alleged payment of Rs. 12,000 and in the view I take of the case, it is unnecessary to enquire. Lastly as regards plaintiff's rights on these pro-notes. He has sued in terms as pledgee and not upon the notes as holder or holder in due course. As pledgee he would, if the notes being notes to order were endorsed, be a holder for value, or if not endorsed be a holder and entitled to the legal remedies of persons holding these positions. Originally the plaintiff did not claim upon the notes in this suit at all, but at the hearing prayed and obtained leave to amend by including them in this mortgage suit on the clear understanding that he claimed only mortgage decree in respect of them. Whatsoever, therefore, plaintiff's rights may be as holders or holders in due course, they deliberately elected to forego these and asked for a sale if necessary of the property described in para. 9 of the plaint, which by their amendment included the pro-notes. There must, therefore, be a decree as against the Official Assignee for Rs. 25,000 with interest at 6 per cent. (as the note specified no rate of interest) and costs, and there must be the ordinary mortgage account taken of what is due by Sallayjee to T. A. R. A. R. M. on the two notes for Rs. 20,000, and Rs. 9,000, or rather on the two notes for Rupees 20,000, and Rs. 5,000, as they have come to be and in default of payment of this amount or so much as may be necessary by Sallayjee to the plaintiffs, the pro-notes and the interest of Sallayjee in House No. 84, 29th Street, must be sold and the amount due by Sallayjee to Kaderasen or so much as may be neces-

sary to discharge T. A. R. A. R. M.'s debt to the plaintiffs must be paid to them and the surplus handed over to the Official Assignee. Sallayjee is also liable for costs.

K N./R.K.

Suit decreed.

A. I. R. 1918 Lower Burma 58

TOWMEY, C. J. AND ORMOND, J.

Chit Tha—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 947 of 1917, Decided on 10th January 1918.

Penal Code (1860), S. 302—Punishment—Youth is extenuating circumstance except in cases of extreme depravity.

Ordinarily youth is in itself an extenuating circumstance in murder cases as in other Criminal cases. Cases of extreme depravity do occur in which the youth of the accused may not be a sufficient reason for imposing the lesser sentence. But the youth of the criminal is a circumstance which should always be taken into account by Sessions Courts in exercising the discretion vested in them by S. 302, I. P. C. [P 59 C 1]

Judgment.—The appellant Nga Chit Tha has been sentenced to death for murder. The case is clear and the appeal admitted only for the purpose of considering the propriety of the sentence. The appellant who is an agricultural labourer had been working with a wood-cutting dhama in his hand and returned to his employer's house to get a light for his cheroot. There he suddenly encountered the deceased Maung San Mya with whom he had a quarrel some months before. He fell upon the deceased with the da and inflicted fatal wounds on his head. The appellant at first stated that he had been threatened with death in an anonymous letter which he attributed to San Mya and when he suddenly met San Mya, he was terrorstruck and attacked him so as to prevent San Mya from attacking him. The Sessions Judge was inclined to believe this story, though the appellant modified it considerably when he was examined in Court. He then alleged that the deceased abused him and assaulted him when he entered the cooking place of the house. There can be no doubt that the appellant was rightly convicted of murder. His age according to the medical subordinate who gave evidence at the trial is between 17 and 19. The Superintendent and Medical Officer of the Jail where Chit Tha is now confined was asked to give his opinion on this point, and he reports that in his opinion Chit Tha is

16 years of age. The Sessions Judge thought that he would not be justified in remitting the extreme penalty on the ground of youth only. The learned Judge was perhaps influenced by the ruling in *Nga Pyan v. Crown* (1). The following is an extract from Fox, J.'s judgment in that case:

"The present case is one in which a youth must have silently brooded for a considerable time over chidings and abuse addressed to him by the man he subsequently murdered, but in the end his act was deliberate, previously meditated, done in cold blood, and was accompanied by great ferocity. To refrain from confirming a sentence of death in such a case on account of the criminal's youth would, in my opinion, be an act of pure mercy. The exercise of mercy is the prerogative of the Crown to be exercised in this country by the very highest authorities, and, if mercy is exercised towards a criminal, he and the public should understand that the mitigation of the sentence passed upon him by the Court of Justice is due to the exercise of the power of clemency, which is an attribute of the King Emperor alone."

In the murder case now under consideration there appears to have been no deliberation; it is probable that the appellant acted on a sudden impulse. The case is, therefore, distinguishable from that of *Nga Pyan*. As to the general principle, we are of opinion that ordinarily youth is in itself an extenuating circumstance in murder cases as in other criminal cases. We refrain from laying down that the lesser penalty should be awarded in every murder case where the accused is below a certain age. Cases of extreme depravity do occur in which the youth of the accused may not be a sufficient reason for imposing the lesser sentence. But the youth of the criminal is a circumstance which should always be taken into account by Sessions Courts in exercising the discretion vested in them by S. 302, I. P. C. We respectfully dissent from the view suggested in *Nga Pyan's* case that a Sessions Court, which on the ground of the criminal's youth imposes on him the lesser sentence provided in S. 302, is thereby encroaching on the prerogative of the Crown. Having regard to the youth of the present appellant and the circumstances of the case, we consider that the sentence passed on him may properly be reduced to one of transportation for life and it is reduced accordingly.

K.N./R.K.

Sentence reduced.

A. I. R. 1918 Lower Burma 59

ROBINSON, J.

Mathuraban—Plaintiff.

v.

D. Tewary—Defendant.

Civil Regular No. 75 of 1916, Decided on 21st March 1917.

Guardians and Wards Act (8 of 1890), Ss. 12, and 25 — No remedy under Act—Father can sue for custody of child.

A suit by a father for the custody of his child is maintainable where no remedy under the Guardians and Wards Act exists that he can apply for. [P. 60 C. 1]

Dhar—for Plaintiff.

Rose—for Defendant.

Order.—This is a suit by the plaintiff asking for the custody of his illegitimate child. The mother of the child was the illegitimate daughter of the defendant. In August 1913 the mother left plaintiff's protection taking the child with her. The mother was the natural guardian of the illegitimate child. She died in December 1915 and the plaintiff then became the natural guardian. Plaintiff has been maintaining the child since the mother left him. The first question is whether the suit lies. The Guardians and Wards Act makes certain provisions for obtaining custody, under S. 12 when an application for the appointment of a guardian is pending, and under S. 25 when the ward leaves or is removed from the custody of the guardian. Neither of these provisions applies here as the plaintiff never has had custody of the child. It is urged that their Lordships of the Privy Council held in *Mrs. Annie Besant v. Narayaniah* (1) that a suit will not lie, but that action must be taken under the Act. This was the view taken in *Arunachallam Pillay v. Iyama* (2). In both these cases the suit had been launched in the District Court though the former was transferred to the High Court, and it was held that its powers were limited to those that the District Court possessed. The contrary view of the Privy Council decision has been taken in *Achratlal Jekisendas v. Chimanlal Parbhudas* (3). The Bombay High Court in *Sharifa v. Mune Khan* (4) and this Court in *Ma Shwe Ge v. Maung Shwe Pan* (5) have held that such a suit

1. A I R 1914 P O 41=35 Mad 807=21 I C 290 =41 I A 314 (P C).

2. (1915) 8 L B R 211=29 I C 763.

3. (1917) 40 Bom 600=37 I C 215.

4. (1901) 25 Bom 574.

5. (1903-04) 2 L B R 140.

would lie, and in *Achratlal's* case (3) the Bombay High Court said:

"We are not prepared to hold that the dictum of the Privy Council in *Mrs. Annie Besant v. Narayanath* (1), to the effect that a suit inter partes is not the proper proceeding, was intended to be of such general application as virtually to overrule the decision of this Court in *Sharifa v. Mune Khan* (4)."

In my opinion this view is correct and the decision of this Court in *Ma Shwe Ge's* case (5) cannot be taken to be overruled. No remedy under the Guardians and Wards Act exists that the plaintiff can apply for. I must, therefore, follow the decision of the Full Bench in *Ma Shwe Ge's* case (5) and hold that the suit lies.

K.N./R.K.

Order accordingly.

A. I. R. 1918 Lower Burma 60(1)

TWOMEY, C. J. AND ORMOND, J.

Maung Ba Han—Plaintiff—Appellant.
v.

Ma Tin—Defendant—Respondent.

First Appeal No. 127 of 1917, Decided on 26th April 1918, against decrees of District Judge, Hanthawaddy, in Civil Regular No. 56 of 1915.

Buddhist Law (Burmese) — Marriage — Minor — Minor girl's marriage without father's consent is invalid.

There cannot be a valid marriage of a minor Burmese Buddhist girl without her father's express consent. [F 60 C 2]

Broadbent—for Appellant.

Connel and Maung Thin—for Respondent.

Judgment.—The plaintiff and defendant are Burmese Buddhists. The plaintiff is a young man of 23 years of age and sues for restitution of conjugal rights. The defendant *Ma Tin* is 16 or 17 years of age and is admittedly a minor. She eloped with the plaintiff and lived with him for four days in *Mg. Gyi's* house in the same village in which she lived with her father. *Lugyis* intervened on behalf of the plaintiff to persuade the defendant's father to allow them to marry. When the *Lugyis* first intervened, they were under the impression that the father would consent to a marriage. On the fourth day the *Lugyis* and the young couple returned to the defendant's father's house and there was an interview which lasted some hours. The father asked his daughter if she had gone willingly with the plaintiff and she said that she had done so because she loved him. The father told the two young people to go up into the house and the *Lugyis* also went into the house.

Shortly afterwards the girl said she did not want to remain in her father's house because she thought her father wished to separate her from the plaintiff. Some of the witnesses say that the father said: "as you love him, I will not interfere," but others who were present do not give evidence to this effect. The *Lugyis* were present in order to be witnesses of a consent to the marriage, but no express consent was given. We are asked to find that there was an implied consent in view of the fact that the father told the plaintiff and defendant to go into the house, and in view of the evidence of certain witnesses that the father said he would not interfere, but as against that there was the conduct of the girl and the fact that the plaintiff did not stay in the house that night; there is the further fact that when he came next morning he was refused admission and that he has not been allowed to see the girl since.

The only question in this appeal is: Did the father give his consent? The facts are fully dealt with by the learned Judge and we agree with him in the view he has taken, namely, that no real consent was given. *Mr. Connel*, for the respondent, contends, that even if the father did give his consent, that would not convert the elopement into a marriage with retrospective effect, but that further cohabitation would be necessary after such consent in order to constitute a marriage and he quotes the Upper Burma case of *King-Emperor v. Naga Ni Ta* (1). But it is unnecessary to go into that question in this appeal, because we find that the father did not in fact give his consent to a marriage between the parties, and *Mr. Broadbent* for the appellant admits that without such consent there could be no valid marriage and that the plaintiff's suit would have to be dismissed. The appeal, therefore, is dismissed with costs.

K.N./R.K.

Appeal dismissed.

1. U B R (1902-03) 1 Final Code 15.

A. I. R. 1918 Lower Burma 60(2)

RIGG, J.

Po Nyein and another—Accused.

v.

Emperor—Opposite Party.

Criminal Appeals Nos. 173 and 874 of 1917, Decided on 7th December 1917.

(a) Penal Code (45 of 1860), Ss. 75 and 379 — Punishment—Highest need not always be

awarded — Extenuating circumstances and subject-matter of theft should be considered.

There is no hard and fast rule that a sentence of two years' rigorous imprisonment must be passed in all cattle and boat theft cases, without regard to the value and utility of the stolen property, the youth of the accused, his previous character, or any other circumstances that may justly be taken into consideration in passing sentence. Each case should be considered on its merits, and if extenuating circumstances appear to exist, the sentence should be modified accordingly. A sentence should never be heavier than is necessary to deter the criminal from committing the offence again. [P 61 C 2]

(b) Penal Code (45 of 1860), S. 75 — Previous conviction is not the only factor to be considered for higher sentence — Scope and object of S. 221 Criminal P. C. stated — Criminal P. C. (5 of 1898), S. 221.

In the case of men with previous convictions, regard should be had to their career and to the time that has elapsed between the convictions passed upon them. Ss. 75, I. P. C., and 221, Criminal P. C., were not intended for the purpose of automatically enhancing by a kind of geometrical progression the sentence to be passed after a previous conviction. The reason for passing a more severe sentence in the case of a criminal with a previous conviction is primarily to protect society from the predations and offences committed by an habitual rogue, who has shown no signs of repentance. A Magistrate or Judge should make some inquiry into the regular and antecedent behaviour of a man whom he proposes to sentence severely. [P 61 C 2; P 62 C 1]

Judgment. — The appellants have been rightly convicted of the theft of a bauktu boat, worth Rs. 8 on 2nd August, and another similar boat, worth Rs. 15, on the 12th August. Nga Po Gyein, who had a previous conviction proved against him was sentenced to two consecutive terms of three and a half years' rigorous imprisonment or to seven years in all, whilst Po Tin who has no previous convictions was sentenced to consecutive sentences of two years' rigorous imprisonment, or to four years in all. The sentence passed on Po Tin for the theft of two boats of little value is an example of that want of discrimination and thought that is shown in some of the sentences passed in these cases. The Magistrate probably had in mind the ruling of *Queen-Empress v. Nga San* (1) in which Aston, J. C., said:

"The reason why boat thefts and cattle thefts call ordinarily for a sentence of two years' imprisonment is two-fold. They for the most part are committed by professional thieves, or by persons ready to join the ranks of professional thieves, and the injury inflicted on the owner is not measured by the intrinsic value of the property stolen, but is usually far beyond that value when the owners are deprived of their means of livelihood by the loss of their cattle or boats."

The proper sentence to be passed in cattle theft cases was again considered in *Queen-Empress v. Nga Ni and Nga Shwe Ni* (2) in which Byles, J. C., said that where there are no extenuating circumstances, a sentence of two years' rigorous imprisonment is not unsuitable. These pronouncements have unfortunately been sometimes interpreted as laying down a hard and fast rule that a sentence of two years' rigorous imprisonment must be passed in all cattle and boat theft cases, without regard to the value and utility of the stolen property, the youth of the accused, his previous character, or any other circumstances that may justly be taken into consideration in passing sentence. When Mr. Aston spoke of cattle thefts being committed for the most part by professional thieves, he was probably thinking of the type prevalent in India, whereas in Burma many of the thefts are committed by young men who are tempted to steal either by the careless way in which cattle are tended, or by motives of bravado. It is undesirable to send young men to jail if they can be suitably punished otherwise, and in many cases I think that a whipping would be a more appropriate sentence than imprisonment. Each case should be considered on its merits, and if extenuating circumstances appear to exist, the sentence should be modified accordingly. A sentence should never be heavier than is necessary to deter the criminal from committing the offence again. In the case of men with previous convictions regard should be had to their career and to the time that has elapsed between the convictions passed upon them. Ss. 75, I. P. C., and 221, Criminal P. C., were not intended for the purpose of automatically enhancing by a kind of geometrical progression the sentence to be passed after a previous conviction.

The reason for passing a more severe sentence in the case of a criminal with a previous conviction is primarily to protect society from the predations and offences committed by an habitual rogue, who has shown no signs of repentance. But there is a large number of men who commit offences more than once, but do not seek to live by crime. These seem to me to stand on a different footing from the professional criminal. On the other hand, a man may have few if any previous convictions and may yet be a dan-

1. P. J. L. B. 198.

2. P. J. L. B. 563.

gerous criminal whose powers of mischief need curtailment by a long sentence. I think that a Magistrate or Judge should make some inquiry into the repute and antecedent behaviour of a man whom he proposes to sentence severely. This could be done after the evidence has been heard and the Court has come to a decision about his guilt. The Police Officer in charge of the station within the jurisdiction of which the prisoner resides, or the head-man of the village would be able to supply the necessary information. Po Nyein must have had previous convictions before the one now set out against him, as he was sentenced to four years under S. 379. He was released from jail in 1915, and has again committed two thefts in August 1917. His appeal is dismissed. The boats stolen by Po Tin were not of much value, but as it is in evidence at the countryside near the landing place from which they were removed, is one vast sheet of water, the thefts probably caused great inconvenience, if not less to the owners. His sentence is reduced to one of six months rigorous imprisonment on each charge to run consecutively.

K.N./R.K.

*Sentence reduced.***A. I. R. 1918 Lower Burma 62**

TWOMEY, C. J. AND PABLETT, J.

C. M. R. M. A. R. Perianan Chetty—
Plaintiff—Appellant.

v.

Maung Ba Thaw and another—Defendants—Respondents.

First Appeal No. 78 of 1917, Decided on 14th August 1917.

(a) Evidence Act (1 of 1872), S. 68—Mere acknowledgement of signature by executant before attesting witness is not sufficient and document is inadmissible and ineffective.

—Where a mortgage deed purports to have been signed by two witnesses as required by S. 59, T. P. Act, but it is clear from the evidence that one of them was not present at the time of execution but that the document was brought to him for signature and he was told by the executant that he had executed it, the document is not only inadmissible in evidence under S. 68, Evidence Act, but does not effect a mortgage at all. [P 62 C 2]

(b) Transfer of Property Act (1882), S. 59,—Witness must sign after seeing actual execution of deed.

Under S. 59, T. P. Act, the mere acknowledgement of his signature by the executant is not sufficient, the witnesses must sign only after seeing the actual execution of the deed. [P 62 C 2]

(c) Transfer of Property Act (1882), S. 59—S. 59 is imperative and High Court can

take cognizance of defect even if Lower Court failed to notice it.

The provision of S. 59, T. P. Act, are imperative, and where they have not been complied with the High Court will take cognizance of the defect even where the lower Courts failed to notice it. [P 62 C 2]

Anklesaria—for Appellant.

Judgment.—The learned Judge of the District Court has dismissed the suit of the plaintiff-appellant firm, holding that the execution of the mortgage instrument is not proved. The circumstances attending the alleged execution, as set out in the judgment, give rise to strong suspicion of fraud and it is remarkable that though the mortgagor Azim is said to have died in 1909, a few months after the document was executed, and the mortgaged property passed into other hands, the mortgagees took no steps to enforce their mortgage rights in respect of either principal or interest for a period of seven years. But though we are inclined to agree with the remarks of the District Court as to the suspicious character of the whole transaction, we find that it is unnecessary to decide the question whether the mortgage should be held unproved on that ground alone. For there is a fatal defect on the face of the mortgage instrument and evidence called by the P. A. Firm to prove it. Under S. 59, T. P. Act, the mortgage instrument required for its validity the attestation of two witnesses. It purports to have been signed by two witnesses, Palaniappa Chetty and Virappa Chetty. Virappa was not called as a witness, and it is clear from the evidence that Palaniappa did not in fact witness the alleged execution by Azim at all. Palaniappa says that the document was brought to him at Pegu for signature and before signing it he was told by Azim that he had executed it. It must now be regarded as a well-established rule of law that mere acknowledgement of his signature by the executant is not sufficient; the witness must sign only after seeing the actual execution of the deed. Palaniappa was, therefore, not an attestation witness as contemplated by law. The document is not only inadmissible in evidence under S. 68, Evidence Act, but owing to the want of two attestation witnesses under S. 59, Transfer of Property Act, did not effect a mortgage at all. The provisions of S. 59 are imperative, and although the effect was not noticed in the lower Court

[we are bound to take cognizance of it. On these grounds the appeal is dismissed. K.N./R.K. *Appeal dismissed.*]

A. I. R. 1918 Lower Burma 63 (1)

ROBINSON, J.

Hnin Yin—Applicant.

v.

Than Pe—Respondent.

Criminal Revn. No. 290-B of 1916, Decided on 3rd November 1916.

(a) Criminal P. C. (1898), S. 350—Scope and object stated—Right when claimed must be granted.

The right of claiming a trial *de novo* on the transfer of a Magistrate is given to an accused person in order that he may have the very great benefit of the Trying Magistrate having the witnesses examined and cross-examined in his presence, so that he may see and note their demeanour and manner of giving evidence. When the right is claimed the Magistrate must recommence the trial.

(b) Criminal P. C. (1898), S. 350—Trial *de novo* claimed—Prosecution witnesses only cross-examined their previous statements being read—No fresh charge or examination—Requirements of S. 350 are not satisfied.

In a criminal trial the Magistrate was transferred after the prosecution evidence was heard and a charge framed. The accused claimed a trial *de novo* before the succeeding Magistrate. Thereupon the witnesses were re-summoned, their statements were read over to them and they were further cross-examined. No fresh charge was framed nor was the accused examined by the Magistrate.

Held: that the provisions of S. 350 were not complied with and that a new trial must be ordered: 2 L. B. R. 17 and 12 C. R. N. 13; *Rel. on.*

Maung Kin—for Applicant.

J. A. Maung Gyi—for Respondent.

Judgment.—This case has been referred by the District Magistrate. The evidence was heard and a charge framed and all but one witness for the defence were examined by Maung Shin. He was then transferred and Mr. . . . took up the case. The accused exercised his right to have all the witnesses re-summoned and re-heard. They were re-summoned but they were not re-heard. Their statements were merely read over to them and they were then further cross-examined. No fresh charge was framed nor was the accused examined by Mr. . . . This is clearly no compliance with the law. The right is given to an accused person in order that he may have the very great benefit of the Magistrate having the witnesses examined and cross-examined in his presence, so that he may see and note their demeanour and manner

of giving evidence. When the right is so claimed, the Magistrate must recommence the trial: *King Emperor v. Naga Pe* (1). In *Sobh Nait Singh v. Emperor* (2) the facts were the same as in the present case and it was held that the provisions of S. 350, Criminal P. C., were not duly complied with and further that it was impossible to say that the accused had not been materially prejudiced. A re-trial was ordered. With this I entirely agree. It is urged that the accused has been very lightly sentenced to fine only and that if a re-trial is ordered he may be convicted again and sentenced to imprisonment and that if so, he would be materially prejudiced. I cannot assume that he would be convicted nor that if he is, he would be imprisoned, and the mere fact that he may be, has nothing to do with the matter before me. A direct contravention of an express provision of law has been committed and is an illegality. This being so, S. 537 cannot cure the defect: *Gomer Sirda v. Queen-Empress* (3). The convictions and sentences are set aside and a new trial is ordered.

K.N. R.K. 1

Retrial ordered.

1. (1903-04) L. B. R. 17

2. (1905) 12 C. W. N. 138.

3. (1898) 23 Cal 563.

A. I. R. 1918 Lower Burma 63 (2)

FOX, C. J. AND ORMOND, J.

Ma Shan Ma Hyu—Appellant.

v.

Ma Chit Saw—Respondent.

Misc. Appeal No. 69 of 1916, Decided on 27th November 1916.

(a) Probate and Administration Act (5 of 1881)—Scope of enquiry under the Act is to determine competent person to administer estate and not heir.

The object of proceedings under the Probate and Administration Act is to determine only the question of representation of the deceased for the purpose of administering the estate, and not for the purpose of determining any question of inheritance: 25 Cal 351, *Foll.* [P 64 C 1]

(b) Probate and Administration Act (5 of 1881).—Questions about adoption should not be enquired into as decisions are not binding in other suit.

Any decision on questions such as adoption in administration proceedings is not final and would not operate as res judicata in any subsequent suit in which the party dissatisfied with the decision might raise the same question. It is not desirable, therefore, that such questions should be gone into in administration proceedings.

(c) Probate and Administration Act (5 of 1881), S. 13—Minor is incompetent for grant of letters.

Section 13, Probate and Administration Act, forbids Letters being granted to minor.

[P 64 C 2]
(d) Probate and Administration Act (5 of 1881), Ss. 23 and 41—Consent between sister and minor alleged to be adopted—Sister is the person entitled both under Ss. 23 and 41.

Where a sister applied for Letters of Administration to the estate of her deceased brother who had no children of his body, and the father of the minor respondent acting as her guardian set up that she had been adopted by the deceased and his wife, and the District Judge finding that adoption had taken place rejected the application:

Held: that prima facie the sister was a person under S. 23 to whom Letters might be granted but that even if she might, as the result of litigation, turn out to have no right to any part of the estate in consequence of the minor having been adopted with right of inheritance, she was a person to whom Letters of Administration might be granted under S. 41 of the Act.

[P 64 C 2]

Ko Ko Gyi—for Appellant.

Isral Khan—for Respondent.

Judgment.—This case illustrates the inconvenience which may be caused by a District Judge not bearing in mind the object of proceedings under the Probate and Administration Act. A sister applied for Letters of Administration to the estate of her deceased brother. He had no children of his body, but the father of the minor respondent acting as her guardian set up that she had been adopted by the appellant's brother and his wife. The District Judge framed one issue, "was Ma Chit Saw the adopted daughter of U Nge and Ma Saung?" He found in the affirmative and rejected the application. There were debts due to the deceased, the documents relating to which were apparently in the appellant's possession. As matters stand, no one can sue to recover those debts and some of them may have become barred by limitation. As stated in *Jagannath Prasad Gupta v. Runjit Singh* (1), the object of proceedings under the Probate and Administration Act is to determine only the question of representation of the deceased for the purpose of administering the estate, and not for the purpose of determining any question of inheritance. In *Ma Tak v. Ma Thi* (2) a Bench of this Court warned District Courts against entering into questions of adoption in proceeding under the

Act, pointing out that the rulings up to that time were to the effect that any decision on such a question under the Act was not final and would not operate as res judicata in any subsequent suit in which the party dissatisfied with the decision might raise the same question. The later case of *Lalit Mohan Das v. Radha Ramau Saha* (3) is to the same effect. A decision in such proceedings being practically ineffective, it is waste of time and labour to take evidence about the adoption. The present case was a simple one. The applicant was admittedly a sister of the deceased, and nothing against her character was alleged. S. 13 of the Act forbids Letters of Administration being granted to a minor, and there being no will and consequently no residuary legatee, Letters could not have been granted to the guardian of the minor even if he had applied for them.

Prima facie, the sister was a person under S. 23 of Act to whom Letters might be granted, but even if she, might as the result of litigation, turn out to have no right to any part of the estate in consequence of the minor having been adopted with right of inheritance, she was a person to whom Letters of Administration might have been granted under S. 41 of the Act. The order of the District Judge is set aside. He will issue Letters to the applicant in the case on her filing the proper court-fee and furnishing security. The respondent's guardian must pay the costs of the appellant on this appeal, two gold mohurs allowed as advocate's fee.

K.N./R.K.

Appeal accepted.

3. (1911) 10 I C 423.

A. I. R. 1918 Lower Burma 64

TWOMEY, C. J. AND PARLETT, J.

Firm of A. C. Kundu—Plaintiff—Appellant.

v.

H. Rookonanand—Defendant—Respondent.

First Appal No. 105 of 1917, Decided on 14th August 1917.

(a) *Transfer of Property Act* (4 of 1882), S 69—Mortgage with power of sale—Default in payment of interest—Right of redemption is dependent on punctual payment of monthly interest.

Where a mortgage instrument gives the mortgagee power of sale at any time in default of payment of principal or interest and the sale-proceeds are to be applied towards the payment of the principal and interest, the document

1. (1898) 25 Cal 354.

2. (1909-10) 5 L B R 78=3 I C 719.

should be considered as a whole subject to S. 69, T. P. Act, and the right of redemption should be taken as dependant on punctual payment of the monthly interest as it falls due in the meantime.

[P 66 C 1]

(b) Transfer of Property Act (4 of 1882). S. 69—Power of sale can be exercised although no default in payment of principal.

Section 69, T. P. Act, contemplates the exercise of the power of sale even if there has as yet been no default in respect of payment of the principal money.

[P 65 C 2]

(c) Transfer of Property Act (4 of 1882). S. 58—Mortgage money includes interest.

The terms "mortgage money" S. 58, T. P. Act, includes interest along with the principal. *Case-law referred*.

[P 65 C 2]

J. R. Das—for Appellant.

Leach—for Respondent.

Twomey, C. J.—The parties carried on business in Moulmein, one of the towns to which S. 69, T. P. Act, expressly extends, and on 19th December 1913, the plaintiff firm mortgaged certain immovable property to the defendant for Rupees 25,000 advanced and such further sums as might be advanced up to Rs. 75,000 in all. The mortgage instrument allows redemption on payment of principal and that interest shall be paid monthly. It also gives the mortgagee a power of sale to be exercised "at any time" and provides that if the power is exercised, the sale-proceeds after meeting the incidental expenses shall be applied to pay and satisfy the moneys which shall then be owing upon the security of the mortgage, any surplus being paid to the mortgagor. To the power of sale is annexed a proviso that

"the power of sale shall not be exercised unless a default shall be made in payment of the said principal sum or the interest thereof."

As the interest was not paid monthly and was heavily in arrear, the defendant (mortgagee) threatened in February 1917 to exercise his power of sale. The plaintiff firm (mortgagor) then brought this suit for an injunction to restrain the defendant from exercising the power of sale. The District Court has dismissed the suit and the plaintiff firm now appeals to this Court. Their main contention is that in India a power of sale under the mortgage must conform with the provisions of S. 69, T. P. Act, and that the power contemplated in that section is not exercisable unless there has been a default in payment of the principal money, which cannot occur until the period allowed for redemption has expired. I think the first part of this contention is correct but not the rest. The section clearly contem-

plates the exercise of the power of sale when interest amounting to Rs. 500 at least is in arrear and unpaid for three months after becoming due. "Default of payment of loan mortgage money" in the Para. 1 of the section would include default of payment of interest, for the term "mortgage money" is defined in S. 58 as the principal money and interest of which payment is secured, and thus it appears that "mortgage money" includes interest as principal is. The use of the conjunction "and" does not imply that the term "mortgage money" is applicable only to principal and interest in combination. In my opinion it is not to be held that there is anything in the section inconsistent with the exercise of the power of sale prior to the expiration of the period allowed for redemption. We have been referred to the ruling of the Privy Council in *Venkatachandra Iyengar v. Venkata Lakshmanal* (1). The mortgage instrument in that case had a clause giving a power of sale which was exercisable if any "obstruction" was caused by the mortgagor in respect of the conditions in the mortgage, and it was held that in the event of such obstruction the mortgagee could sell the property before the expiry of 12 years, the period of redemption, and could pay himself from the sale-proceeds the full amount of principal and interest, not merely the interest then due but interest also for the unexpired portion of the term of 12 years.

It was held that this clause was in the nature of a penalty and could not be enforced; but that is a different thing from saying where the deed gives a power of sale on default of payment of interest, that the mortgagee cannot exercise it to the extent of recovering the full amount of principal and the interest due up to the time of the suit unless the period allowed for redemption has expired. In the Privy Council case the clause was held to be in the nature of a penalty only because it provided for the recovery of interest for the period which had still to run. If the Privy Council ruling gave rise to any doubt on the subject, it has been set at rest by S. 69, T. P. Act, which, as noted above, clearly contemplates the exercise of the power of sale even if there has as yet been no default in respect of payment of the principal money. We have, how-

ever, to consider whether the mortgage instrument in this suit does in fact provide for the power of sale on default of payment of interest alone and for the recovery of the full amount of principal and interest up to date in the event of such defendant. The power of sale is to be exercised according to the instrument "at any time" on default of payment of "principal or interest." The provision in the deed as to the disposal of the sale-proceeds shows that when the power of sale is exercised, not only the interest which is in arrears but also the principal amount secured is to be recoverable from the sale-proceeds. The mortgagee is to take the moneys which shall then be "owing on the security of the mortgage." Although the principal money could not in ordinary circumstances be demanded till 31st December 1919, still it is a debt and is owing to the mortgagee from the time when the money was actually advanced to the mortgagor.

It is true that the exercise of the power of sale before 31st December 1919 has the effect of defeating the express provision for re-conveyance on payment of principal and interest on that date. But the document must be taken as a whole and it appears to me that the parties clearly intended the right of redemption on 31st December 1919 to be dependent on punctual payment of the monthly interest as it fell due in the meantime. I can see no reason why the Courts should not give effect to this intention. I would, therefore, dismiss the appeal with costs.

Parlett, J.—I concur.

K.N./R.K. *Appeal dismissed.*

* A. I. R. 1918 Lower Burma 66

RIGG, J.

San Hla Baw—Plaintiff—Appellant.

v.

Mi Khorow Nissa and others—Defendants—Respondents.

Special Second Appeal No. 19C of 1916, Decided on 3rd December 1917.

*Practice—Judge—Duty of—Judge's knowledge can be used in valuing credibility of witness—Refusal to believe on ground that many cases of party were found to be false held justifiable.

A Judge is justified in using his knowledge about the character of the parties to a suit to come to a decision upon the credit to be attached to their evidence on the case set up by them.

[P 67 C 1]

Where a District Judge declined to believe in the bona fides of a suit brought by the plaintiff,

unless it was supported by evidence that left no doubt in the mind of the Judge as to its credibility, on the ground that many of the suits launched by the plaintiff in his Court had been found to be false:

Held: that the Judge was justified in alluding to his experience of the plaintiff's litigation in his Court. [P 67 C 1]

S. M. Bose—for Appellant.

J. E. Lambert—for Respondents.

Judgment.—*San Hla Baw* Mi sued *Khorow Nissa*, wife of *Kalathan* deceased, *Mi Shora Bi*, *Kalathan's* daughter, and three minor children of defendant 1 for recovery of Rs. 120 said to be the balance rent due on a lease executed by *Kalathan* on 9th May 1913. The suit was filed in the Township Court of *Rathedaung* on 25th November 1915. Neither party was assisted in the Township Court by an Advocate in the trial in which, as the District Judge has remarked, the evidence was recorded in a somewhat perfunctory way without any attempt being made to test the credibility of the witnesses. The Township Judge decreed the claim. The decision was reversed on appeal to the District Court, *Akyab*. On second appeal to this Court exception has been taken to the nature of the judgment written by the learned District Judge. He commences his judgment by saying:

"This is a typical 'San Hla Baw' case. He wants really to get a decree for certain land standing in some one else's name; so he brings a suit, something like two years after it is due, for rent against the heirs of the late owner . . . His ways of business are, I know, very slipshod, and usually sail very close to the wind. . . . *San Hla Baw*, of course, is a convicted perjurer and a man who by his own admission is prepared to swear to anything to gain time when he is pressed."

The Judge also refers to the evidence of *Tha Kaing* who he states, is a man who to his own knowledge is accustomed to give evidence on behalf of *San Hla Baw*. He describes *Tha Kaing* as *San Hla Baw's* creature. It is urged in the appeal to this Court that the Judge was not justified in making remarks about the characters of the witnesses, when such characters were not established by any evidence on the record but were matters of personal knowledge of the Judge. In *Bamundoss Mookerjee v. Mt. Tarine* (1) their Lordships of the Privy Council observe as follows:

"An observation, however, is made by the *Sudder Dewanny Court*, that the *Zillah Judge*, with respect to two of the attesting witnesses has

1, (1857-39) 7 M I A 169=19 E R 273 (P C)

spoken of them from his own knowledge, as being what he calls 'professional-witnesses,' persons of no character, and, therefore, entitled to no credit whatever. He does not say that as we understand him, from his own personal knowledge of the parties, as being in the habit of coming before his Court. Now, the Judges in the Sudder Dewanny Court have passed a severe censure upon the Zillah Judge, for making that observation. Their Lordships think it right to say that in that censure they do not at all concur. It is of great importance that the Judge should know the character of the parties, and it is of great advantage to the decision of the case, that it is heard by a Judge acquainted with the character of the parties produced as witnesses, who is capable, therefore, of forming an opinion upon the credit due to them."

Again in *Mahomed Buksh Khan v. Hosseini Bibi* (2) their Lordships say that they thought the Subordinate Judge was right in relying on the evidence of the Sub Registrar and of the Mukhtar, with whose character the Subordinate Judge seemed to have been acquainted:

"The Subordinate Judge says he holds a diploma, and is a respectable person in his community, and the Court has never seen any act of his by which it can suspect him."

These cases are sufficient authority for justifying a Judge in using his knowledge about the character of the parties to come to a decision upon the credit to be attached to their evidence or the case set up by them. On the other hand, it has been laid down by their Lordships in *Hurpurshad v. Sheo Dyal* (3) that a Judge cannot, without giving evidence as a witness, import into a case his own knowledge of particular facts. Their Lordships appear to draw the distinction between the conclusion drawn from the knowledge of a Judge about the general character and position of the parties and their witnesses and his knowledge regarding any particular facts connected with the facts in issue in the case. I am of opinion, therefore that the District Judge was justified in alluding to his experience of San Hla Baw's litigation in his Court and in declining to believe in the bona fides of the class of the cases launched by him, many or others of which had been found to be false, unless the case was supported by evidence that left no doubt in the mind of the Judge about its credibility.

A. I. R. 1918 Lower Burma 67

TWOMEY, C. J. AND ORMOND, J.

Ko San U and another - Plaintiffs -
Appellants.

v.

Ma Thaung Me - Defendant - Respondent.

First Appeal No. 103 of 1917, Decided on 23rd May 1918, against J. C. of Dist. Judge, Hanthawaddy, in Civil Regular No. 32 of 1916.

Contract Act (9 of 1872), S. 16—Gift by lady to nephew working as agent—Undue influence can not be presumed.

Where a Buddhist lady made a gift of some land to her nephew who was also acting as her agent:

Held: that although there was what may be called a fiduciary relationship between the parties it was not such as would lead the Court to infer undue influence. [P. 65 C 2]

Sin Hla Jung—for Appellants.

P. N. Chari—for Respondent.

Judgment—The plaintiffs appellants Mg. San U and his wife Ma Byaw sued for a declaration of title in respect of two pieces of paddy land and for possession of the lands and mesne profits. These two pieces of land together with two houses were given on 28th May 1912 by a registered document to the plaintiffs by Ma Byaw's aunt Ma Leik and possession was given to the donees. Ma Leik died about July 1914. The defendant Ma Thaung Me was the adopted daughter of Ma Leik and her husband U Po, who predeceased Ma Leik in April 1911, i. e., about a year before the date of the gift. When U Po died Ma Thaung Me applied for Letters of Administration to his estate and the widow Ma Leik, Ma Thaung Me's adoptive mother, opposed the application and denied the adoption. The Letters of Administration were granted to Ma Leik. Ma Thaung Me then instituted a suit to have her adoption recognized and she was successful in that suit. In execution of her decree for costs against Ma Leik, Ma Thaung Me attached one of the houses which had been given to Mg. San U and Ma Byaw. Mg. San U and Ma Byaw applied for removal of the attachment as donees and subsequently sued for a declaration of title to the house in the Subdivisional Court of Twanta. They succeeded in that suit and Ma Thaung Me's appeal to the Divisional Court and her second appeal to this Court were dismissed.

Then the present plaintiffs brought this present suit for possession of the

K. N. / R. K.

Appeal dismissed.

2 (1918) 15 Cal 644 = 15 I A 51 (P. C.).

3. (1917) 26 W R 55 = 3 I A 159 (P. C.).

S. N. D.
Advocate High Court

Jammu & Kashmir

two pieces of land against Ma Thaung Me, who had obtained possession from the administrator pendente lite of Ma Leik's estate. The learned District Judge, after examining various rulings of the Indian High Courts on the subject of undue influence, has come to the conclusion that Mg. San U being in a position of active confidence towards Ma Leik the burden of proving that no undue influence was exercised by him lay on him and that he has not satisfactorily discharged the burden, as she has not shown that at any time either before or after the making of the gift on 28th May 1912 Ma Leik had any independent advice from anybody conversant with the full facts of the case. He decided therefore that the gift was avoidable by Ma Leik and after her death by her legal representative Ma Thaung Me, the defendant.

The execution of the deed of gift is clearly established and it is also clear that the donor was at that time in full possession of her faculties, though she was then a very old woman. San U had a power of attorney from Ma Leik and was acting as her agent from the time of her husband's death in 1911 until she died in 1914. He had to transact all Ma Leik's business in Court. He and his wife lived with Ma Leik up to time of the gift but when the gift was made, Ma Leik went to live in another house with her sister Ma Hla. San U however continued to look after the property of her. During the two years which elapsed between the time of the gift and Ma Leik's death in 1914 she took no steps to revoke the gift and in January 1914 she gave evidence that she had made a gift. It is clear that Ma Leik fell out with her adopted daughter Ma Thaung Me, though it does not appear whether their first disagreement was prior to the gift of 1912 or not. The learned Judge remarks that Ma Leik's dislike of Ma Thaung Me may have been due to the fact that Ma Thaung Me had neglected her adoptive parents for some years. Ma Thaung Me admits that she left U Po's house about two years before his death in 1911, that she saw him afterwards only once and she was not present at his funeral. As the learned Judge remarks, there is no need in the circumstances to presume any undue influence as accounting for the favour shown to Mg. San U and Ma Byaw. The donor's estrangement from her adopted

daughter Ma Thaung Me and the desire to prevent her from getting the lands after Ma Leik's death would be sufficient to account for Ma Leik's action in making the gift to Mg. San U and Ma Byaw, whom she probably regarded with as much affection as if they were her own children. In setting aside the gift the learned Judge was influenced by the fact that the relationship of principal and agent existed between Ma Leik and San U. He considered that they stood to one another in such a fiduciary relationship that San U was bound to prove the good faith of the transaction under S. 111, Evidence Act, by showing that Ma Leik had independent advice. It has been pointed out in the case of *Maung Pu v. Lucy Moss* (1) that under the English law there is no presumption of undue influence in the case of a gift to a son, grandson or son-in-law even if made during the donor's illness and a few days before his death and that the Indian law in this respect would be the same. In *Coomber, In re, Coomber v. Coomber* (2) there was a gift by a mother to her son who had managed her business for her and collected her rents. The learned Judges decided that although there was what might be called a fiduciary relationship between the mother and the son, it was not such relationship as would lead the Court to infer undue influence and that the burden of proof did not lie upon the donee. We do not consider that the present case is one in which the plaintiffs were bound to show that Ma Leik had independent advice. It is sufficient that she knew perfectly well what she was doing, that she had a clear motive for it and that she abided by her act for the remaining two years of her life.

It was pleaded in para. 2 of the written statement of Ma Thaung Me that Ma Leik at the time of the gift was the owner of the property subject to the rights of Ma Thaung Me as Auresa child and that in any case therefore the gift should be held valid only to the extent of Ma Leik's interest in the property. But it would follow from the ruling in the Full Bench case of *Ma Sein Ton v. Ma Son* (3) that on the death of a father the eldest daughter can possibly claim a quarter share of the joint property of her

1. (1915) 8 L B R 251=26 I C 83.

2. (1911) 1 Ch 727=30 L J Ch 399.

3. (1915) 8 L B R 501=30 I C 588.

parents. At the hearing of this appeal Mr. Chari for the respondent expressly waived Ma Thaung Me's claim to a share as Aurasa child set up in the defendant's written statement.

We find that the gift to the plaintiffs-appellants was valid; the decree of the District Court will be set aside, and there will be a declaration in favour of the plaintiffs that they are the absolute owners of the two pieces of land referred to in the plaint and for possession of the said lands. The question of mesne profits from 1913-1914 onwards has not been decided and the defendant-respondent's Advocate in the District Court expressly stated that the claim for mesne profits as set forth in the plaint was not admitted. The case must therefore be remanded to the District Court for inquiry as to the amount of the mesne profits and when the amount is determined the District Judge will thereupon grant a decree on the amount so determined with costs. The defendant-respondent will pay the plaintiffs-appellants costs in all Courts.

K.N./R.K.

Case remanded.

A. I. R. 1918 Lower Burma 69

MAUNG KIN, J.

Bichay Sukul—Appellant.

v.

Behari Sukul—Respondent.

Second Appeal No. 40 of 1916, Decided on 15th March 1917.

(a) Practice — Appellate Court disposing of case on point raised by itself commits error of law.

A Judge who disposes of a suit on a point taken by himself on appeal without affording the parties an opportunity of proving what is necessary to meet the point, commits an error of law: 17 *Mad.* 140, *Foll.* [P 70 C 1]

(b) Negotiable Instruments Act (1881), S. 87 — Difference of ink does not amount to material alteration — Altering a figure does not amount to forgery.

It is absolutely wrong to say that because a man alters a figure in a document, he thereby forges the document, or because there is something in a different ink to the rest of the document, there must be a material alteration of the document. [P 70 C 1]

J. R. Das—for Appellant.

Doctor—for Respondent.

Judgment.—The suit was by the appellant for the recovery of Rs. 1,720 principal and interest alleged to be due on a promissory note for Rs. 1,000, dated 26th June 1914. The respondent replied that the promissory note sued on was a forgery and that on that date he borrow-

ed, not Rs. 1,000, but only Rs. 100 for which he executed a promissory note and that he had paid off what was due on the same. He produced what he alleged to be the promissory note for Rs. 100. The trial Court dismissed the suit on the ground that it was not satisfied that the plaintiff had proved his claim. The plaintiff appealed to the Divisional Court which confirmed the decree of the trial Court. There is on the record much evidence on both sides. But the learned Divisional Judge apparently found it unnecessary to consider it, as he had seized on what he apparently considered to be a matter which helped to dispose of the suit without calling for further evidence or explanation. It was a matter which he himself discovered and from it he drew his own inferences without giving the party against whom he drew the inferences an opportunity of explaining the matter. I will now quote the learned Judge's words to show how he made the discovery:

"while the case was being argued in this Court, I noticed that the last figure in the number 1,000 and the dash at the end of the number had the appearance of being in a different ink from the other figures of that number, so I sent for a glass and examined it carefully. On examination through my glass, it is seen beyond doubt that the last 0 and the dash have been added, and that the note as originally written was one for Rs. 100 and not Rs. 1,000."

The learned Judge then proceeded to hold that that part of the defendant's story where he said he borrowed only Rs. 100 is true but the note he produced was a forgery and that the note he executed was the note sued on, which however the plaintiff had forged by altering the figure "100" into the figure "1,000". He further held that it followed that the defence that the defendant repaid the loan must also be false. Both sides were therefore guilty of perjury and forgery but the plaintiff could not get a decree even for the amount held to have been borrowed by the defendant, as he had materially altered his pro-note. Now the learned Judge has worked out all this upon the basis of the plaintiff having made the alteration in question. What he held may be put in a few words: the plaintiff altered his note, therefore he is guilty of forgery; the alteration is material, therefore the note becomes void by reason of that. It is apparent that his views are based upon assumptions which have not been put down in

black and white. But I may say in passing that it is satisfactory to note that he has not done so, for I am going to remand the case for further evidence. In my judgment it is absolutely wrong to say that because a man alters a figure in a document, he thereby forges the document, or because there is something in a different ink to the rest of the document, there must be a material alteration. It is obvious that it is not fair to resort to this train of reasoning without giving the party affected thereby a reasonable opportunity of meeting it. What appears at first sight to be suspicious may be capable of a satisfactory explanation and to use a homely saying, circumstances often alter cases.

For the above reasons, I will order that the case be remanded to the trial Court upon the following issue: How did it happen that the last figure "0" in the number 1,000 and the dash at the end of the number have the appearance of being in a different ink from the other figures of that number? The trial Court will record such evidence as is offered by the parties on the issue and return the proceedings together with its findings through the Divisional Court, which will make any remarks it may think proper upon the findings of the trial Court. This order is justified by the cases of *Kristamma Naidu v. Chapa Naidu* (1), where it was expressly held by Collins, C. J., that a Judge who disposed of a suit on a point taken by himself on appeal, without affording the parties an opportunity of proving what was necessary to meet the point, was wrong in law. The question immediately before the Full Bench in that case was whether such an error was a ground for revision under S. 622, Civil P. C., which is S. 115 in the present Code. The other Judges went upon the assumption that the error was one of law without expressly saying so and discussed the applicability of S. 622 to the case.

K.N./R.K.

Case remanded.

1. (1391) 17 Mad 410.

A. I. R. 1918 Lower Burma 70TWCNEY, C. J. AND PARLETT, J.
Maung Shwe Min—Appellant.

v.

Chetty Firm of A. M.—Respondents.

First Appeal No. 110 of 1916, Decided on 23rd August 1917.

Evidence Act (1 of 1872), S. 92 (4)—Mortgage—Oral agreement to forego is inadmissible—No payment of principal—No application of Contract Act (9 of 1872), S. 63.

A mortgagee, desirous of getting in his outstanding debts, made an oral offer to the mortgagors that he would accept the principal money in full satisfaction of the mortgage debt foregoing the interest that had accrued for some three years. The mortgagors accepted the offer and tried to raise the money but they could not raise it and no tender of the principal money was made to the mortgagee:

Held: (1) that the oral agreement was inadmissible in evidence in view of the prov. 4, S. 92, Evidence Act; (2) that as there was no payment of the principal money, the provisions of S. 63, Contract Act, did not apply. (P 71 O 1)

Ormiston—for Appellants.*J. R. Das*—for Respondents.

Judgment.—This was a suit for the principal and interest due on a mortgage instrument. The appellants owed the defendant-respondent firm Rs. 10,000 on a registered instrument of mortgage executed in 1905, the stipulated rate of interest being 1/12 per cent. per mensem. The agent of the respondent firm at that time was Allagappa Chetty. It appears that a new agent Muthia being appointed in 1906 and Allagappa, being desirous of getting in the outstanding debts of the firm before going back to Madras, made an oral offer to the mortgagors that he would accept the principal money Rs. 10,000 in full satisfaction of the mortgage debt foregoing the interest that had accrued for some 3 years. The mortgagors accepted this offer and took some steps to raise the money. But they did not actually raise it and no tender of Rs. 10,000 was made. They explain that as there was a dispute between Allagappa and Muthia as to whether the defendant's outgoing or incoming agent should receive the money they, the mortgagors, told them to settle between themselves who was to receive it and as they did not settle this point, the money was never actually paid. Some years later, before the institution of the suit the agent Muthia demanded the money from the plaintiffs appellants but they declined to pay him unless the former agent Allagappa came along too. In the mortgage instrument the mortgagee is mentioned as A. M. Allagappa Chetty, but it was not disputed in the written statement or apparently at the hearing of the suit that it was a mortgage to the A. M. Firm of which Allagappa was the agent

at the time and of which Muthia is the present agent.

The learned Judge on the Original Side has granted a decree for the full amount of principal and interest as claimed in the plaint, holding that the mortgagors failed to carry out their part of the oral arrangement of 1908 and cannot now rely upon that arrangement as absolving them from payment of interest. In my opinion this view is clearly correct. The arrangement was that the principal money should be paid in cash at once or at any rate while the two agents were making over and taking over charge. The defendants-appellants cannot now avail themselves of the excuse that the two Chetties were unable to agree among themselves which of them was to receive the money. It was open to the mortgagors to deposit the money in Court under S. 83, T. P. Act, or at least to tender the money to one or other of the two agents. They did not tender the money at all and did not even raise the amount required. By their own want of diligence they lost the opportunity which had been given to them of obtaining a discharge in full by prompt payment of the principal money.

I agree also in the learned Judge's remark that evidence as to the oral agreement of 1908 was really inadmissible in view of the provisions of S. 92, Prov. 4, Evidence Act. The appellants' learned counsel refers to S. 63, Contract Act, as showing that an oral agreement to forego interest can be enforced. If the mortgagors had actually paid up the principal money at the time and had thereupon obtained a discharge in full of the mortgage debt, they could doubtless under S. 63, Contract Act, rely on such discharge as a good defence if the mortgagees were afterwards to sue them for the interest. But in the present case there was no such payment and no such discharge and the provisions of S. 63, Contract Act, cannot, in my opinion, affect the application of S. 92, Evidence Act, to the oral agreement, which was not carried out. The application is dismissed with costs.

K.N./R.K. *Application dismissed.*

A. I. R. 1918 Lower Burma 71

ORMOND, OFFG. C. J.

Ma Pan U—Plaintiff—Applicant.

v.

Ma Shwe Tint—Defendant—Opposite Party.

Civil Revn. No. 95 of 1916, Decided on 5th March 1917.

★ Registration Act (16 of 1908), Sec. 17 and 49—Unregistered document affecting immovable property lost—Secondary evidence is admissible only to prove oral agreement not affecting land.

Secondary evidence of a lost unregistered document affecting an interest in immovable property and therefore required to be registered is not admissible as evidence of any transaction affecting such property but such evidence is admissible to prove the document so far as it evidences an oral agreement not affecting the land or any interest in land. [P 72 C 1]

Lambert—(for Applicant).

Moung Thin—(for Opposite Party).

Judgment.—In 1910 the plaintiff-appellant advanced Rs. 450 to the parents of the respondent in consideration of being put into possession of certain land, and it was agreed that the plaintiff should take the profits in lieu of interest. The transaction was reduced to writing but not registered. In 1915 the plaintiff had to give up possession to the respondent because the document not having been registered, the plaintiff had no right or interest in the land and therefore had no legal right to possession. The plaintiff then instituted this suit in September 1915 asking for a money-decree for the Rs. 450. In the Township Court the plaintiff obtained a decree; in the District Court plaintiff's suit was dismissed on the ground that the plaintiff was prevented from proving the agreement under which he obtained possession by Ss. 49 and 17, Registration Act. The plaintiff applies in revision on the ground that the District Court wrongly rejected that evidence. S. 17 requires this document to be registered. S. 49 says:

"No document requiring under S. 17 to be registered shall affect any immovable property comprised therein, or be received as evidence of any transaction affecting such property."

The document in the present suit has been lost but if the plaintiff could not prove that document if available, he would be debarred from proving it by secondary evidence. But the plaintiff does not rely upon that document to prove any transaction affecting the land. He does not claim that he ever had any legal right to the possession of the land under that docu-

ment. That he is entitled to use that document as evidence of an oral agreement which does not affect the land or any interest in the land has been held by all the High Courts of India: vide, *Ulfatunnissa v. Hosain Khan* (1) and in this Court *Myat Thin v. P. C. V. E. Kasu Visvanathan Chetty* (2). The District Judge, therefore, wrongly held that that evidence was inadmissible. From this judgment it appears that he concurs with the Township Judge in the findings of fact, if this evidence was admissible, i. e., that the plaintiff advanced Rs. 450 to the defendant's parents in 1910 and obtained possession and received the profits in lieu of interest and was dispossessed in 1915. That being so, plaintiff is entitled to a decree for Rs. 450 against the respondent in her representative capacity with costs in both Courts, and three gold mohurs for the costs of this application.

K.N./R K. Application accepted.

1. (1883) 9 Cal 520 (F B).

2. (1907-08) 4 L B R 52.

A. I. R. 1918 Lower Burma 72

TWOMEY, C. J. AND MAUNG KIN, J.

David M. Bruce and another—Plaintiffs—Appellants.

v.

Mg. Kyaw Zin—Defendant—Respondent.

First Appeal No. 54 of 1917, Decided on 29th April 1918, against decree of Original Side of the High Court, in Suits Nos. 219 and 220 of 1915.

(a) Tort—Vicarious Liability—Master is liable if act is done in course of service and for his benefit.

A master is answerable for every such wrong of his servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved. [P 70 C 1]

(b) Tort—Vicarious Liability—Liability is not of owner as such but as employer of crew.

The owner of a vessel is not liable qua owner for damage caused by the negligence of the crew. He is liable only as employer of the wrong-doer. [P 74 C 1]

(c) Evidence Act (I of 1872), S. 102—Master's liability for wrong of servant—Burden of proof of limit of authority is on master—Tort—Vicarious liability.

In a case where the question is whether a particular act was or was not within the scope of the agent's employment, the burden of proving the limit of the agent's authority is on the principal, inasmuch as the character of the authority is a matter specially within the knowledge of the latter, [P 74 C 1]

Lentaigne—for Appellant^s.

Vakharia—for Respondent.

Twomey, C. J.—These appeals which were heard together arise out of two suits in which the plaintiffs-respondents (1) Messrs. Walker and Whyte, Ltd., and (2) Mr. and Mrs. Bruce claimed damages from the defendant-respondent Mg. Kyaw Zin on account of a collision between Kyaw Zin's motor launch "Handy" and Walker and Whyte's "Triad" on the evening 7th January 1915 in the Kanoungto Creek. The Triad's bows were smashed and she sunk and Mr. and Mrs. Bruce who were crossing in the Triad to the Rangoon side had to swim for their lives. The collision was admittedly caused by the negligence of Haidayut Ali, the Serang of the Handy. His certificate was afterwards suspended and he was also prosecuted and punished under the Penal Code. Kyaw Zin, the owner of the Handy, lives at Kya In, a village in the delta about 7 hour's journey from Pyapon. The launch was used by him to ply with goods and passengers in the delta. He sent it in July 1914 to Messrs. G. Nichols and Co., Marine Contractors, Rangoon, to have a new engine put in. In November Nichols wrote that the new engine was ready and asked Kyaw Zin to send Rs. 4,000, the amount agreed upon. Kyaw Zin sent his young cousin Klai Po to Rangoon to pay the money and bring the launch to Pyapon. She was not brought back at once. She was hired out with a crew of a Serang and engine driver, first to the Arracan Co. for 18 days at Rs. 500 a month and subsequently to Messrs. Steel Bros., Ltd., at Rs. 15 a day. She had been only for 2½ days with Steel Bros. when the accident occurred.

The plaintiff's case in both suits is that Klai Po was Kyaw Zin's agent, that the crew were engaged by Klai Po, that the launch was hired out by Nichols as broker for Klai Po to Steel Bros. and that Kyaw Zin is responsible as owner of the launch and as Klai Po's principal for the results of the Serang's negligence. The defendant-respondent Kyaw Zin has not been consistent in his defence. In a letter, Ex. 5, written by his legal adviser Mr. Broadbent two months after the accident, it is said that Klai Po without authority from Kyaw Zin hired out the launch to Nichols and that it was Nichols who engaged the crew and that he let out the launch on his own account to

the Arracan Co. and afterwards to Steel Bros. In his written statement Kyaw Zin takes up a different position, viz., that Nichols having possession of the launch hired it out without any authority. The written statement does not refer to Klai Po at all. When examined at the hearing Kyaw Zin at first said that Klai Po came back to Kya in December for a few days and left word that he had hired out the launch to Nichols, but when the evidence was read over to Kyaw Zin he altered this statement and said Klai Po left word merely that "Nichols had hired out the launch." Klai Po in his evidence said that Nichols asked him to hire the launch to him but that they did not agree about the rate of hiring. He denied that the Serang and engine driver were engaged by him and denied also that the launch was hired by his authority to Steel Bros. The learned Judge found that it was Klai Po who engaged the crew and also that Klai Po hired out the launch to Steel Bros. through Nichols as broker. But the Judge held that Klai Po was employed by Kyaw Zin merely as a clerk and that he had no authority to hire out the launch and that in hiring it out he acted beyond the scope of his employment. The Judge added:

"To hold otherwise means to hold that he had powers of management and was in fact the agent of defendant for which there was no justification"

The plaintiffs' suits were, therefore, both dismissed.

It is urged for the defendant that this decision is right if it be assumed that the crew was engaged and the launch hired out by Klai Po, but we are asked to go further and hold on the evidence produced that Klai Po did not engage the crew and that if he did hire out the launch he hired it only to Nichols, who thereupon engaged the crew and sublet the launch on his own account. Klai Po is clearly not a truthful witness and Nichols has a strong motive for supporting the view that he himself acted merely as a broker. The documentary evidence is very much against defendant. Nichols' salary book Ex. R, which appears to be kept regularly, does not show that Haidavut Ali and Tha Maung the Serang and engine driver were employed by Nichols during the material period, November 1914 to January 1915. If these men were engaged by Nichols for the period in December when the launch was hired out

to the Arracan Co. and the period in January when she was hired out to Steels, their names, salary and acquittances would probably appear in this book in the ordinary course of business. If it be true that Chinasawmy Pillay, who was at that time a clerk of Nichols, refers at the end of his evidence to another book, an "engagement book", as showing for what period Nichols' men were employed. But in an earlier part of his evidence this witness says there is no other establishment book except Ex. R and that this is the only book by which he could say who the employees were. This witness says that receipts for salary were sometimes taken on slips of paper and not in the book. He supports defendant's case that it was Nichols who engaged the crew and says that so far as he knows, Nichols had no authority from Klai Po to hire out the launch. But Chinasawmy is unfriendly to Nichols. He is now a rival in the stevedoring business.

He admits that he left Nichols partly "because he could not put up with his ways and manners" and that he afterwards wrote to a Liverpool firm, with which Nichols had business, a letter, Ex. Q, in which he tried to injure Nichols and get the English firm's business in Rangoon away from Nichols. It seems to me, Ex. R must be regarded as strong negative evidence against the defendant. Tha Maung (P. W. 8) himself said that he was engaged by the clerk Klai Po and worked for him as engine driver on the *Haudy* for over two months and was paid by him altogether Rs. 75 or Re. 80. But Tha Maung's evidence must be accepted with considerable reserve as he is a nephew of Mrs. Nichols. Klai Po admits that he paid Tha Maung Rs. 30 but says he took him on only after the collision. He admits, however, giving Tha Maung a certificate Ex. B on 1st February, in which he says that Tha Maung worked for him for three months. Then we have Ex. 5 in which there is a clear admission that Klai Po paid off the crew, though it is said that Nichols induced him to do so "taking full advantage of his simplicity and ignorance of business." Kyaw Zin gives Klai Po's age as 20; but Klai Po himself owns to nearly 24, and he has a fair knowledge of English as he passed the 8th standard. After the collision he signed

the receipts Exs. D and E for the hire of the launch by the Arracan Co. and Steels and in each of these receipts the transaction appears as a hiring out by Nichols as broker on behalf of Maung Kyaw Zin. These are both signed "E. T. Klai Po, for Mg. Kyaw Zin."

We are asked to believe that this is only another instance of Nichols' superior cunning and Klai Po's ignorance and simplicity, but it is hardly likely that Klai Po signed the receipts without reading them and without noticing that Nichols figured in them merely as a broker. On the evidence there can be no reasonable doubt that it was Klai Po who engaged the crew and that Nichols was authorized by him to hire out the launch to the Arracan Co. and to Steels. It remains to consider whether the Judge was right in absolving the defendant on the ground that Klai Po acted beyond the scope of his employment in hiring out the launch through Nichols. The owner of a vessel is not liable *qua* owner for damage caused by the negligence of the crew. He is liable only as employer of the wrong-doer. The wrong-doer in this case, i. e. Serang was employed by Klai Po. The Judge considered that there was no justification for holding that Klai Po was an agent of the defendant. In this Court Mr. Vakbaria for the defendant does not go so far as this. He only urges that Klai Po in his capacity of clerk was an agent with strictly limited authority. I think it is for the owner to show clearly the character of Klai Po's agency and to prove that Klai Po exceeded his authority by hiring out the launch at Rangoon. The burden of proof on this point lay on the defendant according to the principle of S. 106. Evidence Act, for the character of Klai Po's authority was a matter specially within the principal's knowledge. We cannot rely on the evidence of either Kyaw or Klai Po. They have contradicted themselves and one another and their evidence conflicts in material particulars with the statements made on Kyaw Zin's instructions in Ex. 5.

It is clear on Ex. 5 that Klai Po was sent to Rangoon to take delivery of the launch and bring her to Pyapon, and Klai Po admits that he did bring her to Pyapon after the collision, having hired a Serang under Kyaw Zin's express instructions. Kyaw Zin has a brother Kya

Zin also called Mg. Di, and Klai lives with the two brothers who are related to him as second cousins once removed, but he calls them both his "uncles." Kya Zin as well as Kyaw Zin had a launch. It was called the *Admire*. Klai Po admittedly looked after it. It was Klai Po who started negotiations with Nichols for the purchase of the *Admire*. He went to Pegu with Nichols and saw the launch there and liking the look of her took her to Kya Zin, who then bought her. After the collision Klai Po had the *Handy* repaired at Rangoon, meeting the costs of the repairs out of the money received from the Arracan Co. and Steels. During this time he also applied to the Port Commissioners on behalf of his principal Kyaw Zin for license to ply the launch for hire. The engine driver Tha Maung says that before returning to Pyapon after the collision the launch was again hired by a broker and taken to a village beyond Kyauntan and that Klai Po directed him, Tha Maung, to go there with the launch, but Klai Po denies this hiring also. After returning to Pyapon the launch was plied for about six months in the delta and Klai Po was on the launch during the greater part of this time.

According to Kyaw Zin he was on her for about five months out of the 6. Kyaw Zin says that Klai Po was on the launch to look after the money and that he was only acting as a clerk. Klai Po himself says that he did not act as a clerk and he does not say in what capacity he was on the launch, except that he washed the launch when it was dirty. He got no pay. It is a legitimate inference that at this time at any rate, i. e., after the collision, he was looking after the *Handy* for Kyaw Zin as he had previously looked after the *Admire* for Kya Zin. He was evidently regarded by the Police as the person in charge of the launch, for he was arrested and kept in custody for a week or more when the *Handy* collided with a *Sampan* in the delta. As a matter of fact it seems likely that Kya Zin and Kyaw Zin were in partnership in the launch business, though Klai Po says that they were only planning to work together. Klai Po wrote and signed several letters about the launches for both the brothers. Several letters are produced written by Klai Po and signed by him for Kyaw Zin. Exs. L,

M, N, O are signed "Kyaw Zin Bros." while one letter, Ex P, is signed "Mg. Kyaw Zin Sigun" Mg. Sagun being the father of the two brothers.

Kyaw Zin and Klai Po would have us believe that Klai Po's principal object in going to Rangoon was to get employment for himself and that Kyaw Zin seized the opportunity of his going to Rangoon to send the Rs. 400 to Nichols. It is clear, however, that Klai Po remained in Rangoon only as long as the launch was plying there and then returned with her to his village after carrying out the repairs rendered necessary by the collision and obtaining a plying license from the Port Commissioners. The admissions of the defendant and Klai Po and the circumstances are, in my opinion, entirely inconsistent with the view taken by the learned Judge as to the nature of Klai Po's employment. The facts appear to me to show that Klai Po, being the best educated member of the family, was entrusted with a wide degree of control at Rangoon in the absence of Kyaw Zin. The very fact that he was paid no salary is significant. Kyaw Zin deputed him to bring the launch from Rangoon, which would necessarily involve hiring a crew. When Nichols proposed that the launch should be hired out in Rangoon, it seems probable that Klai Po readily agreed to the proposal. The launch had admittedly been plying at a loss in Pyawon—vide Kyaw Zin's evidence—and the opportunity of lucrative employment at Rangoon would no doubt be acceptable to Kyaw Zin. Klai Po admits that he did not communicate Nichols' proposal to Kyaw Zin at all. He probably thought that there could be no doubt as to his principal's approval. When he went back to Kya In for a few days in December, he left word for Kyaw Zin who was absent that the launch was being hired out at Rangoon. Kyaw Zin says that after receiving this message he wrote to Klai Po to tell Nichols to send the launch back to Pyawon at once. But he admits that he did not write until two weeks after Klai Po's return to Rangoon and a week after his own return to Kya In. Klai Po, on the other hand, denies that he received any letter from Kyaw Zin, but says he did receive a verbal message from him on the day of the collision to the effect that the launch should be sent back.

It is clear at any rate that Kyaw Zin expressed no disapproval of the hiring out at Rangoon. When the plaintiffs demanded compensation through their lawyers, Kyaw Zin visited Mr. Bruce and asked him to let him off. So far from disclaiming responsibility for the accident he offered to give up his own launch, the Handy, and his brother's launch "Admire" by way of compensation. The inclusion of the Admire in this offer lends colour to the suggestion that the two brothers were really in partnership though it may have been that Kyaw Zin only counted on obtaining the consent of Kyaw Zin to sacrifice the Admire.

I would hold that the defendant failed entirely to prove that Klai Po was a mere clerk with no powers of management and that on the contrary the evidence is sufficient to show that Klai Po had considerable powers of control at Rangoon. He was sent there to bring the launch to Pyawon. He had to get a license from the Port Trust, to hire a crew, and to buy petrol for the launch. While at Rangoon he saw that it would be to his employer's benefit to hire out the launch there and that he did so apparently without consulting the owner or thinking it necessary to do so. But he was acting for the owner's benefit and he evidently considered it so much a matter of course that he did not inform Kyaw Zin of what he was doing until he went back to the village some weeks later, and even then he only left a casual message that the launch had been hired out at Rangoon. It is unlikely that Klai Po would have acted in this manner if his authority from Kyaw Zin was not wide enough to let out the launch at all. Kyaw Zin's inaction on hearing of the letting out, his apparent acquiescence in what Klai Po had done, suggests that Klai Po had in fact the necessary authority. The relations between Klai Po and his two uncles and the admissions of Klai Po as to his connexion with the Admire and the Handy strongly support this inference. It is instructive to remember that an interval of about three weeks elapsed between the time that Klai Po went to Rangoon for the launch and the time in December when he returned to the village for a few days. If he had no authority from Kyaw Zin except to go and fetch the launch, Kyaw Zin would probably have written or sent a message

enquiring the reason of delay in bringing the launch to Pyapon. His inaction leads to the inference that he had constituted Klai Po his representative and agent for the purpose of dealing with the launch and that it was left to Klai Po either to bring the launch back at once or to deal otherwise with it as might seem profitable. The case falls within the general rule laid down by Willes, L. J., in *Barwick v. English Joint Stock Bank* (1):

"The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved. That principle is acted upon every day in running down cases. It has been applied also to direct trespass to goods, as in the case holding the owners of ships liable for the act of masters abroad improperly selling the cargo. It has been held applicable to actions of false imprisonment, in cases where officers of Railway Companies, entrusted with the execution of bye-laws relating to imprisonment, and intending to act in the course of their duty, improperly imprisoned persons who are supposed to come within the terms of the bye-law. It has been acted upon where persons employed by the owners of boats to navigate them and to take fares have committed an infringement of a ferry, or such like wrong. In all these cases it may be said, as it was said here, that the master has not authorized the act. It is true, he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in."

I would set aside the decree of the Original Side in both cases and would record a finding in favour of the plaintiff on issue 1 and remand the suits for further enquiry as to the amount of damages in each case and for final disposal. The costs of the appellants in this Court should be borne in both cases by the defendant.

Maung-Kin, J.—I concur.

K.N./R.K.

Decree set aside.

1. (1907) 2 Ex 259=50 L J Ex 147.

A. I. R. 1918 Lower Burma 76

Rigg, J.

U Thet—Appellant.

v.

Tola Ram—Respondent.

Special Second Appeal No. 98 of 1916, Decided on 13th November 1917.

General Clauses Act (10 of 1897), S. 3 (25) —Pugmill created and affixed to earth is immovable property.

Where a pugmill is erected and affixed to the earth it is immovable property within the meaning of S. 3 (25), General Clauses Act. [P 76 C 2]

Doctor—for Appellant.

Ray—for Respondent.

Judgment.—The facts of this case are fully set out in the judgment of the lower appellate Court. It is contended on second appeal that it has been wrongly decided by that Court that a pugmill is movable property, and that even if this contention is unsound, the Judge should have applied Art. 49, Lim. Act, and passed a decree for the value of the Mill. Immovable property is defined in the General Clauses Act 10 of 1897 as including things attached to the earth. Before a pugmill can be worked, its posts have to be imbedded in the earth in order to keep it stationary, and unless it was fixed in this manner, it would be of no use. In *Miller v. Brindaban* (1) it was held that things such as steam engines and boilers seized in execution of a decree were fixtures and not goods and chattels. In *Hobson v. Gorringe* (2) it was decided that a gas engine affixed to the freehold by bolts and screws to prevent it from rocking, was sufficiently annexed to the earth to become a fixture. The learned Judge thinks that there is no distinction between the affixing of a pugmill to the land and that of a tent or plane table. In the case of a plane table, there does not seem to me to be any difficulty in drawing a distinction, as any one using it has no intention of attaching it to the earth. Whether a tent could be said to be attached to the earth would, I think, depend on the circumstance of the case. But here the pugmill is erected and affixed to the earth for the purpose of making a quantity of bricks, and I have no doubt that it should be regarded as immovable property. It is conceded that if the pugmill is immovable property, the suit is in time. The only other question for decision is the amount of damages to be awarded for wrongful attachment. The plaintiff valued the pugmill at Rs. 150, which is about the cost when the mill is new. The mill had been in use for sometime before its attachment, and the claim for its full value is excessive. Mr. Doctor agrees to my estimating the value at any figure I think proper. I allow Rs. 75 for the pugmill. Mr. Doctor also waives the claim for attending fees, and there is no proof that the plaintiff spent Rs. 41 4-0 in attending

1 (1879) 4 Cal 918.

2 (1897) 1 Ch 182=52 L J Ch 114.

Court in connexion with the proceedings for the removal of attachment. I accordingly set aside the decree of the lower appellate Court and pass a decree for Rs. 75 plus Rs. 120-2-0 costs ordered in Civil Miscellaneous Case No. 20 of 1914 of the Sub-divisional Court, Pyn. The defendant-respondent will pay two-thirds of the costs throughout.

K.N./k K.

*Decree set aside.***[A. I. R. 1918 Lower Burma 77]**

YOUNG, J.

Ah Foke—Plaintiff.

v.

P. M. A. Nagappa Chetty and another—Defendants.

Regular Civil Suit No. 116 of 1917. Decided on 10th June 1918.

(a) Contract Act (9 of 1872), S. 23—Agreement not to bid against each other is not void.

An agreement between two persons not to bid against each other at an auction is not necessarily illegal or against public policy. [P 79 C 2]

(b) Contract Act (9 of 1872), S. 23—Void agreement not carried out—Money paid can be recovered—When is such contract executed, stated—Authority to stake holder to pay money can be revoked before it is paid out.

If two parties enter into an illegal contract and money is paid upon it by one to the other it may be recovered back before the execution of the contract but not afterwards. In the case of persons entering into such a contract and paying money to a stake-holder, if the event happens and the money is paid over without dispute, that is considered as a complete execution of the contract and the money cannot be reclaimed, but if the event has not happened, the money may be recovered. [P 81 C 1, 2]

Authority given to a stake-holder to pay over money in respect of an unlawful transaction may be revoked at any time before it has been actually paid, even if it has been credited in account to the other party. [P 81 C 2]

*Das—for Plaintiff.**B. Cowasjee and Chari—for Defendants.*

Judgment.—In this suit one Ah Foke originally sought to recover from the Chetty firm of P. M. A. Nagappa Chetty the sums of Rs. 5,000 and Rs. 4,000, which he alleged that he had deposited with him on 2nd April 1917 with interest. The Chetty replied denying that the deposit had been made by the plaintiff and alleging that it had been deposited by one Li Kut Chaung in the plaintiff's presence and had been returned to him (Li Kut Chaung) five days later. The plaintiff then obtained leave to amend and add Li Kut Chaung. Li Kut Chaung in turn put in a written statement plead-

ing, as the Chetty had also pleaded, that it was he who deposited the amount and not the plaintiff. On or about 18th April 1918 plaintiff again applied and was allowed to amend. His amendment consisted in explaining the circumstances of the alleged deposit, namely, that the deposit was a bribe to be paid to defendant 2 (a) if he obtained from bidding at the auction of liquor licenses for Hlauza Liquor Licenses Nos 2 and 3 and (b) if plaintiff obtained these licenses for a certain sum not specified in the pleading. He stated that these sums were deposited with Nagappa as stake-holder—he being known to both parties, but that licenses were knocked to him at much higher figures, and that consequently he was entitled to the return of his money. Defendant 1 replied denying all knowledge of the above facts, and maintaining that the money had been deposited by defendant 2.

Defendant 2 also put in another written statement in which he denied the plaintiff's allegations and in his evidence explained that the deposit had indeed been made with a view to prevent his competition, but had been made by himself as an instalment towards a quarter share in a partnership in the two licenses, and that the arrangement was that he was to be a partner if the licenses went for less than a big and less than Rs. 85,000 respectively. The licenses as a matter of fact were knocked down for Rs. 1,05,000 and Rs. 75,100 and so he considered the bargain off and went and withdrew the money. It also transpired in the evidence that Ah Foke was a partner with one Li Kan Shu in the purchase of No. 2 and that both were partners with one Wong King in the purchase of No. 3, and that Wong King had supplied Rs. 2,000 out of the Rs. 4,000 alleged to have been deposited for No. 3, while Li Kan Shu and Ah Foke had supplied the Rs. 5,000 for No. 2 and the other moiety of Rs. 2,000 for No. 3. No question of non-joinder, however, was raised and any such point must be taken as waived. Now having regard to the flat contradiction of the plaintiff's story by that of defendant 2 two points at once leap into prominence, (a) that the Chetty, an impartial person, trusted by both, with no apparent object but to do the right had paid defendant 2 and (b) that whichever had paid the Rs. 9,000 ought to be able to produce accounts

showing that he had taken from his shop or borrowed from his Chetty the sum in question. The plaintiff tendered such an account, but it was promptly objected that in his affidavit of documents he had sworn so far back as July 1917 that he had no account or book of account relating to the matter.

When, therefore, as soon as the case came on for hearing he at once tried to put a book of this vital importance in evidence, which the other side relying upon his affidavit had never inspected, I declined to admit it, and had it not been for the fact that Wong King produced his own cash book in which an entry dated 2nd April 1917 occurred showing Rupees 2,000 as paid "for backshish for peace in the license", matters would in my judgment have gone hard with the plaintiff.

No objection was taken either to the admissibility or to the genuineness of this latter document, and it was therefore, admitted, though having regard to what had happened with regard to plaintiff's books, it cannot be said to have the weight that it otherwise would, for Ah Foke and Wong King are partners. Technically there may have been no ground for objecting to its admissibility, but defendants had no real opportunity of considering its genuineness and unless we assume that there was inexplicable negligence on the plaintiff's part when he swore he had no relevant entries in his account books, the ones that he produced were not genuine and if so, why should those of his partner be. Carelessness, however, may be the answer. Let us turn to defendant 2. No affidavit of documents was ever called for from him, and therefore, if he had produced such accounts, plaintiff would only have had himself to thank if a hurried inspection in Court yielded no result. But defendant 2 produced none at all; his story was that the Rs. 9,000 was part of a much larger sum which he had drawn from two Chetties. He called neither of these, one for the weak reason that he had been subpoenaed by the other side, the other because he said he had left Rangoon. He also produced no entry of any receipt in his own books though the sums alleged to have been taken were very large. He says he drew the other and larger portions of the sums drawn for the purpose of bidding, but re-paid them as he did not succeed in obtaining any license. As they constitut-

ed an overdraft, one would have expected that he would not have left the unused Rs. 9,000 with Nagappa, but have diminished his overdraft. Instead of this he left it idle with Nagappa and asks that it should be believed that he charged no interest to Nagappa and was charged in turn no interest by the other Chetties. Both he and Nagappa swear that this is quite a common thing, but it seems rather curious to me.

There is no apparent motive for any fraud on the part of Nagappa, but that is slender proof that none exists; he had been the Chetty of both and each trusted him, but every one has a good character till he is found out. It is impossible to decide the case against the plaintiff on these grounds only. It is not without significance that the two defendants contradict one another as to what happened when the money was deposited. The Chetty says that all that he was told by Li Kut Chaung was that he was going to an auction and that he was to keep the money till he came back, when he would tell him what he has to do with it. Li Kut Chaung told the same story in examination-in-chief, except that he said that in the evening when he went back to the Chetty he merely told him that he might keep the money as he had no use for it. In cross examination, however, he said that he told the Chetty that the money was to be used for buying the license at the auction and that it was to be bought by him and Ah Foke jointly. He immediately corrected the last statement, but says that he told the Chetty in the evening that Ah Foke had nothing to do with the money, because the license was not in his (Li Kut Chaung's) name, a statement which would be unnecessary unless he had more or less explained the matter in the morning. Moreover as he admits that the money was deposited with the Chetty, because he and Ah Foke distrusted each other, it is difficult to suppose that Ah Foke would have been content to leave the matter quite unexplained and Li Kut Chaung consequently at liberty to send and withdraw the money the next minute. Nagappa, however, says that no one else told him anything and that he did not ask any one. Li Kut Chaung says that Ah Foke merely listened and was satisfied. I do not think he would have been satisfied, had the story been that told by the Chetty, viz.,

that there was a mere deposit liable to withdrawal the next instant. Explanations in my opinion must have been given.

Nagappa's advocate cross-examined Li Kut Chaung as to these statements and he persisted that he had made them. It follows that the Chetty's account, which, improbable in itself, cannot be accepted, and that he had no business whichever of the two made the deposit to give it up till satisfied that the conditions had been fulfilled.

Lastly, Li Kut Chaung's story strikes me as very lame: Li Kan Shu was the head partner of Ah Foke, and Li Kut Chaung had formerly been a partner of Li Kan Shu, but the two had quarrelled and were no longer even on speaking terms, and had become bitter rivals. Ah Foke was Li Kan Shu's man and Li Kut Chaung knew and says in an unguarded moment that Li Kan Shu was Ah Foke and Ah Foke was Li Kan Shu, and yet he would have it believed, though each swore that he would never be partner again of the other, that he was willing to take a 4th share with Ah Foke and his enemy partners in the other 3/4. I cannot believe the tale and must hold that plaintiff's story is the truth. Mr. Chari, however, contended that if so, the contract was void under S. 23, Contract Act, on the ground that its object was to obtain the licenses in question at an undervalue, that all parties were in pari delicto and that the Court would not interfere to aid one or the other, relying on the somewhat similar cases of *Sit Kauk v. Ah Kun* (1) and *Maung Thain Gah v. Maung Kan Tark* (2). In the earlier and leading case, that of *Sit Kauk v. Ah Kun* (1), Burgess, Judicial Commissioner, relied on *inter alia* a passage from Stoll's Principles of Equity 9th Edn. p. 575, running as follows:

"Agreements whereby parties engage not to bid against each other at a public auction, especially where the same is directed or required by law, are held void for (however common) they are unconscientious and have a tendency to cause the property to be sold at an undervalue."

The learned Judge had also before him the Edn. 6 of Dart's Vendors and Purchasers, which laid down the conflicting rules that an agreement between two persons not to bid against each other at an auction is legal and forms a valuable

consideration for an agreement giving to the party withdrawing his opposition at the auction a right of pre-emption, and after regretting his inability to consult the decisions on which the rules were based decided that such an agreement was either fraudulent or involved or implied injury to the person or property of another or was immoral or opposed to public policy, and was void under S. 23, Contract Act. In my opinion the learned Judge laid down the rule too strictly and I consider that the true rule is as stated by Brett and Mockerjee, J. in *Gobindo Chandra Jha v. Shyam Lal Jha* (3), viz., that such an agreement is not necessarily illegal or against public policy. Sargent, C. J., held the same in *Hari Ballabhusa v. Naro Moreshear* (4), and in *Mahomed Mira Ibrahim v. Sarwan Vijaya Raghunatha Gopalar* (5), the Judicial Committee agreed with the view of the Madras High Court that a charge against a ladder that he and those in concert with him have acted in such a manner as to prevent the best price being obtained does not of itself amount to a charge of fraud, and that proof of such concert will not invalidate the sale.

In my opinion, it is impossible to say that the object of such an agreement is necessarily to get property at an undervalue: it is quite possible that its object may be to avoid having to buy at an overvalue, as was pointed out by Mockerjee, J. in *Ambika Prasad Singh v. R. H. Whitwell* (6), and where as here the object of defendant 2 is, on the facts as found by me, to retain the money which does not belong to him and that of defendant 1 is to avoid having to re-pay money which either through carelessness or fraud he paid to the wrong person, neither can rightly object if the Court calls for clear proof that the object of the transaction was fraudulent, for as has been often laid down, the Courts look with great disfavour on such a plea when it comes from the mouth of a partner in inequity.

Section 23, Contract Act, provides that contract is void if either its object or consideration is illegal. Here the consideration was on one side the promise to pay on the other the promise not to bid, and

3. (1907) 1 C L J 85.

4. (1904) 18 B. & P. 42.

5. (1900) 23 Mad 227 = 27 I. A 17 (P. C.).

6. (1861) 6 C L J 111.

1. (1897-1901) 2 C B & 17.

2. (1897-1901) 2 U B R 326.

neither seems to fall within the section. It is only the object that can be so stigmatised. What then was the object? To defraud Government and buy the licenses at an unfair undervalue or to get the licenses at a reasonable price? In favour of the first alternative is the fact that the plaintiff, who had had the licenses in the previous years and presumably knew what it would be worth his while to offer agreed to pay the defendant Rs. 5,000 if license No. 2 was knocked down at Rs. 72,000, but eventually thought it worth his while to pay Rs. 1,05,000 and agreed to pay him Rs. 4,000 if license No. 3 was knocked for Rs. 70,000, but eventually thought it worth his while to pay Rs. 75,100. In favour of 2nd alternative are the facts, (a) that the Rs. 72,000 and Rs. 70,000 were in each case an advance on the price offered and accepted in the former year, (b) that there is no evidence of any collusion except between these two and it seems to be admitted that there were many bidders, and (c) the plaintiff and defendant 2 were not merely rivals in business but on very unfriendly terms, and the plaintiff may well have thought that the defendant would run up the price to an unfair height out of spite. Colour is lent to this last point by the fact that the contract was not merely that defendant should not bid, but that the price was not to exceed the price named. The plaintiff had no objection to the defendant bidding, so long as he did not bid above the price which he (the plaintiff) was willing to pay; on the contrary he would probably have welcomed such bidding as tending to create a belief in the bona fides of the bidding, and the object of the stipulation was to prevent the defendant from having the satisfaction of pocketing plaintiff's money and getting the license by bidding benami.

On the whole, however, while I have no sympathy with the defendant, I find it impossible to get over the fact that plaintiff, who best knew the profits of the licenses inasmuch as he had held them certainly for the previous year and also I think for several years, tried to get for Rs. 72,000 a license for which he ultimately deemed it worth his while to pay Rs. 1,05,000. In accordance with the ordinary rules that govern mankind, I must assume in the absence of any evidence to the contrary that the plaintiff saw his way to making a profit even at

this price, in other words, that he hoped by bribing the defendant to get a property worth at least Rs. 1,05,000 for Rs. 72,000. I consider that this was an unfair undervalue and that the plaintiff's object was not to buy off unfair competition but to obtain the property at an unfair price. As Mookerjee, J., pointed out in *Ambika Prasad Singh v. R. H. Whitwell* (6):

"The test, in each case, is what was the object of the agreement among the bidders, it is the end to be accomplished which determines whether a combination is lawful or otherwise. If the object be to obtain the property at a sacrifice, by the artifice combination is fraudulent, if the object be to make a fair bargain, the combination cannot be said to be fraudulent."

It is for this reason that Judges have in case after case laid down that combinations such as this are not necessarily or are not in themselves fraudulent and the circumstances of each case must therefore be considered. In this case for the reasons already given, I consider that the object in regard to license No. 2 was fraudulent. Whether if the plan had succeeded the vendors could have upset the sale is a different matter. In Halsbury's Laws of England, Vol. 1, p. 512, the opinion is expressed that even if there is a combination among bidders amounting to what is known as a knock out, it does not give rise to an action at the suit of a vendor and Fletcher, J., in *Jyotiprakash Nandi v. Jhommull Johury* (7) criticised adversely the decisions in *Ambika Prasad Singh v. H. R. Whitwell* (6) and *Gobindo Chandra Jha v. Syam Lal Jha* (3), in so far as they decided to the contrary. But I am not dealing with this case but with the quite distinct one—whether parties who have made such an agreement between themselves should be entitled to the assistance of the Court to recover the price of their mutual and possibly corrupt bargain. The question whether the vendor, who has ample power to ascertain the value of his property and who can, by putting a reserve price upon it, avoid having to part with it at less than his own price, is entitled to rescind his contract, merely because he has not chosen to put a reserve price or has put too low a one, is quite a different one. If he is willing to sell at a certain price and gets that price, has he any right to complain because if he had put a higher price, he could have obtained it? *Lex subvenit vigilantibus non dor-*

mientibus. The Contract Act is a Code though not a complete one. S. 123 penalises the correlative fraud of pulling by a vendor, is it intentional or unintentional that there is no provision penalising combinations by bidders to effect the opposite result?

The great lawyers who drew up the Code could hardly have been unaware of the judgment in *Hogfer v. Martyn* (8), in which L. D. Romilly, M. R., in 1867 five years before the passing of the Act commented on the difference of treatment meted out. But it is enough to say that the question of the rights of the vendor is not (and in the present case where the combination failed could not be) before me. Here I am concerned only with the contract between Ah Foke and Li Kut Chaung and not with that between Ah Foke and his vendor, and the sole question is whether the Court should lend its aid to the plaintiff to recover his money from defendant 1 or 2. With regard to license No. 3, the arrangement was that Rs. 4,000 was to be paid if the biddings did not exceed Rs. 70,000; as a matter of fact it was knocked down for Rs. 75,000 and if the case stood alone, I might have held that the difference of price was insufficient proof of any impropriety of object. But it does not stand alone and was all one transaction and I think that the object was the same in both, and on the principles that *ex dolo malo non oritur actio* and *in pari delicto potior est conditio possidentis*, I must decline to help the plaintiff to get his money back from defendant 2 as he had largely performed his part of the contract: cf. *Kearley v. Thompson* (9). But as regards Nagappa the case is different; he was a trustee or agent or, if the transaction be regarded as a wager in which Ah Foke bet Li Kut Chaung Rs. 5,000 and Rs. 4,000 to nil that the licenses would fetch respectively more than Rs. 72,000 and Rs. 70,000, he was a stakeholder, and the rule is laid down in *Hastelow v. Jackson* (10) where Littledale, J., stated as follows:

"If two parties enter into an illegal contract, and money is paid upon it by one to the other, that may be recovered back before the execution of the contract, but not afterwards. In the case of persons entering into such a contract and paying money to a stakeholder, if the event happens and the money is paid over without dispute, that is considered as a complete execution of the con-

tract and the money cannot be reclaimed, but if the event has not happened, the money may be recovered. With respect to a stakeholder there is a third case, viz., where the event has happened, but before the money has been paid over, one party expresses his dissent from the payment."

This case was followed in *Hodson v. Terrill* (11), and *Stirling, J.*, in *Barclay v. Pearson* (12) stated that these two cases had been repeatedly recognized as correctly laying down the law on the subject, and Collins, M. R., in *Torman v. Charlemouth* (13) expressed his approval of *Stirling, J.*'s remarks. In the present case, as I have already said, even if the oral evidence of the plaintiff on the point should be discarded, which I must not be taken as conceding, it is clear that the plaintiffs by their lawyer's letter prohibited the payment of the money, before it had been paid over and when only a promissory note had been given. To pay and to promise to pay are not the same thing and as is stated by Pollock and Mulla's *Contract Act*, Edn. 3, p. 574, authority to pay money in respect of an unlawful transaction may be revoked at any time before it has been actually paid, even if it has been credited in account. I doubt if the promissory note could have been enforced. Nagappa, however, elected to pay it and must take the consequences. The contract was, in my opinion, illegal, and also largely performed by Li Kut Chaung, and I, therefore, cannot help the plaintiff to recover the money from him and the suit must be dismissed as against him, though under the circumstances I make no order as to costs; but as against Nagappa, who was an agent and virtually a stakeholder who paid over money after his authority had been countermanded, I must grant a decree with interest at 6 per cent. from 5th April 1917 to realization and costs.

R.N./B.K.

Suit decreed.

11. (1832) 1 D & M 707.

12. (1893) 2 Ch 154=62 L J Ch 636.

13. (1905) 2 K B 129=74 L J K B 620.

A. I. R. 1918 Lower Burma 81

MAUNG KIN, J.

Nga San Pu — Accused — Appellant.

v.

Emperor — Opposite Party.

Criminal Appeal No. 109 of 1917, Decided on 23rd March 1917, from the order of Special Power Magistrate, Pegu, D/- 27th January 1917, in Criminal Reg. Trial No. 218 of 1916.

8. (1867) 16 L J Ch 372.

9. (1890) 24 Q B D 742.

10. (1828) 8 B & C 321.

(a) Penal Code (1860), S. 376—Statement by complainant immediately after occurrence is admissible as evidence of consistency of her conduct—Evidence Act (1872), Ss. 8 and 157.

In a case of rape the statement made by the complainant immediately after the occurrence to another woman is admissible, not as evidence of the truth of the charge alleged, but as corroborating the credibility of the complainant and as evidence of the consistency of her conduct.

[P 82 C 1]

(b) Penal Code (1860), S. 376—Suicide of complainant cannot be taken into consideration in passing sentence on accused.

An inference adverse to the accused cannot be drawn from the fact that the complainant was very much ashamed and even committed suicide owing to the shame brought on her.

[P 82 C 2; P 83 C 1]

The fact of the complainant's suicide should not be taken into consideration in passing sentence in a case of rape because that is neither the natural nor ordinary nor probable consequence of the accused's act.

[P 83 C 1]

Judgment—I am not satisfied that the conviction for rape is justified by the evidence and I think the offence committed was one of assault with intent to outrage the modesty of a woman. The conviction for rape depends solely upon what the girl is supposed to have said to Ma O Za and others. What she said to Ma O Za is admissible, not as evidence of the truth of the charge alleged, but as corroborating the credibility of the girl and as evidence of the consistency of her conduct. Let us now see what happened. The girl went to cut grass in the field and sometime after she went running to Ma O Za and told her that the accused had squeezed her neck and raped her, and when asked where the offender was she pointed out and the accused was seen walking away fast. Ma O Za does not appear to have asked any questions as to the details of the offence committed. Nor did she examine the girl's longyi or person. She saw a red mark on her throat. It was shown her by the girl. To two other women including her mother the girl stated the same thing as she had done to Ma O Za. According to their evidence the girl would seem to be very much ashamed of having been maltreated by the accused, for she beat her breast and cried saying that it would not be worth her while to live in the human world any more. None of the women asked the girl in order to get details showing that her words that she was raped were correctly used. Nor any of them examine her person or her clothes to see if there were any signs of rape. Only Ma Pe, the girl's

mother, is supposed to have asked her, if there was penetration and she is supposed to have said there was. Curiously enough this was deposed to not by Ma Pe but by Ma O Za who said:

"I did not ask when Ma Pe asked Ma E Thwe that is, the girl said that penetration took place when rape was committed."

so that it is not safe to seize on this piece of evidence and direct one's attention against the accused. The girl is dead; she hanged herself the very day she was insulted, so we have not her evidence. Now it is for me to try and ascertain whether there is evidence on the record of rape having been committed. The girl's longyi and the accused were sent to the Chemical Examiner, who has reported that there was no spermatozoa on either longyi. The medical evidence shows that owing to the decomposed state of the girl's body it was difficult to detect marks of violence other than wounds such as stick and dah wounds. No signs of violence could be detected at the vulva orifice. The medical evidence shows, if anything, that there were no signs of violence on the girl's person. There was not rent of any sort or kind in the girl's jacket. It was, however, stained with mud on the right side of the back of the jacket especially on the upper part and also on the outside of the right sleeve about the forearm. This shows that, if the girl was thrown before the attempt at rape, the man did not succeed in making the necessary preparations. He never got her full on her back.

This view is supported by the fact that it is nowhere stated that there were any mud stains on her longyi. In fact we must take it that there were no such stains on the longyi because the Magistrate had both the longyi and the jacket before him and after examining them noted about stains on the jacket only. The proper inference then is that the girl's neck was squeezed and that she was thrown down on the ground; she resisted and the man gave up and ran away. The fact that the paddy plants appeared to have been trodden down only shows that there was a struggle and nothing more. In my judgment it is very unsafe to rely on a jungle girl when she says "I am raped" without particulars being obtained by questioning her. That such people do not speak with clearness and precision is proverbial. Nor can we draw any

inference adverse to the accused from the fact that the girl was very much ashamed and even committed suicide owing to the shame brought on her. She must be adjudged to be a girl with an abnormal mind, doing and saying things what others in similar circumstances would not do or say. Her words are not consistent with the post mortem appearances or the absence of stains on her longyi or the mud stains which were only on the right side of her body which shows that she must have fallen sideways and never on her back. I thought at first that the offence committed by the accused might be one of an attempt to commit rape. But I think the above findings do not justify that view: see *Empress v. Shanker* (1).

For the reasons above stated I hold that the conviction and sentence for rape ought to be set aside and the accused convicted of an assault with intent to outrage the modesty of a woman. I, therefore, alter the conviction to one under S. 354, I. P. C. and sentence the accused to one year's rigorous imprisonment. In passing sentence I have not taken into consideration the fact of the girl's suicide, because that is neither a natural nor ordinary nor probable consequence of the accused's act.

R.N./R.K. *Conviction altered.*

1 (1880-81) 5 Bam 403.

A. I. R. 1918 Lower Burma 83

YOUNG, J.

Consterdine—Petitioner.

v.

Smaime—Opposite Party.

Civil Regular No. 271 of 1916, Decided on 6th July 1917.

(a) Divorce Act (4 of 1869), S. 4—S. 4 does not prevent consideration of whether marriage is void under Christian Marriage Act (1872), Ss. 4 and 5.

Section 4, Divorce Act, which provides that the jurisdiction exercised by the High Court in all causes, suits and matters matrimonial shall be exercised subject to the provisions of the Divorce Act and not otherwise, does not preclude the Court from considering the provisions of Ss. 4 and 5, Christian Marriage Act and declaring a particular marriage void as not having been solemnized in accordance therewith.

[P 84 C 1]

(b) Christian Marriage Act (15 of 1872), S. 5—"Solemnized" refers to ceremony—S. 5 does not concern with capacity of performing and on whom performed.

The word "solemnized" in S. 5, Christian Marriage Act means "celebrated" and refers to the ceremony only.

[P 85 C 2]

Section 5, Christian Marriage Act, deals only with the ceremony and the person who may perform it, and not with the capacity of the persons on whom it is performed or with the capacity of the person who performs it, save that he should have received episcopal ordination.

[P 85 C 2]

(c) Divorce Act (1869), S. 19—Fraud to set aside marriage—Fraud must be such as to amount to no consent.

There is no degree of deception which can avail to set aside a contract of marriage knowingly made, unless the party implicated upon has been deceived as to the person and thus has given no consent at all.

[P 84 C 2]

When fraud is spoken of as avoiding a marriage, it means such fraud as procures the appearance without the reality of consent; it does not include such fraud as induces a consent, nor fraud which is practised on a third party in order to procure a licence.

[P 84 C 2]

Giles and Villa—for Petitioner.

DeGlanville and Miller—for Opposite Party.

Judgment.—In this suit the petitioner seeks to have it declared that his marriage with the respondent is null and void: (a) on the ground that his consent was procured by fraud, (b) on the ground that they were married by a Roman Catholic priest, who was by the rules and regulations of his church incapable of marrying them inasmuch as the respondent was a divorced woman, a fact of which he was unaware when he performed the marriage ceremony. Mr. DeGlanville for the respondent raised a preliminary objection to the jurisdiction relying on Ss. 4, 18 and 19, Divorce Act, the effect of which is clearly, if this Act alone is to be considered, to deprive the Court of any jurisdiction to consider the petitioner's second ground. Mr. DeGlanville also urged that S. 4, which provides that the jurisdiction then exercised by the High Courts in all causes, suits and matters matrimonial shall be exercised subject to the provisions of the Divorce Act and not otherwise, precludes the Court from considering the provisions of S. 4, Christian Marriage Act, which declares that every marriage solemnized otherwise than in accordance with the provisions of S. 5 shall be void. In support of his contention he relied upon the case of *Gasper v. Gonsalves* (1), in which Pontifex, J., held that the High Court could not entertain a suit of a matrimonial nature otherwise than as provided by the Divorce Act and, therefore, had no jurisdiction to make a decree of nullity on

1. (1874) 13 B L R 109.

the ground that the marriage was invalid. This case, however, was decided *ex parte*. Further in *Lopez v. Lopez* (2), where the question was whether a certain marriage was void on the ground that the parties were within the prohibited degrees—one of the grounds on which a marriage may be declared null and void under the Divorce Act, it was also argued that the marriage was void under the Christian Marriage Act and Wilson, J., who delivered the opinion of the Full Bench, stated as follows:

"Section 5, Act 15 of 1872 enacts, as did the Act of 1865, that 'marriage may be solemnised in India (1) by any person who has received episcopal ordination provided that the marriage be solemnised according to the rules, rites, ceremonies, and customs of the church of which he is a minister.' It was argued that the words 'rites, rules, ceremonies, and customs, here used include rules as to capacity to marry, and make those rules in each case depend upon the law of the church whose minister performs the marriage. That argument would lead by a short process to the same conclusion as which we have arrived upon this reference. The construction of those words is difficult; we are not prepared to express a unanimous opinion upon it and it is unnecessary that we should deal with it."

The case was, therefore, decided on the Divorce Act, but while it is unfortunate that this Court is deprived of the advantage of learning the views of the Calcutta High Court on the meaning of these words, it is significant that it never occurred either to counsel or to Court to question the jurisdiction to decide the reference under the Christian Marriage Act. The Court refrained from doing so only from lack of unanimity and because it was possible to decide the question raised in the case under the Divorce Act. I am of the same opinion: the Christian Marriage Act in S. 4, expressly declares that marriages are null which are not solemnised in accordance with the provisions of S. 5 and I fail to see how if, as here, the question is whether a particular marriage was so solemnised, I can refrain from deciding it and declaring the result in accordance with the law. I cannot agree with the decision in *Gasper v. Gonsalves* (1), if, and so far as, it decides to the contrary, and I am not bound by it, and if I were, I should require to be satisfied that the suit being one to declare a marriage solemnised in Chandernagore, a French settlement, null and

void, the learned Judge had any jurisdiction to deal with the case at all, for under the Divorce Act decrees of nullity can only be granted in cases where the marriage has been solemnised in British India (S. 2) and the same is the case under the Christian Marriage Act. Unless, therefore, Chandernagore is in India, which seems to me doubtful under the General Clauses Act, which defines India as meaning British India together with any territories of any native prince, or chief under the suzerainty of His Majesty, the decision would be one without jurisdiction. As, however, I am not bound by the decision, I do not propose to discuss the point on which I have not had the advantage of hearing argument. I hold that I have jurisdiction to deal with both grounds of the petition.

As regards the first ground, viz., that the petitioner's consent was obtained by fraud, the cross-examination of the petitioner shows that if there was fraud within the meaning of the Divorce Act, it was condoned and the authorities of *Moss v. Moss* (3), and *Swift v. Kelly* (4), shew that the frauds alleged do not, according to the principles and rules of the English Courts which under S. 7, Divorce Act, I am bound to follow, afford grounds for granting the relief sought. Thus in *Swift v. Kelly* (4), the Judicial Committee stated as follows:

"It would seem indeed to be the general law of all countries, as it certainly is of England, that unless there be some positive provision of Statute Law requiring certain things to be done in a specified manner, no marriage shall be held void merely upon proof that it had been contracted upon false representation, and that but for such contrivances consent would never have been obtained. Unless the party imposed upon has been deceived as to the person and thus has given no consent at all, there is no degree of deception which can avail to set aside a contract of marriage knowingly made."

and in *Moss v. Moss* (3), Sir Francis Jeune expressed his agreement with this view of the law of England, and stated (page 268), that:

"when in English Law fraud is spoken of as a ground for avoiding a marriage, this does not include such fraud as induces a consent, but is limited to such fraud as procures the appearance without the reality of consent."

In this case it is not alleged that there was no consent, the petitioner expressly pleads that he did consent, but that his consent was procured by fraud. He also

pleads that the license was fraudulently obtained by the respondent concealing from the priest that she had been divorced. The alleged fraud upon the petitioner is expressly dealt with by both the above authorities and the fraud upon the priest is inferentially dealt with in *Moss v. Moss* (3), and expressly in *Swift v. Kelly* (4), where their Lordships say:

"If such be the law touching consent to the marriage itself and the fraud whereby that consent was obtained, it would be extraordinary indeed if another rule were allowed to govern the case where fraud has been practised upon a third party, acting immaterially in granting the license to celebrate it."

Moreover, S. 19 does not include fraud upon a third party as one of the grounds for invalidating a marriage. At the commencement of the second day's hearing I asked Mr. Giles whether in the face of these authorities and the evidence as to condonation it was worthwhile proceeding with the case upon the ground of fraud, and he abandoned this portion of it. It remains to deal with the second ground, viz., that the marriage was celebrated by a Roman Catholic priest in this city of Rangoon and that as the lady had been divorced, the marriage was null and void under the provisions of the Christian Marriage Act. S. 5 of the Act provides that marriages may be solemnised in India by (amongst others) any person who has received episcopal ordination, provided that the marriage be solemnised according to the rules, rites, ceremonies and customs of the church of which he is a minister. There is no doubt that in this case the celebrant had received episcopal ordination and no doubt that the marriage was celebrated according to the rules, rites, ceremonies and customs of his church, except as regards the fact that the lady had been divorced. There is equally no doubt on the evidence that according to its rules and customs no priest of the Church of Rome can celebrate a marriage between persons one or both of whom has been divorced, and no person can marry a divorced man or woman. The question, however, is not whether the marriage is valid in the eyes of the church which is simple, but whether it is valid in the eyes of the law which is difficult. It is exactly the question on which the Calcutta High Court were not unanimous, and on which unfortunately they expressed no opinion, and the answer depends upon the meaning of the words "provided

that the marriage be solemnised according to the rules, rites, ceremonies and customs of the church." According to the tenets of the Roman Church such a marriage is bigamous, no priest can solemnise it, no person can enter into it. According to the law it is otherwise and if the parties had had their marriage solemnised by a marriage Registrar or a clergyman of the Church of England, no question, so far as I can see, could have arisen, and it undoubtedly would have been more prudent if the lady, who it may be assumed desired to contract a marriage that would be binding had adopted that course. But she elected not to do so, and it is, therefore, necessary to determine, not whether the union is binding according to the Church of Rome, but whether it is binding by law.

In my opinion in this Act "solemnised" means celebrated, see *Queen-Empress v. Postlethwaite*, and while the Divorce Act gives the external reasons and causes for which, apart from the ceremony, a marriage may be declared null and void, the Christian Marriage Act in these sections deals with the ceremony and the ceremony only. S. 4 does not say that persons may marry each other if the law of the church by which they are married so permits, and does not say that priests may marry such persons if and only if the law of their church allows, but merely provides, as it seems to me, how every Christian marriage is to be solemnised or celebrated.

"Every marriage" it says "shall be solemnised in accordance with the provisions of S. 5 and every marriage not so solemnised shall be null."

Again S. 5 does not say that Christians in India marry one another provided that they are married by a person who has received episcopal ordination and provided further that they are permitted to marry each other by the rules of the church and are married in accordance with its rules, rites, ceremonies and customs, but that marriages may be solemnised in India by certain persons, provided that they are solemnised in accordance with certain rules. In other words, the section, in my opinion deals only with the ceremony and the person who may perform it and not with the capacity of the persons on whom it is performed or with the capacity of the person who performs it, save as is expressed in the section, viz.,

that he should have received episcopal ordination. It is not suggested that the parties are not Christians, or that the person who performed the marriage ceremony had not received episcopal ordination or that the ceremony was performed in any way differently from that in which marriages are celebrated in the Roman Church. Such being the case, the marriage, in my opinion, fulfilled the conditions required by the Christian Marriage Act, and the parties in the eye of the law are man and wife. I dismiss the application with costs, eight gold mohurs.

K.N./B.K.

Petition dismissed.

A. I. R. 1918 Lower Burma 86 Full Bench

ORMOND, OFFG. C. J., AND PARLETT,
YOUNG AND MAUNG KIN, JJ.

Howa—Applicant.

v.

Sit Shein and another—Opposite Party.

Civil Ref. No. 3 of 1917. Decided on 31st May 1917.

Civil P. C. (1908) O. 33, Rr. 2, 3, 6 and 15—
Application not framed properly—Rejection
does not bar under R. 15 of subsequent
application of like nature.

The rejection of an application to sue as a pauper, on the ground that it is not framed and presented in the manner prescribed by Rr. 2 and 3, O. 33, Civil P. C., is not a bar under R. 15 to a subsequent application of a like nature, in respect of the same right to sue, merely because the order of rejection is passed after the opposite party has appeared in response to a notice issued under R. 6. *Case-law discussed.* [1918 C 1]

Maung Ba Kya—for Applicant.

Palit—for Opposite Party.

Order of Reference.

Parlett, J.—The petitioner filed an application on 28th July 1915 for permission to sue the two respondents as a pauper. Notice was served upon the respondents, who on the 7th December filed through an advocate a written statement setting out, among other things, that the application for leave to sue as a pauper was not framed according to law. The District Judge found that the schedule of the property belonging to the applicant annexed to her application was not verified, nor was it referred to in the application itself, which was verified. He therefore rejected the application under O. 33, R. 5 (a), as not being framed in the manner prescribed by R. 2. On 22nd January 1916 the petitioner filed another application for leave to sue as a pauper and notice was issued to the respondents,

who filed a written statement pleading, among other things, that the refusal of the former application constituted a bar to the entertainment of the present one, and on 23rd March 1916 the District Judge so held and dismissed the application under O. 33, R. 15. The petitioner now applies for revision of the District Judge's order, on the ground that the order of rejection under R. 5 (a) does not amount to an order of refusal under R. 7 so as to constitute a bar to the further application under R. 15. If this be so, the District Court in refusing to consider the second application on its merits failed to exercise jurisdiction vested in it, and so the matter is open to revision.

The District Judge relied upon *Kali Kumar Sen v. N. N. Burjorjee* (1). In that case the applicant filed a petition for permission to sue as a pauper, upon which notice was issued under O. 33, R. 6. Subsequently an amended petition was filed adding the names of several new defendants to whom notice was also issued. The application was rejected by the District Judge for want of verification in proper form, and revision of that order was sought. A Bench of this Court decided that though the verification might perhaps be held to comply substantially with the rule, the petitioner was bound to fail for want of a schedule of the property belonging to the applicant, so there was no ground for interference with the District Judge's order. It was however further laid down that that order was clearly passed under R. 7 and should have been a refusal to allow to sue as a pauper. The reason for this, view is not stated, but it would appear to be that the petition was not rejected in limine under R. 5 but after the opposite party had appeared in response to a notice issued under R. 6. But the point does not appear to have been necessary for the decision of the case nor even to have arisen in it. I think the same may be said of the remark in the judgment that the absence of a schedule of the property rendered the applicant subject to the prohibition specified in O. 33, R. 5 (a).

In *Narsiah v. Vithalingam Thinganda* (2) where an application to sue as a pauper had been rejected for want of a proper verification, after, as the record shows notice, had been issued to the op-

1. (1913) 7 L B R 60=20 I C 610.

2. (1911-12) 6 L B R 117=16 I C 83.

posite party under R. 6 a Bench of this Court expressly refrained from recording an opinion as to whether a subsequent application would be barred under R. 15. In *Ranchod Morar v. Beroonji Edulji* (3) an application to sue in forma pauperis was rejected as the applicant did not wish to proceed with it, and it was held that this order amounted to a refusal under S. 409 and was a bar to a further application under S. 413 of the Code of 1882, corresponding to Rr. 7 and 15, O. 33. It was remarked that an order of rejection under S. 407, corresponding to R. 5 (a), can only be made on preliminary grounds before notice is issued and before inquiry is held into the applicant's pauperism, whereas in the case then being dealt with such an inquiry had commenced. In *Atul Chandra Sen v. Peary Mohan* (4) a second application was held to be barred under R. 15, where the former application was ostensibly rejected under R. 2 for failure to furnish the particulars required in regard to the plaint, but in reality after evidence had been taken on both sides and it had been found that the applicant had made a false statement as to the property he owned; and I think the dictum that there is no distinction between rejection under R. 5 and an order of refusal under R. 7 was intended to apply to a case like that under consideration where evidence had been given on both sides.

It appears to me therefore that there is no strong authority for holding that when an application to sue as a pauper, which is not framed and presented in the manner prescribed by Rr. 2 and 3, is rejected only after the opposite party had appeared in answer to a notice, such rejection is an order refusing to allow the applicant to sue as a pauper, which under R. 15 bars a subsequent application. On general principles such a view would not appear to be right. Rr. 4, 5 and 6 imply that it is the Court's duty to scrutinize the application to see whether it complies with the conditions laid down as to both form and substance, and to reject it forthwith if it, on the face, fails to satisfy any one of those conditions. The applicant can then present another application. If the Court neglects its duty in this respect and issues notice upon an application which is not in proper form

and thereafter rejects it on that ground, it would be unjust that the applicant should be put in a worse position by reason merely of the Court having failed to do its duty. Turning to the rules themselves, R. 5 lays down that an application to sue as a pauper must be rejected unless it conforms to each of five conditions. Briefly it must be rejected: (a) where it is improperly framed and presented, (b) where the applicant is not a pauper, (c) where he has within two months fraudulently disposed of any property in order to be able to apply for permission to sue as a pauper, (d) where his allegations do not show a cause of action, and (e) where he has entered into a champertous agreement with reference to the subject-matter of the proposed suit. Of those conditions it would be obvious on the face of the application whether (a) and usually whether (d) was fulfilled or not. The decision as to the others could only be arrived at on inquiry and after taking evidence, so if (a) and on the face of it (d) are complied with, a notice should issue under R. 6. When the opposite party appears, the conditions (b) to (e) may be gone into, but if the Court has done its duty so questions as to (a) ought to arise at this stage, and the decision to which the Court is required to come under R. 7 should on the face of it have no reference to Cl. (a), R. 5. Cl. (2), R. 7 runs:

"The Court shall also hear any argument which the parties may desire to offer on the question whether, on the face of the application and of the evidence (if any) taken by the Court as herein provided, the applicant is or is not subject to any of the prohibitions specified in R. 5."

The language is somewhat unusual, but the word prohibition appears to me to refer to some status of the applicant or to some conduct on his part which disqualifies him from being allowed to sue as a pauper, and not to any formal defect in his application. The fact that he is not a pauper disqualifies him, so would a fraudulent disposal of his property or an agreement such as are referred to in Cls. (c) and (e) and these three disqualifications are clearly prohibitions. Usually I think failure to show a cause of action would not be, but however that may be, I am clearly of opinion that a merely formal defect in the frame of the application cannot be said to render the applicant subject to a prohibition. It is significant that S. 405 of the Code of 1882 re-

3. (1896) 20 Bom 86.

4. (1916) 33 I C 812.

quired the application to be rejected if not framed and presented in the prescribed manner, thus corresponding to Cl. (a), R. 5, while S. 407 enjoined rejection for the reasons now appearing in Cls. (b) to (e), R. 5, and S. 409, corresponding to R. 7, provided for the application being allowed or refused after considering whether the applicant was or was not subject to any of the prohibitions specified in S. 407. It is clear, therefore, that under the old Code a formal defect in the application was not regarded as a prohibition to which the applicant was subject, and I cannot see that it becomes one merely because all the grounds on which the application must be rejected are now grouped together in one rule. From all points of view it appears to me that the District Court's order of 7th December 1915 in the present case should not have been held a bar to the application of 20th January 1916. I think the question should be further considered whether the rejection of an application to sue as a pauper, because it is not framed and presented in the manner prescribed by Rr. 2 and 3, O. 33, is a bar under R. 15 to a subsequent application of a like nature in respect of the same right to sue, merely because the order of rejection is passed after the opposite party has appeared in response to a notice issued under R. 6.

Ormond, J.—I agree that the question suggested should be referred to a Full Bench in view of the decision in *Kul Kumar Sen v. N. N. Burjorjee* (1).

Opinion.

Ormond, Offg. C. J.—The question we have to determine is whether the rejection of an application to sue as pauper, because it is not framed and presented in the manner prescribed by Rr. 2 and 3 O. 32, is a bar under R. 15 to a subsequent application of a like nature in respect of the same right to sue; such order of rejection having been passed after the opposite party has appeared under notice issued under R. 6. It is contended for the applicant that under the rules an order of rejection and an order of refusal are in effect the same and amount to a final dismissal of the pauper-application; and that the word "prohibitions" in R. 6 includes Cl. (a), R. 5. If this contention is correct, a pauper who through ignorance presents his application through a pleader is altogether debarred from having

his application heard. R. 15 implies that if the application has been rejected, such rejection would not of itself be a bar to the subsequent presentation of the application. Rr. 4 and 5 show that it is the duty of the Court, when the application is presented, to see that it is in proper form and duly presented. The Court need not at that stage examine the applicant and consider the merits. But it may do so; and if it does and is satisfied upon the admissions made by the applicant that he is not a pauper; according to R. 5 the application must be rejected and no notice can issue under R. 6. But if the Court, without going into the merits, issues notice under R. 6 and then finds that the applicant is not a pauper; according to R. 7 the application must be refused. It is clear that such order of rejection under R. 5 must have the same effect as the order of refusal under O. 7 and that it operates as a final dismissal of the application: for both orders are made upon the finding that the applicant is not a pauper.

It is unreasonable to suppose that the legislature intended that when the Court has come to a finding that the applicant is not a pauper, the application should not be finally dismissed: or to suppose that a finding based upon the admissions of the applicant was intended to be of less effect than a finding based upon the evidence of the opposite party. In my opinion an order of rejection under R. 5 which is based upon a finding that applicant is subject to any of the prohibitions referred to in R. 7, must, by necessary implication, have the effect of a final refusal of the application. The question then is: Does the word "prohibitions" in R. 7 include Cl. (a), R. 5? The word appears in the corresponding section of the Code of 1882, S. 409, and if in Rule 7 it is used in the same sense as in the old S. 409, it would not include Cl. (a), R. 5. Again, Cl. (a), R. 5, refers to irregularities in the framing and presentation of the application; and I do not think such a clause could be said to contain a prohibition in the ordinary sense of the word. In my opinion Cl. (a), R. 5, is not one of the prohibitions referred to in R. 7 and an order of rejection under R. 5, on the ground that the applicant has not complied with the provisions of Cl. (a), does not operate as a bar to a subsequent representation of the

application in proper form. The last clause of R. 7:

"The Court shall then either allow or refuse to allow the applicant to sue as a pauper," does not mean that if the application should have been rejected under Cl. (a), R. 5, it is too late for the Court to do so after notice has issued to the opposite party. That clause merely states what order is to be made when the Court has decided whether the applicant is or is not subject to any of the prohibitions, and it has an applicability to the question of an order of rejection under Cl. (a), R. 3. In my opinion an order of rejection under Cl. (a) R. 5 can be made after a notice has been issued under R. 6. For the above reasons I would answer the question referred in the negative. Rr. 5, 7 and 15 are no doubt ambiguous. I think the ambiguity arises from the word "reject" appearing in S. 407 of the old Code, which must be a mistake for the word "refuse." S. 408 begins:

"If the Court sees no reason to refuse the application on any of the grounds stated in S. 407, and that mistake has been overlooked when these rules were framed.

Parlett, J.—I set out my views fully in the order of reference and none of the arguments adduced at the hearing have led me to modify them in any respect. Briefly, they are as follows: The enactment of R. 15, O. 33, shows clearly that every unsuccessful application for leave to sue as a pauper is not necessarily a bar to a subsequent similar application. An application which has been refused under R. 7 (3) is such a bar. An application is refused under that rule when the applicant is subject to one or more of the prohibitions specified in R. 5. In my opinion the failure to frame and present the application in the manner prescribed by Rr. 2 and 3 is not one of those prohibitions, and is not a ground for an order of refusal under R. 7 (3). The appropriate order, whenever such failure comes to the notice of the Court, is one rejecting the application, and an order of rejection on such grounds is not a bar under R. 15 to a subsequent application. The question, whether an order of rejection passed under R. 5 on other grounds may be such a bar is not referred or argued, and I express no opinion upon it. The question referred I would answer in the negative.

Young, J.—The question referred to

is, whether the rejection of an application to sue as a pauper, because it is not framed and presented in the manner prescribed by Rr. 2 and 3, O. 33, is a bar under R. 15 to a subsequent application of a like nature in respect of the same right to sue, merely because the order of rejection is passed after the opposite party has appeared in response to a notice issued under R. 6. O. 33, R. 15, is in plain and enacts as follows: An order refusing to allow the applicant to sue as a pauper shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue. It goes on to provide that in such a case the applicant may still sue in the ordinary way. The words "an order refusing to allow an applicant to sue as a pauper" throw us back on to R. 7, and we see that for the same defects (set out in R. 5) the Court is bound either to reject an application for leave to sue as a pauper or to refuse to allow a person so to sue. Which order is to be passed depends on the time and method of detection (R. 6). If the Court detects the defect unsided, it passes an order of rejection under R. 5, if it fails to do so and it is pointed out by the opposite side, an order of refusal under R. 7 is the necessary consequence.

In ordinary language rejection and refusal are practically synonymous; but the legislature does not lightly use different words in the same sense in the same Act: an order of rejection and an order of refusal are clearly different orders, verbally at any rate, and when we see that under R. 15 the bar to making a second application is confined to an order of refusal, one is inclined to doubt whether the same consequence follows an order of rejection. The rest of the Code, I think, confirms these doubts. S. 141 enacts that the procedure provided for suits shall be followed in all proceedings in a Court of civil jurisdiction and O. 7, R. 13, provides that when a plaint is rejected another may be brought. An application for leave to sue is clearly not an application in a suit, it is equally clearly a proceeding in a Court of civil jurisdiction, and the result, in my opinion, is that the word rejection is not only different from the word refusal but each has different results attached to it by the legislature. In other words, an order of rejection under R. 5 does not

prevent, but an order of refusal under R. 7 does prevent, a similar application of the like nature by the same person in respect of the same right. It is a curious result, making as it does the consequence depend not upon the nature of the fault but upon the time and method of its detection. It is, however, a construction which, so far as R. 5 is concerned, is in favour of the subject and in my opinion it is the true construction. This, however, is a case under R. 7. The applicant has committed a purely formal mistake, which unfortunately was not detected by the Court under R. 5 but under R. 7, and the question is whether we can see our way to allow him to correct this formal error in a subsequent application.

Rule 7 is very clear and gives the Court no option but to pass an order of refusal. R. 15 is equally clear as to the result that follows. The only method by which we can give relief lies, so far as I can see, in Cls. 2 and 3, R. 7, which direct that the Court shall see whether the applicant is subject to any of the prohibitions specified in R. 5; if he is, the Court is bound to refuse the application. It cannot reject it. R. 5 deals with the circumstances and causes for which a Court is to reject an application. They are five in number and are briefly speaking as follows: (1) Where the application is not properly framed and presented. (2) Where the applicant is not a pauper. (3) Where his application is fraudulent. (4) Where it does not disclose right to sue. (5) Where it is champertous. So far as I can see these are all prohibitions; the applicant is prohibited from applying in a wrong manner—he is also prohibited from applying if he is not a pauper, or if he has been fraudulent or champertous or if his application shows he has no right to sue. They are all prohibitions the results of which differ according to the method and time of detection of the errors committed. Under the former Code the first ground was treated separately and an applicant who made these trivial formal errors only had his application rejected. The legislature, however, deliberately removed these formal errors from the special section and incorporated them in R. 5. Whether it intended the result that in my opinion follows may perhaps be doubted, but it is not for a Court to speculate on what

the legislature intended, but to construe what it has enacted. In my opinion an applicant is as much prohibited from presenting in a wrong manner as he is from presenting it fraudulently. I should have expected the legislature to have provided different results, but the legislature have chosen to enact otherwise in plain and unmistakeable language and I see no room for interference. I would, therefore, answer the question referred in the affirmative—the Courts can, however, in future mitigate the results of the commission of those formal defects by rejecting in such cases the applications under R. 5 of their own motion and should, therefore, pursue the applications carefully.

Maung Kin, J.—In my judgment the answer to the question referred should be in the negative. I do not think that the failure to frame and present in application to sue in forma pauperis in the manner prescribed by Rr. 2 and 3 is a prohibition within the meaning of the word "prohibitions" as used in R. 7.

K.N./R.K.

Reference answered.

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MAUNG KIN, J.

Mung Po Aung—Accused—Applicant.
v.

Emperor—Opposite Party.

Civil Revn. No. 166 of 1916 Decided on 26th March 1917.

Criminal P. C. (1898), S. 195 (6)—High Court can decide whether order of lower Court granting or refusing sanction to prosecute is proper or not—Powers of High Court are not restricted to those under Civil P. C. S. 115 or Criminal P. C. Ss. 435 or 439.

Under S. 195 (b) the High Court has power to interfere with the order of lower Court upon the merits of the case, and its powers are not confined to those under S. 115 Civil P. C. or those under S. 435 or 439, Criminal P. C. according as the case in hand is a civil or a criminal case. The High Court has power to go into the evidence and decide whether the order of the lower Court granting or refusing sanction is a proper one or not. [P 92 C2]

Gaunt—for Applicants.

Palit—for Nagur Meera.

Judgment.—In the Subdivisional Court of Tharrawaddy Nagur Meera sued Mung Po Aung, the present applicant, and four others for the recovery of the principal sum of Rs. 500 and interest alleged to be due on a promissory note. Po Aung pleaded payment of two sums of Rs. 300 and Rs. 500 towards the promissory note

but failed to prove the plea and the suit was accordingly decreed against him and the other defendants. He then appealed to the Divisional Court but unsuccessfully. Thereupon Nagur Meera applied to the Subdivisional Court for sanction to prosecute Po Aung, on the ground that the entries in a certain book of his, which he produced and relied on in the suit, were forgeries. The Subdivisional Judge held an enquiry and examined 3 witnesses with the result that he rejected the application. Nagur Meera then appealed to the Divisional Judge, praying sanction might be granted to prosecute Po Aung for forgery. The learned Judge granted sanction as prayed. Po Aung now applies to this Court praying that the order of the Divisional Judge may be set aside. He describes his application as miscellaneous application, thus invoking the civil jurisdiction of the Court. The main ground of the application is, that the learned Judge has failed to consider that on the evidence a conviction is improbable. Mr. Palit for Nagur Meera contends that as this matter arises out of the civil case, this Court can interfere only under S. 115, Civil P. C. and that action does not justify an interference on the evidence. He further contends that this Court would have wider powers under S. 439, Criminal P. C., if that section applied but it applies only in cases in which the sanction giving authority is a criminal Court. He cites in support of his contentions the following cases: *Hamirpudi Mondol v. Damodar Ghose* (1), *Ram Prosad Malla v. Raghubar Malla* (2) and *Beni Pershad v. Sarju Pershad* (3). These cases and many others which need not be cited here, do justify Mr. Palit's contentions.

On the other hand Mr. Gaunt, for Po Aung, contends that this Court has power to interfere on the facts, inasmuch as there is authority for saying that the applicant's remedy is really by way of an appeal, as held in *Mathusami Mudali v. Veeni Chetty* (4). In that case a Full Bench of the Madras High Court decided following the case of *Palaniappa Chetti v. Annamalai Chetti* (5), that the right of appeal conferred by S. 195 (b), Criminal

P. C. as read with sub.S. (7) to the same section, is not restricted to a right of appeal to the appellate Court to which the Court of first instance is immediately subordinate and that an appeal lies to the High Court, not only in cases where the Court of first instance refuses sanction and sanction is granted by the Court to which that Court is immediately subordinate, but also in cases where the Court of first instance grants sanction and the sanction is revoked by the Court to which that Court is immediately subordinate. The learned Judges differed from the decision in the Calcutta case of *Hamirpudi Mondol v. Damodar Ghose* (1), above referred to and agreed with the two subsequent Calcutta decisions in *Holburn Rahman v. Moushar Kunda Bakhsh* (6) and *Gurpreet Shankar Roy v. Khode Sheikh* (7). In the former of those two last cited cases the learned Judges (Rampool and Mookerji, JJ.) observed:

"The learned Member for the opposite party says that we have no authority to interfere in the present case. But we think we have power to interfere under sub-S. 6, S. 195, Criminal P. C. Both the Courts which have granted sanction are subordinate to this Court and therefore we have authority to set aside the sanction granted by them."

Turning to Allahabad, we find that High Courts (Akman and Karamat Hussain, JJ.) in the cases of *Emperor v. Sarf Ma* (8) and *Kanhai Lal v. Chhadarami Lal* (9) dissenting from the Full Bench of Madras, by holding that under S. 195 (b), Criminal P. C., there could be only one proceeding by way of appeal from an order giving or refusing a sanction and from the order either way of the appellate Court there could be no further appeal. This question whether there can be further appeal or not was raised in Calcutta, *Ram Prosad Malla v. Raghubar Malla* (2), but the learned Judges (Chitty and Carnduff, JJ.) preferred to interfere under S. 422, Civil P. C. of 1882, though they expressed an inclination in favour of the Madras view, especially as it was supported by some of the Calcutta cases. Then we come to the Calcutta case of *Pochay Malay v. Emperor* (10), decided by Holmwood and Carnduff, JJ. in 1913. There the latter Judge observed as follows:

1. (1906) 10 C. W. N. 1026.

2. (1910) 37 Cal 13=4 I C 6.

3. (1911) 33 All 512=3 I C 982.

4. (1907) 30 Mad 282.

5. (1904) 27 Mad 213.

6. (1907) 5 C. L. J. 219.

7. (1905) 5 C. L. J. 222.

8. (1908) 30 All 243.

9. (1909) 31 All 48=1 I C 5.

10. (1913) 40 Cal 239=16 I C 167.

"Sub-S. 6, S. 195, Criminal P. C. 1898, provides that any sanction given or refused under that section may be revoked or granted by the higher authority indicated. I think that this language is such as to confer not a right of appeal on the person aggrieved by the grant or refusal to the higher authority. . . What is given is not a right of appeal from below but power to intervene, if thought advisable from above."

So far we find that the Full Bench case of Madras above cited and the two Calcutta cases with which it agrees speak of the further remedy as an appeal while Carnduff, J., in the recent Calcutta case referred to above does not give the name of an appeal but says that the higher authority has discretionary power to interfere, and this discretionary power would appear to be wider than that of revision. Carnduff, J.'s view is supported by a Full Bench of the Madras High Court in *Bapu v. Bapu* (11), where the learned Judges, after saying that they were not prepared to dissent from the above Full Bench ruling of the same High Court, proceeded to hold that the power conferred on the High Court by S. 195 (6), Criminal P. C. is not a part of its appellate and revisional jurisdiction but it is a special power conferred by S. 195 (6). This view has been held in a case decided by the Allahabad High Court (Piggott, J.) in 1915, namely, *Ram Raja Dat v. Sheo Dayal* (12), where the learned Judge observed:

"I wish also to note that I look upon an application under S. 195, Cl. (6), as standing on a very different footing from an application in revision. The right conferred by the clause above mentioned may not be exactly a right of appeal but it is strongly analogous to such right. I think the legislature intended that a Court of superior jurisdiction whose jurisdiction was invoked under S. 195, Cl. 6, Criminal P. C., should reconsider the entire matter on the merits and while allowing all reasonable weight to the opinion of the Court below, should nevertheless reconsider the question of the propriety of the order of sanction on its merits upon a complete review of the entire facts."

In *Buho Lal v. Chattu Gope* (13) of the Calcutta High Court (Sanderson, C. J., and Mookerji, J.) decided in 1916, Mookerji, J., observes as follows:

"In my opinion the controversy as to the rival claims of S. 115, Civil P. C. and S. 435 and 439, Criminal P. C. is based upon a misapprehension and one fallacy which underlies the decision of Pugh, J., in *Ramdin Bania v. Sew Bahsh Singh* (14) is the erroneous assumption

that one of these sections must be applicable. The true view is that S. 195 creates a special jurisdiction as explained in *Bapu v. Bapu* (11), and provides in Cl. 6 the machinery for the correction of possible errors committed by the primary Court. Consequently upon well known principles the interference by the High Court must be attributed neither to S. 115, Civil P. C. nor to Ss. 435 and 439, Criminal P. C. As Lopes, L. J., observed in *Reg v. Essex County Court Judge* (15), in the case of an Act which creates a new jurisdiction, a new procedure, new forms, or new remedies, the procedure, forms and remedies there prescribed and no others must be followed. To the same effect is the exposition by Lord Halsbury in *Pasmore v. Oswaldtwistle Urban District Council* (16): "The principle that where a specific remedy is given by a statute it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar and which runs through the law. In the case before us the machinery for correction of possible errors is provided in Cl. 6, S. 195, and consequently the party who seeks relief must have recourse thereto and cannot invoke the aid of S. 115, Civil P. C. or Ss. 435 and 439, Criminal P. C. The remedy provided is not restricted in scope; the superior tribunal is not limited to an examination of question of fact or questions of law alone but may upon a review of all the circumstances either affirm or reverse the order of the primary Court. It is thus immaterial whether the remedy provided in Cl. 6 is regarded as in the nature of an appeal or a revision."

The result of the above review of the authorities is that there is a distinct preponderance of authority in favour of the view that the High Court has the power to interfere with the order of the lower Court upon the merits of the case and that its powers are not confined to those under S. 115, Civil P. C. or those under Ss. 435 and 439, Criminal P. C. according as the case in hand is a civil or criminal case. I shall therefore, hold that I have power to go into the evidence and decide whether the order of the learned Divisional Judge granting sanction is a proper one or not.

Nagur Meera depends upon the evidence of two witnesses, namely, Muttu and Belu. The former described himself as a bicycle repairer and the latter as a money lender. I do not think the evidence of these two witnesses will do when we bear in mind that they were not called in the pro-note case and that the application for sanction appears to have been thought of only after the Divisional Judge's remarks that in his opinion the entries in question were forgeries. There is some explanation but none that is satisfactory as to how these

11. (1912) 14 I C 305.

12. A I R 1915 All 145=29 I C 329=37 All 439.

13. (1917) 44 Cal 816=39 I C 465.

14. (1910) 37 Cal 714=6 I C 473.

15. (1887) 18 Q B D 704=56 L J Q B 315.

16. (1898) A C 387=62 J P 628.

two witnesses came forward. Nagur Meera says Mutu did not of his own motion tell him but he happened to question the witness, who then told him that he had at Po Aung's request written something about the receipt of money in Po Aung's book. Mutu swears that about six months before Po Aung went to him on two occasions, asking on one occasion to note the receipt of Rs. 300 and on the other receipt of Rs. 200 in his Po Aung's note book; he complied with the request by making a note in each case in the kala language. Belu corroborates Mutu. I do not think it is safe to convict Po Aung upon evidence such as this. The learned Divisional Judge says that there is circumstantial evidence besides, which is referred to by him in the pronote case. On reference to the record of that case I find the circumstantial evidence referred to is contained in the following sentence in the learned Judge's judgment:

"If defendant 2 was so anxious to have the payment put on the record why did he not have it noted on the pro-note which was there and available?"

I do not think we can safely go upon such a hypothesis as this. At any rate the hypothesis does not render the testimony of the two witnesses reliable which without it is unreliable. Such evidence as that of these two witnesses is on its own not obtainable. I would not myself convict upon such evidence. I shall, therefore, revoke the sanction granted by the Divisional Judge and it is hereby revoked.

R.N./B.K. Application accepted.

* A. I. R. 1918 Lower Burma 93

MAUNG KIN AND RIGG, JJ.

Moulmein Rubber Plantation Co., Ltd.,
—Defendant—Appellant.

v.

C. W. Mitchell—Plaintiff—Respondent.

First Appeal No. 140 of 1917, Decided on 4th June 1918.

(a) Master and servant—Wrongful dismissal—What is not gross insolence and insubordination illustrated.

Plaintiff, an accountant in the defendant Company's service, preferred certain charges of a criminal nature against the local manager of the Company. The manager, while preparing an answer to the charges, wanted to remove one of the Company's registers from the office in order to show it to his counsel. Plaintiff stopped him and told him that under the Articles of Association

of the Company he could not show the Company's registers to outsiders.

Held: that the plaintiff's conduct did not amount to gross insolence or insubordination so as to justify his dismissal by the Company.

[P 95 C 2]

* (b) Master and servant—Wrongful dismissal—Servant need not wait till expiry of term for which engaged to sue for damages.

A servant who has been improperly dismissed need not wait till the expiration of the term for which he was engaged to serve before bringing his action for damages.

[P 95 C 2]

* (c) Master and servant—Dismissal—Burden of proof that servant could have obtained another service is on master.

Though it is the duty of the servant who is discharged to seek employment, the onus rests on the person who denies his right to receive his wages in full to show that he could have obtained employment.

[P 95 C 2; P 96 C 1]

MacDonnell—*for Appellant.*

Darbar—*for Respondent.*

Maung Kin, J.—This appeal arises out of a suit by the plaintiff-respondent against the defendant-appellants for damages on the ground that the plaintiff was wrongfully dismissed from the service of the defendants. The plaintiff entered the service of the defendants on 3rd December 1915. He served them as an accountant until 15th December 1916, when he was suspended. On the 7th he was dismissed with effect from the date of his suspension. He claims Rupees 10,750 12-0 as damages. The defence denied the dismissal but pleaded justification. It appears that some time previous to the suspension of the plaintiff he and some other assistants at the estate office of the Company wrote a letter to the Secretary of the defendant Company making several charges of a criminal nature against Major Bradley, the Manager. Some correspondence passed between them and the Secretary, which culminated in the assistants sending Ex. K which contains specific details of the charges. Major Bradley was then called upon by the defendant Company to answer the charges. He sought the assistance of Mr. Sutherland, a barrister, who on 3rd December 1915 came to Major Bradley's bungalow on the estate in order to write a reply to the charges. The bungalow was a two-storied building, of which the downstairs portion was used as the office of the Company while the upstairs was used as residence for Major Bradley and his wife. On the 4th December Mr. Sutherland was upstairs with Major Bradley and was taking instructions from his client as to the charges,

when Major Bradley went downstairs to fetch the permanent Establishment Register. He went up to Hla Pe, the head clerk's table and getting the book from him went through it for a little time and then proceeded to go upstairs carrying the book. Thereupon the plaintiff got up from his seat and went up to Major Bradley. He put his hand on Bradley's arm and then showing Ex. BB, which is the revised Articles of Association of the defendant Company spoke loudly to him and said that under a certain rule contained therein Major Bradley was not entitled to show the book to any outsider. Major Bradley, however, continued his journey upstairs with the book. He then sent a telegram to Mr. Dawn, the Managing Director of the defendant Company, to this effect:

"Sutherland here preparing explanations reference charges wished see Company's books Mitchell refuse access wire permission."

Major Bradley got the following reply (Ex. 4) from Mr. Dawn, "Have wired Mitchell give you access to books dismiss him if he refuses." On receipt of Ex. 4 Bradley wrote a letter (Ex. 5) to Mitchell asking for the keys of the office almirahs and saying that he had no doubt that Mitchell had received orders from the Managing Director that he (Bradley) was to have access to the office records. Mitchell noted on this letter the time of its receipt by him, namely, 12 noon, and wrote (Ex. 6) in reply to say that he had not received any orders from the Managing Director that Bradley was to have access to the office records. He further stated in that letter that he did not see why such orders should be sent to him when the books of the Company were open to Bradley's inspection at all times and he added that what he objected to was only the inspection of the Company's books by outsiders without the assent of the Board of Directors. At the time of the receipt of Ex. 5 and the writing of the reply Ex. 6 Mitchell was at lunch away from the office. It is clear that when Mitchell wrote Ex. 6 he had not received any orders, such as were alleged by Bradley, from the Directors. At 1 p. m. Mitchell received at the telegraph office a telegram (Ex. DD) from Mr. Dawn ordering him to allow Bradley access to the books. The tone of Ex. 6 was certainly impolite; but when considered in the light of what had actually happened, it must be held

that Mitchell was only showing some measure of independence in maintaining the right as he conceived it to point out to Major Bradley that the books were not open to the inspection of any outsider. Had he received DD when he wrote Ex. 6, not only would his reply be impolite in tone but it would also be a lie. Under the circumstances I do not think that his conduct in writing that letter can be classed as being insubordinate. However that may be, in considering the question whether the plaintiff's dismissal was justified, I do not think that Ex. 6 can be taken into account. Major Bradley himself made no mention of it in writing to the Company afterwards about Mitchell's conduct towards him. The Company themselves did not charge the plaintiff with insubordinate or gross insolence in respect of the letter. The charge against him of insubordination or gross insolence was based on the incidents which occurred in the office on 4th December. The charge made against Mitchell by the Directors was as follows: "You have been directed to attend at this meeting to give you an opportunity of explaining your grossly insubordinate conduct to the Manager, Major Bradley, at the estate office on the 4th instant."

The Chairman read Major Bradley's letter to him complaining of the conduct of Mitchell and Mr. Sutherland's letter in corroboration of it, and then heard what Mitchell had to say. Mitchell said that he did not stand in front of Bradley nor did he grab hold of him, and that all he did was to touch him on the shoulder and tell him that if he as Manager wanted the books he could have them. He then drew Major Bradley's attention to Art. 98 of the Articles of Association. Major Bradley then told him to mind his own business and went upstairs. He admitted having spoken in a loud tone, but said that it was always necessary to do so to Major Bradley because he was deaf. He also stated that at the time there were present Maung Hla Pe and Maung Tun Aung, clerks, and Mr. Wend, a fitter, all servants of the defendant Company. In answer to Mr. Darwood, a Director, he said that he objected to Major Bradley taking the Permanent Register upstairs, because it contained matters which constituted evidence against Major Bradley for the charges he and the other assistants had made and because he thought that if they were altered the evidence would thereby

be destroyed. In reply to Mr. Law, another Director, he said he thought Art 98 applied to the occasion but that he might have done so wrongly. Mitchell then withdrew from the meeting and the Directors, after consideration, held that Mitchell's behaviour towards Major Bradley was grossly improper and insubordinate and dismissed him. Considering that Mr. Sutherland saw nothing but only heard Mitchell's voice and afterwards the story of the occurrences from Major Bradley which must have been given in an excited manner, I think the defendant Company should have examined the witnesses named by Mitchell before they took any action against him. The only question we have to consider is as to whether the charge of insubordination and grossly improper conduct with reference to the incidents of the 4th December has been proved. I do not think that it is relevant to inquire into the question whether, as now charged by the defendant Company, Mitchell, for about 2 months prior to his dismissal, treated Major Bradley with veiled insolence, for that was not a part of the charge made against Mitchell. I agree with the learned District Judge in holding that Major Bradley took an exaggerated view of Mitchell's conduct towards him. It has been clearly proved by the evidence of the Burman clerks and the fitter and also of Mrs. Bradley herself that, when people wished to attract the Major's attention, they touched him, as he was very deaf. The Burman clerks and the fitter all corroborate Mitchell's version of occurrence and I can find no reason why they should have sworn falsely in favour of Mitchell, seeing that they are still in the employ of the defendant Company and that Mitchell was not financially in a position to tempt them from the path of rectitude. I agree with the learned District Judge in saying that, considering the strained relations that existed, Mitchell must have put his hand on Major Bradley's arm somewhat too roughly, because at the time he must have been excited and was certainly hurrying up to the Major.

Mr. Sutherland, who was upstairs, might have attributed the loud voice to the intention of Mitchell to be impertinent and insubordinate to his manager. Upon the evidence there may be room for thinking that Mitchell was somewhat

insolent to Major Bradley, but none for saying that his conduct was gross insolence or insubordination. He was the accountant in charge of the books of account and had in conjunction with other assistants made charges of a criminal nature against Bradley and was greatly under the impression that the books were, as he said in his evidence, his only safeguard and when Major Bradley took one of the books away in order to show it to an outsider out of his sight he thought he had a right to object to his doing so. And, as the learned District Judge says, he being an accountant, and not a manager, must be allowed some measure of independence. I think that when he raised the objection, he honestly believed that he had the right to do so and although he may have done so in an impertinent manner his conduct was not, in my opinion, such as warranted a dismissal. I would, therefore, hold that his dismissal was not justified. It is a question whether one act of gross insolence would justify dismissal or not, see *Edwards v. Leary* (1), but I have held that there was no gross insolence which warranted dismissal. Therefore, it is not necessary for us to consider the question. The learned District Judge considered that a 2 months' salary without alternative would be a just and adequate compensation for the plaintiff's wrongful dismissal. I do not think the learned Judge was wrong in doing so.

The learned Judge came to this conclusion after considering the law on the subject as stated in Halsbury's Laws of England, MacDonell's Master and Servant, in *Sowden v. Mills* (2), *Hartland v. General Exchange Bank* (3). At para 624, Vol. 10, Halsbury's Laws of England, it is stated that in actions for wrongful dismissal the plaintiff may recover the wages for the whole unexpired period of service including wages due at the date of dismissal. At p. 160 of MacDonell's Master and Servant, Vol. 2, it is stated that a servant who has been improperly dismissed need not wait till the expiration of the term for which he was engaged to serve before bringing his action with the qualification, as stated at p. 159 *ibid.* that though it is the duty of the servant who is discharged to seek employment, the onus rests with the person who dis-

1. (1900) 2 F and F 231.
2. (1861) 30 L.J.Q.B. 175.
3. (1860) 11 L.T. 803.

nies his right to receive his wages in full to show that he could have obtained employment. In *Sowden v. Mills* (2) Lord Blackburn says:

"If an action is brought by a servant for a wrongful dismissal soon after the dismissal, the Judge tells the jury that they must speculate on the chance of his getting a new place and ease their damages on that."

In *Hartland v. General Exchange Bank* (3) the plaintiff had been engaged for three years and was wrongfully dismissed at the end of four months, the jury were told that they should not give him the whole of his salary for the unexpired portion of the term of three years but that they should take into account the probability of his obtaining other employment. Considering that Mitchell had two years more to serve when he was dismissed and considering also how hard it is to get work in these days and having regard also to the fact that Mitchell has proved that he did seek to obtain employment but failed, I think the damages allowed by the District Judge were not excessive. I would, therefore, dismiss the appeal with costs.

Rigg, J.—I concur in thinking that there is no proof of such gross insolence on 4th December on the part of Mitchell as warranted his dismissal. The appeal is dismissed with costs.

K.N./R.K. Appeal dismissed.

A. I. R. 1918 Lower Burma 96(1)

MAUNG KIN, J.

Emperor.

v.

Nga Tun Kaing—Accused.

Criminal Revn. No. 68-A of 1917, Decided on 28th May 1917, against order of Special Magistrate, Myaungmya, D/- 19th December 1916.

Penal Code (1860), S. 376—Attempt to commit rape—Boy of twelve can be held guilty of offence.

A person physically incapable of committing the offence of rape, i. e., a boy 12 years, can yet be held guilty of an attempt to commit it.

[P 96 C 2]

Order.—The accused, a little boy of twelve, has been found guilty of an attempt to commit rape upon a little girl of four. The girl's parts were found to be bruised. The accused was convicted of an attempt to commit rape. In England the rule at Common law is that a boy under fourteen is under a physical incapacity to commit the offence of rape and that is a *prossumptio juris et de jure* and

Judges have from time to time refused to receive evidence to show that a particular prisoner was in fact capable of committing the offence. In *Reg v. Williams* (1) the prisoner being under the age of fourteen, it was held by Lord Coleridge, C. J., Hawkins, Cave, Day and Collins, JJ., that he was entitled to be acquitted of having had carnal knowledge of a girl of 13 but that he was guilty of an indecent assault. But the question whether the boy would have been convicted of an attempt at rape was expressly left an open question by Hawkins and Day, JJ. The former said:

"I do not assent to the notion that a boy cannot be convicted of an attempt to do that which the law says he cannot do."

In India, there seems to be no ruling except in the unreported case of *Gopala Rama*, which is quoted in Ratanlal's Law of Crimes at p. 762 from Unreported Criminal Cases 866. The volume cited is not available. There it is stated to have been held that a person physically incapable of committing the offence of rape cannot be held guilty of an attempt to commit it. The point to consider is whether that view is correct. In *Queen v. Ramsaran Chombey* (2) Turner, J., says: "To constitute then the offence of attempt under this S. 511, there must be an act done with the intention of committing an offence, and for the purpose of committing that offence it must be done in attempting the commission of the offence."

Having regard to the above definition and to the fact that it is not necessary to prove omission in a charge of rape, but only penetration, I think the offence committed was an attempt to commit rape.

K.N./R.K. Conviction upheld.

1. (1892) 1 Q B 320.

2. (1872) 4 N W P 46.

A. I. R. 1918 Lower Burma 96 (2)

MAUNG KIN, J.

Phaung Tha Rhi—Applicant.

v.

Mi Me Baw—Opposite Party.

Civil Revn. No. 147 of 1916, Decided on 5th June 1917.

Criminal P. C. (1898), S. 488—Maintenance—Father paying maintenance of child under order of Court is not bound to pay for medical attendance.

A father who is paying maintenance for his child under the orders of a Court is not bound to defray the charges for the medical attendance of the child, unless he has expressly or impliedly contracted to pay the same. [P 97 C 1]

Kyaw Htoon—for Applicant

Judgment.—Mi Me Baw sued her former husband Phaung Tha Rhi for Rupees 17-4-0, the amount of the medical bill tendered by the medical attendance of her son by the defendant. The parties had been divorced, their son being taken by the mother while the father promised to pay her Rs. 10 per month for the maintenance of the child. The child fell ill and a doctor attended on him and then presented the above bill. According to the doctor he has been paid Rs. 6 by the plaintiff and therewith remains Rs. 11-4-0 unpaid. I do not understand how she came to sue for 17-4-0 when she had paid only Rs. 6. She cannot sue for what she has not paid or for what she has paid, because the latter amount must have come out of the monthly allowance. Even if she had paid the whole amount out of her own pocket, the monthly allowance having been spent on other requirements of the boy, there is no obligation on the part of the father to pay fees for medical attendance, unless he has expressly or impliedly contracted to pay the same. In *Mortimore v. Wright* (1) it was held that the moral obligation which a father is under to provide for his child imposes no liability to pay the debts incurred by the child and that he is not so liable, unless he has given the child authority to incur them or has contracted to pay them. In *Pluck v. Tollemache* (2) it was held that a father is not bound to pay for clothes furnished to his son, without some contract, express or implied, on his part to do so.

In *Urmsion v. Newcomen* (3) the question was whether a father deserting his infant child would be liable in assumption to a party who supplied the child with necessities, no further proof of contract being given. It was held that no such action can be maintained, if the father had reasonable ground to suppose that the child was provided for. The above authorities seem to me to be against the plaintiff, even if she could prove that the monthly allowance not being available for the purpose of paying the bill, she had paid the whole of the amount of her own pocket. The application is allowed and the decree of the lower Court is set aside. I shall however make no order as to costs of this application, as I think the

defendant, being able to pay, as he is a well-to-do broker, should have considered himself morally bound to pay.

K.N./R.K. Application allowed.

A. I. R. 1918 Lower Burma 97

YOUNG, J.

K. K. Janoo & Co.—Plaintiffs.

v.

Joseph Heap & Sons, Ltd.—Defendants.
Civil Regular Suit No. 57 of 1915, Decided on 31st May 1917.

(a) Contract Act (1872), Ss. 37 and 38—Requirements of valid offer of performance of contract stated.—There must be actual attempt to perform.

The offer of performance to be valid, it must be complete and must satisfy all the requirements of the contract as to delivery of goods—where the contract requires delivery at a particular place, the goods must be delivered at that place. Where the contract requires delivery of goods at a particular place, the offer of performance must be made at that place. Where the contract requires delivery of goods at a particular place, the offer of performance must be made at that place. Where the contract requires delivery of goods at a particular place, the offer of performance must be made at that place.

Held, that this was a valid offer of performance within the meaning of S. 37, Contract Act, inasmuch as the bill was not tendered at the defendant's mill. (1910 G 2)

(b) Interpretation of Statutes.—Illustrations—Value of.—They must be accepted as relevant and as explaining section.

It is the duty of a court to construe, if that can be done, illustrations given under the sections of a statute as being of such relevance and value in the construction of the text, and they should in no case be rejected because they do not square with ideas derived from another system of jurisprudence as to the law with which they or the sections deal. (1913 G 1 & 2)

H. Cowanji—for Plaintiffs.

Counsel and Barristers—for Defendants.

Judgment.—In this suit Messrs. Kavin Kassim Janoo & Co. sue Messrs. Joseph Heap & Sons, Ltd., for breach of contract, dated 14th July 1914, under which they undertook to buy from the plaintiff 50,000 baskets of rail and box paddy at the price of Rs. 121 per 100 baskets of 15 lbs. each and for Rs. 10,721 damages made up as follows: Rs. 10,500 the difference between the contract price and the market rate, survey fees Rupees 192 and Rs. 29 certain railway and godown charges in respect of certain paddy tendered but not accepted.

The sole stipulations in the contract were that the paddy was to be "free from yellows" and was to be delivered into Messrs. Heap's cargo boats at their Pazundaung siding within July and August: vide Ex. P, the bought note. On 27th

1. (1810) 6 M & W 481.

2. (1844) 1 Car & P 5=28 R R 765.

3. (1836) 1 Ad & E 899=5 N & M 451.

July the plaintiff's tendered seven wagon loads of paddy to the defendants which were not accepted. According to the defendants they contained new unripe grain, which plaintiffs agreed to replace as they were able to sell it at a profit: vide defendant's letter of 5th August 1914 — (Ex. C). The plaintiffs, though it is admitted that they sold the paddy in question at a profit, took exception to the defendant's act and wrote to them on July 30th, saying that the paddy had been rejected on the ground that it was new paddy and alleging that they had a perfect right to tender new paddy provided it was free from yellows and asking if they were going to reject all new paddy as they only intended to deliver such, and if they intended to reject it, it was no use going to the expense of formally tendering it. They also asked if it was rejected on any other ground. On 5th August, having received no reply, they again wrote and asked whether the defendants claimed that under the contract they were entitled to get old paddy and would refuse to take new paddy of the quality last tendered. On the same day the defendants wrote to them the letter already mentioned, in which they replied that their contract had always been for ripe sound grain of 1913-14 and not of new 1914 crop, but that the question of non-acceptance had never arisen. This last sentence was an allusion to their contention that the tender had been withdrawn so to speak by consent, as the plaintiffs were able to dispose of it elsewhere to better advantage. It may however be remarked that this contention was given up in the written statement, in which the defendants admitted that they had rejected the paddy as not being of contract quality. The defendants also stated that the plaintiffs had agreed to replace the paddy with good sound paddy. On 7th August the plaintiffs replied denying that they had promised to replace the paddy with paddy of any other quality and asking the defendants to state definitely whether they would take paddy of the quality which had been tendered and rejected. The defendants replied the following day reiterating their assertion that the question of acceptance or non-acceptance had never arisen and stating that until paddy was tendered, they were not in a position either to accept or reject it.

At this stage of the dispute there were

two courses open to the plaintiffs which were either to treat the defendants' conduct as tantamount to a wrongful putting an end to the contract and use them for the breach, or to continue the contract. The plaintiffs elected to adopt the latter course and tendered three more wagon loads which were again rejected, whereupon the plaintiffs again wrote on August 20th, Ex. F, to the defendants asking for the reasons of such rejection. The defendants replied on 22nd August that they had rejected it because it again consisted of new crop grain and was damaged, and on 29th August the plaintiffs wrote as follows:

"Referring to previous correspondence we have to point out that you have twice rejected paddy tendered to you on grounds which our clients consider untenable. We are now instructed to tender 14,300 bags of paddy now lying at Moola Dawood's Dawbong Mill. We have to request you to examine this paddy and say whether you will accept it. If you will, our client will cause it to be brought to your mill at once."

The defendants replied the same day declining to accept tender except at their own mill in the customary manner, and the plaintiffs then wrote on August 31st to the defendants stating that it was apparent that they did not intend to take the paddy under any circumstances and adding as follows:

"We hereby give you notice that as you have refused to take delivery of paddy of the quality mentioned in the contract, our client hereby cancels the contract."

From these words it is quite clear, and the plaintiffs do not contend to the contrary, that whether the defendant's previous conduct might or might not have justified the plaintiffs in putting an end to the contract, they had not done so, but had elected to keep it alive until the defendants' refusal to inspect and state whether they would accept the 14,300 bags of paddy lying at Moola Dawood's Dawbong Mill. Up to this stage they kept the contract alive and as pointed out in *Frost v. Knight* (1), kept it alive for the benefit of the defendants as well as their own and enabled the defendants to take advantage of any supervening circumstance which would justify them in declining to complete it. The defendants claim that this request that they should examine these 14,300 bags at Moola Dawood's Dawbong Mill was such a supervening circumstance, inasmuch as it was no tender or offer of performance within

the meaning of the law and that therefore the present suit must be dismissed. They rely upon Ss. 37 and 38, Contract Act. S. 37 provides that the parties to a contract must either perform or offer to perform their respective promises, unless such performance is dispensed with or excused under any law. Whatever rights the defendant's former rejections might have conferred upon the plaintiffs with regard to cancelling the contract, had been admittedly waived by the plaintiffs and unless their letter of 29th August constituted a valid offer of performance, they cannot, in my opinion, be said either to have performed or to have offered to perform their promise or to be entitled to say that the defendants had wrongfully omitted to perform in turn their own promise, whether it was a rightful offer of performance depends upon the construction of S. 38, which provides inter alia that an offer to perform must be unconditional and made at a proper place and time. Here the contract was to deliver paddy within July or August. It was offered within this period and there is, therefore, no objection as to time, but the contract also provided that it was to be delivered into buyers' cargo boat at the Pazundaung siding, and plaintiff's offer was not to deliver there, but to give inspection at Moola Dawood's Dawbend Mill and then deliver at defendants' mill if defendants agreed to accept it. Can this be said to be an offer to perform at a proper place? What is meant by a proper place is not explained in S. 38, presumably because it is in each case a question of fact whether the place is or is not proper except that as we see from the illustration, when a place for performance has been mentioned in the contract, that place is the proper place also for the offer to perform. The illustration, runs as follows:

"A contracts to deliver to B at his warehouse on 1st March 1873, 100 bales of cotton of a particular quality. In order to make an offer of performance with the effect stated in this section, A must bring the cotton to B's warehouse on the appointed day."

Words could hardly be more emphatic or plain than the words "in order to make an offer of performance with the effect stated" and in *Mohamed Syedol Ariffin v. Yeoh Ooi Gark* (2) the Privy Council laid down

"that it is the duty of a Court of law to accept,

2. A 1 R 1916 F C 212=29 I C 404=44 I A 266 (F C).

if that can be done, the illustrations given are being both of relevance and value in the construction of the Act, and that they should in no case be rejected because they do not square with ideas possibly derived from another system of jurisprudence as to the law with which they or the sections deal."

This was laid down in an appeal not from India but from the Strait Settlements, but the law laid down is clearly of general application and was, moreover, enunciated with regard to a section reproduced from the Indian Evidence Act, as the judgment in question elsewhere states. The illustration is, therefore, both of relevance and value, and, as here, it so emphatically states that "in order to make an offer of performance with the effect stated in this section" certain things are essential, it seems to follow that if these essentials are not complied with, the offer of performance cannot have the effect stated in the section. In the case of *Mohamed Syedol Ariffin v. Yeoh Ooi Gark* (2) the Court of Appeal of the Strait Settlements had held it safer to construe the section and illustrations on English lines, and their Lordships reprobated this; but in the present case if we turn to English law, we find that the law of tender is exactly the same in this respect as that laid down in the illustration. I can see no difference between a tender and an offer of performance. In *Baker on Contracts*, Edn. 4, p. 523, we find the two words used interchangeably for the same act. He writes as follows:

"When a contract is one it may be discharged by performance according to the terms. A promise may be available for performance independently of any act or concurrence on the part of the promisee or it may be incapable of complete performance without some act or concurrence upon his part. Where the performance is dependent upon the concurrence of the promisee, the promisee discharges his liability by a tender or offer of performance, so far as it can be completed on his part."

A promise to deliver goods is clearly a promise that cannot be completely performed without the concurrence of the promisee: *Startup v. Macdonald* (3). But unless the offer is made at the place specified in the contract, the offer cannot be said to be as complete as it was possible for the promisor to make it. Again in *Anson's Law of Contracts* Edn. 12, p. 313, we read that "tender is an attempt to perform frustrated by the act of the other party," and again that

3. (1843) 6 Man & G 203=7 Scott N R 269.

"where in a contract for the sale of goods the vendor satisfies all the requirements of the contract as to delivery and the purchaser nevertheless refuses to accept the goods, the vendor is discharged and may either maintain or defend successfully an action for the breach of the contract."

Again it follows that unless the vendor has offered to perform at the place specified in the contract, he has not satisfied all the requirements of the contract as to delivery. Parke, B., in the same case of *Startup v. Macdonald* (3) at p. 624, stated as follows:

"Where the thing to be done is to be performed at a certain place the tender must be to the other party at that place."

This particular case turned on the question of time rather than of place, but the authorities are quite sufficient to establish the proposition that English law is fully as strict as the illustration. S. 47 lays down in India the law as regards time and place for performance and I have no doubt that the offer to perform, to be a valid offer, must follow the same rule as laid down in the illustration to S. 38 and that as Parke, B., stated at p. 623, the law has fixed the rule and it is not to be left to a jury to be determined as a question of practical convenience or reasonableness in each case. In my opinion therefore for an offer of performance to be valid, it must be complete and must satisfy all the requirements of the contract as to delivery; it must, where the contract requires delivery at a particular place, be an attempt to deliver at that place. In their letter of 29th August the promisees seem to have waived delivery at their Pazundaung siding and consented to take it at their own Dawbong Mill; they were, of course, entitled to do this, but I think they were fully within their rights in declining to inspect at Moola Dawood's Mill or to accept tender of paddy at any place other than that mentioned in the contract or agreed to by both parties. The two mills seem to have been at most only about half a mile apart; but this seems to me immaterial. In England the rules are so strict that a tender of a large sum of money accompanied by a demand for exchange is invalid; the tender or offer to perform must be in accordance with the contract.

This was not such an offer. The plaintiffs themselves recognized this for they said that if the defendants would pass the paddy at Mulla Dawood's Mill they

would then deliver it at the defendants mill. There was no such term in the contract, and they could not import it. I must, therefore hold that there was no valid offer of performance and that plaintiffs' suit must be dismissed so far as the two first and main items are concerned. As regards the small claim of Rs. 29 it was practically disregarded by counsel. It arose out of the second tender of three wagon loads; the defendants had a claim against the plaintiffs for certain gunny bags, and claimed a lien on this paddy for the payment, and detained it for some days. I do not see that they were entitled to any lien and I think they are entitled to be reimbursed this amount. The result is that the suit must be dismissed with costs on Rs. 10,721 less Rs. 29 for Rs. 10,692 and the defendants must pay the plaintiffs or deduct from their costs the sum of Rs. 29.

K.N./R.K.

Suit dismissed.

A. I. R. 1918 Lower Burma 100

TWOMEY, C. J. AND ORMOND, J.

Aung Ma Khaing—Appellant,

v.

Mi Ah Bon—Respondent.

Civil Misc. Appeal No. 166 of 1916, Decided on 11th December 1917.

(a) Probate and Administration Act (5 of 1881), S. 23—Enquiry into question of adoption where rival claimants right to letters depended upon such decision held proper.

Where the full sister and an alleged adopted daughter of the deceased whose adoption was disputed applied for Letters of Administration to the estate of the deceased:

Held: that inasmuch as in the event of the adoption being established the sister would not under the Buddhist law be entitled to any share in the estate, the Court would be justified in going into the question of adoption. [P 101 C 1]

(b) Buddhist Law (Burmese)—Adoption by divorced woman is as good as by single woman.

Under the Buddhist law as regards the power to adopt, a woman who is divorced from her husband and has divided the joint property with him is in the same position as a single woman.

[P 101 C 1, 2]

(c) Buddhist Law (Burmese)—Adoption—Formality—Adoption is matter of intention and is good without formal declaration.

An adoption is to a great extent a matter of intention and where an attempted adoption by a married woman causes a divorce between her and her husband but the intention to adopt continues after the divorce and full effect is given to it, there is a good adoption without any formal declaration. [P 101 C 2]

Ba Dun—for Appellant.

J. E. Lambert—for Respondent.

Judgment.—The present respondent Mi Ah Bon applied for Letters of Administration to the estate of Chi Ma Pru, who died in May 1916. The present appellant Anug Ma Khaing opposed the application, alleging that she was an adopted daughter of the deceased. She is also the natural half niece of the deceased. Mi Ah Bon is the full sister of the deceased. Ma Khaing appeals from the order of the District Judge granting Letters of Administration to Mi Ah Bon. Mr. Lambert for Mi Ah Bon contends upon the authority of *Ma Tak v. Ma Thi* (1) that Mi Ah Bon was entitled to Letters of Administration inasmuch as she was an admitted relation and the adoption of Ma Khaing was in dispute; but that decision refers to the case of an admitted heir and if the adoption of Ma Khaing in this case is proved, Mi Ah Bon would not be an heir. She would not be a person entitled to Letters of Administration under S. 23, Probate and Administration Act, because she would not be entitled to any share in the estate. The District Judge has taken, we consider, a correct view of the case cited. He took the evidence in support of the adoption which lasted a whole day, and then decided that it would be waste of time to take the evidence against the adoption, because it was shown that the deceased Chi Ma Pru adopted Ma Khaing against the wish of her husband. In consequence of this adoption by Chi Ma Pru there was a divorce between her and her husband by mutual consent and a division of their property was made. The learned Judge was of opinion that a sole woman can adopt but that a married woman cannot adopt without the consent of her husband and that the adoption of Ma Khaing, at its inception being invalid, could not become valid after the divorce without some formal adoption or re-adoption in order to place her in the position of a child who had been adopted with a view to inherit. No authorities have been cited to show that a single woman cannot adopt. In the case of *Ma Ba Lone v. Ma Mya Sin* (2) it was taken for granted that a spinster could adopt. Mr. May Qang in his work on Buddhist law remarks that it is quite usual for widows to adopt.

There is no reason in principle why a woman who is divorced from her husband and has divided the joint property with

him should be in a different position as regards the power to adopt. It seems probable, as held by the District Judge in this case, that a married woman living with her husband cannot adopt without his consent. But an adoption is to a great extent a matter of intention and if Chi Ma Pru's intention to adopt Ma Khaing continued after the divorce and full effect was then given to that intention, there would be a good adoption without any formal declaration. From the evidence, so far as it has been taken, it would appear that Chi Ma Pru's intention was to adopt Ma Khaing; that such attempted adoption was the cause of the divorce and that Chi Ma Pru's intention continued after the divorce and that she paid effect to it. The case is remanded in order that Mi Ah Bon may be allowed an opportunity of adducing evidence to show that Ma Khaing was not adopted; and the District Court will dispose of the application in accordance with the above remarks. The costs of this appeal will abide the final result.

K. N. J. K.

Case remanded.

A. I. R. 1918 Lower Burma 101

MAUNG KIN, J.

Maung Ba Tu and another—Defendants—Appellants.

v.

Baman Khan and another Plaintiff—and Defendants—Respondents.

Special First Appeal Nos. 81 and 119 of 1916. Decided on 15th February 1917, against Decree of Hon. E. C. Judge, Rangoon, in Civil Reg. No. 7966 of 1915.

Civil P. C. (1908) Sec. 16, 19 and 20—Promise to repay loan at certain place—Creditor is not entitled to sue at that place solely by that reason unless promise is for consideration or falls under S. 25 (2), Contract Act (1872).

A promise to pay what one is already under an obligation to pay, is a promise without any consideration and does not give rise to any cause of action. Therefore, a promise by a debtor to repay the loan at a certain place for the sake of the creditor's convenience does not entitle the creditor to sue at that place solely by reason of it, unless the promise is supported by consideration, or is one falling under S. 25 (2), Contract Act: 8 M. L. J. 491 (P. C.); 1 L. B. R. 190 and 30 Mad. 438, Ref. [P 102 C 2]

Ba Hun—for Appellants.

I. Khan and A. C. Ihar—for Respondents.

In No. 81 of 1916.

Judgment.—In the Small Cause Court, Rangoon, the plaintiff sued for the

1. (1909-10) 5 L. B. R. 183; 1 C. 719.

2. (1903-05) 14 Bur. L. R. 9.

recovery of Rs. 1,681-8-0, the balance found due at a settlement of accounts made between him and defendants 1 and 2 at Twante.

The transaction to which the settlement related was an agreement entered into at Twante between them, for the plaintiff to manufacture kutch bricks at Twante at a certain rate. Defendant 3 is sued as having guaranteed payment. Defendant 4 was added as a party defendant after the institution of the suit in consequence of his claim to have a share in the subject matter of the suit. All the defendants reside at Twante. The plaintiff, however, claims to be entitled to sue in Rangoon by reason of an alleged promise of the defendants made at the settlement of accounts to pay the amount found due to the plaintiff at his house in Rangoon on a later date. Defendants 1 and 2 plead among other things to the jurisdiction of the Court. The lower Court held that the said promise to pay at Rangoon gave it jurisdiction to entertain the suit, and after hearing the case on the merits passed a decree for a certain sum against defendants 1, 2 and 3. Defendants 1 and 3 now object that the lower Court had no jurisdiction. After carefully considering the law on the subject I have come to the conclusion that the objection must be upheld. It is clear that without the promise to pay at Rangoon, the suit must be filed at Twante, being the place where the original contract was entered into and was to be performed or where the balance was struck and the amount became due and payable. In my judgment what gave rise to the cause of action was the original contract which was made or was to be performed at Twante or the settlement of accounts which was made at the same place: see *Luckmee Chund v. Zorawur Mull* (1). The promise in question was no part of the settlement and it is at best a promise to pay what the defendants were already under an obligation to pay either under the original contract or under the settlement of account and as it is a promise without any consideration, it can give rise to no cause of action. If it was part of the original contract as indicating the place of performance, then there can be no doubt it will give the Rangoon Court jurisdiction. But that was not the case. I am unable to see how it can form part of

1. (1859-61) 5 M L A 291=1 W R 35 (P C)

the settlement of accounts, as on the balance being struck the amount found due became payable without any promise on the part of the defendants to pay. My view is supported by authority. As to the nature of the promise, there is the case of *Kankani v. Maung Po Yin* (2), where it was held that a naked promise to pay what the promisor is already under an obligation to pay gives rise to no cause of action. In *Seshagiri Row v. Nawab Askur Jung Aftai Dowlah Mushral Muk* (3) the plaintiff sued the defendant at Madras for services rendered at Hyderabad, where also the contract was made, alleging a promise, after the work had been done, to pay at Madras.

It was held that as there was no allegation of any consideration for the promise and as it was not a promise falling under S. 25 (2), Contract Act, there was no contract in law to pay at Madras, which would give the Madras Courts jurisdiction. There is no difference between this case and the case before me. The real thing to pay attention to is that the promise of the defendants was separate and apart from the settlement of the accounts, which, without any promise on their part to pay their amount found due, would have given rise to a cause of action. Therefore any separate promise made to pay the amount at any particular place must be supported by a consideration, before it can give rise to legal consequences. It was rightly conceded before me that if, after a contract of loan has been made, the debtor makes a promise to repay the loan at a certain place for the sake of the creditor's convenience, the promise cannot entitle the creditor to sue at that place solely by reason of it, unless it is supported by a consideration. For the above reasons I am bound to hold that the lower Court had no jurisdiction to entertain the suit. I allow the appeal with costs and direct that the plaint be returned to the plaintiff for presentation to the proper Court.

In No. 119 of 1916.

For the reasons appearing in my judgment in Special Civil First Appeal No. 81 of 1916, heard together with this, I dismiss this appeal with costs. The appellant will pay the court fees which would have been paid by him in this appeal as

2. (1900-02) 1 L B R 190=3 Bar L R 101.

3. (1907) 30 Mad 438.

well as in the original suit, if he was not permitted to sue as a pauper.

K.N./R.K. *Appeal dismissed.*

A. I. R. 1918 Lower Burma 103

MAUNG KIN, J.

Curpen Chetty—Defendant—Appellant.
v.

Ana Mahalingam—Plaintiff—Respondent.

Misc. Appeal No. 99 of 1916, Decided on 7th June 1917.

Limitation Act (1908), Sch. I, Art. 182—Application for transfer of decree to another Court without certified copy of—Decree is step-in-aid of execution.

An application for execution of a decree by transfer to another Court, though not accompanied by a certified copy of the decree and though the decree is not transferred, is a step-in-aid of execution within the meaning of Art. 182, Limitation Act, and serves to save the decree from being barred by limitation. *Case-law the point considered.* [F 104 C 13]

Campagne—for Appellant.

Nariman—for Respondent.

Judgment.—In Suit No. 12 of 1911 of the Sub-Divisional Court of Kynaktan, Ana Mahalingam sued Pazma Sooml and obtained an attachment before judgment. The attachment was subsequently raised by Curpen Chetty executing a bond as surety for the amount of the decree. After this the suit was transferred to the District Court for disposal. That Court passed a decree on 4th March 1911. On 5th April 1911 the plaintiff applied to the District Court for execution against Curpen Chetty. The Court held that Curpen Chetty was bound under the bond to the Sub-Divisional Judge and referred him to the Sub-Divisional Court. On 30th September 1913 plaintiff applied to the Sub-Divisional Court for the execution of the decree by the enforcement of the bond, without having previously applied to the District Court for the transfer of the decree with a certificate of its non-satisfaction and without attaching a certified copy of the decree. But as the bond could not be found no further action was taken either by the plaintiff or by the Court. On 11th March 1914 the plaintiff again applied to the District Court for execution by the arrest of the judgment-debtor and the Chetty surety. This application was dismissed on the ground that it had already been held that the bond could not be enforced by the District Court and as that decision was not appealed against, the application was

barred by res judicata. The plaintiff appealed from this order of dismissal but was unsuccessful. On 3rd March 1915 the plaintiff again applied to the Sub-Divisional Court for execution by the enforcement of the bond. That Court held that the application was time-barred. On appeal to the Divisional Court it was held that the application was not time-barred and the case was remanded for decision on the merits. The defendant appeals to this Court.

It is contended that the application of 5th April 1911 to the District Court was not an application for execution, or a step-in-aid of execution, in accordance with law, as it was made to the wrong Court and should be disregarded, as also the application of 11th March 1914. The contention is obviously correct. By reason of the ruling in the case of *Narayan v. Timmaya* (1) the application of 11th March 1911, though also against the judgment-debtor and in order in regard to him, does not save limitation in regard to the surety. We have then left for our consideration only the question whether the application to the Sub-Divisional Court of 30th September 1913 would save limitation for the application in question here of the 3rd March 1915. Mr. Campagne for the defendant contended that the application of 30th September was not in form in accordance with law, inasmuch as it was not accompanied by a certified copy of the decree and no application had been made for the transfer of the decree to the Sub-Divisional Court as required by law and as more than three years had elapsed from the date of the decree to the date of the present application. If 30th September is left out of consideration, the present application is barred by limitation under Art. 182, Lim. Act. The Bombay case of *Saivashiva Raghunath v. Ramchandra Chintaman* (2) supports the learned counsel's contention. But this case was dissented from by the Madras High Court in *Pachiappa Achari v. Poojali Seenan* (3). In the latter case as in the Bombay case the defect relied on was the failure to produce a copy of the decree sought to be executed and it was held that the defect had reference to an extraneous matter and the application, though ac-

1. (1907) 31 Bom 50.

2. (1903) 5 B.L. 334.

3. (1905) 28 Mad 557.

accompanied by such a defect, was in accordance with law.

In a later Bombay case of *Ramchandra Sadashiv v. Laxman Sadashiv* (4) the Madras case cited above was followed and it was said in regard to the Bombay case cited above that Chandavarkar, J., who was a party to it, would no longer adhere to the decision of his colleague, who pronounced the judgment. So that case was not followed. The Full Bench case of the Calcutta High Court, reported as *Gopal Chunder Manna v. Gosain Das Kalay* (5), may be cited in support of the Madras and the later Bombay cases, as it was therein held that material defects only could vitiate an application for execution. Another Bombay case *Vinayak Vaman v. Ananda Ramji* (6), decided in 1903 may also be cited as denying the correctness of the view contended for by Mr. Campagnac. There is also the Allahabad case of *Abdul Majid v. Muhammad Faizullah* (7), which may also be cited against Mr. Campagnac's contention. I, therefore, hold that by reason of the application of 4th March 1911 the application now in question is not barred by limitation, though it was not accompanied by a certified copy of the decree and though the decree has not been transferred to the Sub-Divisional Court for execution. The appeal is dismissed with costs and the case will, therefore, be sent back to the Sub-Divisional Court for decision upon the merits as ordered by the Divisional Court.

K N / R K.

Appeal dismissed.

4. (1905) 31 Bom 162.

5. (1903) 25 Cal 591.

6. (1910) 34 Bom 58=4 I C 582.

7. (1891) 18 All 89.

A. I. R. 1918 Lower Burma 104 Full Bench.

ORMOND, OFFG. C. J., ROBINSON,
PARLETT AND MAUNG KIN, JJ.

Thein Myin—Accused—Applicant.
v.

Emperor—Opposite Party.

Criminal Revn. No. 42-B of 1917, Decided on 13th March 1917.

(a) Lower Burma Courts Act (1900), S. 12—Case referred to Bench under S. 12—Conviction set aside on ground of misdirection to Jury—Retrial can be ordered on original commitment—Criminal P. C. (1898) Ss. 423 and 439.

Where, in a case referred to a Bench of the Chief Court under S. 12, Lower Burma Courts Act, the conviction and sentence are set aside

on the ground of misdirection to the Jury, the Bench has the power to order a re-trial of the accused on the original commitment; 3 L. B. R. 75. Diss. from. [P 105 C 2 P 107 C 1 P 108 C 1, 2]

(b) Lower Burma Courts Act (1900), S. 12—Case referred to Bench under S. 12—On ground of misdirection to Jury—Misdirection amounting to illegality—Trial is void—Bench cannot deal with evidence in case—Procedure—Letters Patent S. 26—Criminal P. C. (1898) Ss. 423 and 439.

Pet. Robinson, J.—In a case referred to a Bench of Chief Court under S. 12 on ground of misdirection to Jury if the misdirection amounts to an illegality, the trial is void and of no effect and the Bench cannot deal with the evidence in the case. If, however, the misdirection is not of that character but is a wrong admission of evidence or a misinterpretation of it, the Bench can go into the evidence. Where the guilt or innocence of the accused depends on evidence consisting of several separate and distinct parts and where the part tainted by the misdirection can be separated from the rest and it is clear that the misdirection has not affected in any way the finding of the Jury on the remainder of the evidence, the Bench can and should consider whether the finding is justified if the objectionable evidence is left entirely out of consideration. If it is justified, the conviction and sentence should be maintained. In doing so the Bench would not be usurping the functions of the Jury but merely reviewing and checking their finding. [P 107 C 1, 2]

Dawson and Kyaw Htoon—for Applicant.

Higinbotham—for the Crown.

ORMOND, OFFG. C. J.—This is an application under S. 12, Lower Burma Courts Act, upon the certificate of the Government Advocate to review the case of *King Emperor v. Petitioner Nga Thein Myin* which was tried at the last Sessions of this Court, upon the ground of misdirection. The petitioner was found guilty by a unanimous verdict of committing mischief by fire, an offence under S. 436, I. P. C. There was evidence to show that the petitioner was seen in the room where the fire originated, when the fire was first discovered. In his examination before the Magistrate, the petitioner said, "after that at about 11 o'clock upon coming back to my house I learnt of the fire in the house and of the people of the quarter having combined and put it out."

The statement was wrongly translated by the Court translator as follows:

"Then at about 11 P. M. I came home and found the house burning and the local people trying to put out the fire."

This statement was read out to the Jury as the statement of the accused and the learned Judge commented to the Jury on the fact that the accused admitted that he was present at the fire and saw the people putting it out. The Judge by

mistake put to the Jury, as being a statement made by the accused to the Magistrate, a statement which the accused did not make. It was clearly a case of misdirection which might possibly have had a material effect upon the minds of the Jury when forming their verdict, seeing that the case rested upon the identification of the accused. Mr. Dawson for the petitioner contends that having found there was a misdirection, the only course open to this Court is to set aside the conviction and sentence. He contends that this Court cannot now go into the facts with a view either of convicting or acquitting the accused—because that would be usurping the functions of a Jury; and that this Court cannot order a re-trial—because that power is not expressly mentioned in S. 12 and that it is not the practice of this Court to do so. S. 12, Lower Burma Courts Act, is very similar to Art. 26 of the Letters Patent; and the provisions of S. 537 of the Code and of S. 167, Evidence Act, apply to proceedings under S. 12.

Counsel for the Crown contends that both these sections apply to the present case and that under S. 167 this Court must go into the facts and see whether the evidence that should have been before the jury justifies the decision. Strictly speaking there has been no improper admission or rejection of evidence and I doubt if S. 167, Evidence Act applies. But even if it does, I think the effect of both these sections, when dealing with the verdict of a Jury, is the same. This Court has to consider what effect the improper admission or rejection of evidence or the irregularity or misdirection might have had upon the decision of the jury. It is the duty of this Court to go sufficiently into the facts to determine whether there is a reasonable possibility that upon a proper trial a Jury might come to a finding different to the finding that would commend itself to this Court or not. If there is no such reasonable possibility, then it is the duty of this Court to confirm or alter the judgment in accordance with the finding come to by this Court. But if in the opinion of this Court there is a reasonable possibility that a Jury might either acquit or convict, it would be a proper case for a re-trial, for in such a case this Court would not be satisfied that

"independently of the evidence wrongly admitted a Jury would consider that there was sufficient evidence to justify the previous decision or that if the rejected evidence had been received, the Jury would not have varied the decision."

And the accused being entitled to have the verdict of a jury, failure of justice might be occasioned if the finding of this Court on the facts were to prevail in a case where there is reasonable possibility of a jury coming to a different finding. In this view, the provisions of S. 167, Evidence Act, and S. 537 of the Code would be fully complied with and the right of the accused to be convicted solely upon the verdict of a jury would be preserved. S. 12 authorizes this Court to alter the judgment, order or sentence and to pass such judgment, order or sentence as it thinks right. Thus the widest powers are given in express terms. The only limitation that has been placed upon these wide powers is, that they do not authorize the Court to assume the functions of a jury. It has never been held that these powers do not include the power to order a re-trial and in my opinion we have that power.

In *Uo Gai v. Emperor* (1) it was held that an order of commitment was satisfied after conviction and sentence, although such conviction and sentence were subsequently set aside in proceedings under S. 12. But the conviction and sentence, having been set aside, were not final; and with great respect I doubt if the commitment was satisfied. In any case S. 12 authorizes this Court to pass such orders as it thinks right. I think the right order to pass in this case is to set aside the conviction and sentence and to order the petitioner to be re-tried upon the same commitment and in the meantime to be detained in custody as an under trial prisoner.

Robison, J.—As the Judge who presided at the trial, I think it right to record what occurred. The case was one of arson and it is admitted that arson was committed by some person, but it was denied that the evidence of the witnesses for the prosecution was reliable and that the prisoner at the Bar was the man who set fire to the house or was the person whom the witnesses had seen. In summing up the evidence to the Jury I dealt of with the evidence the eye-witnesses and the question whether

ther they had seen the prisoner, as they stated. I reminded the Jury of the statement of the prisoner to the Committing Magistrate which was evidence, and I pointed out that he himself had stated that he was in the house while the fire was still burning. The statement of the prisoner was recorded in Burmese and I read to the Jury the official translation of this part of it. It now appears that that translation is incorrect and that the prisoner had stated that when he returned he found that there had been a fire which had been put out by the neighbours.

I therefore had inadvertently put to the Jury as a statement of the prisoner something that he had never stated and I did so as a statement which might be considered together with the evidence of the eye-witnesses in deciding whether the prisoner was the man whom witnesses had seen. This was clearly a misdirection. It is clearly not a misdirection amounting to an illegality, as for instance the failure to comply with some express provisions of the law or a breach of some express prohibition of the law, such as was before the Lordships of the Privy Council in *Sulrahmania Ayyar v. King-Emperor* (2). It is therefore necessary to consider the provisions of S. 537, Criminal P. C. I am prepared to agree that this may have influenced the decision of the Jury, and that on a fact vital to the correct decision of the case. I would however record my opinion that in order to arrive at such a decision it is open to this Bench to go into the evidence. We must therefore set aside the conviction and sentence. This brings us to the question whether having done so, this Bench can pass any other judgment, order or sentence. Can we go into the whole case and decide on the evidence, including the prisoner's statement, whether he is guilty or not guilty or can we order a re-trial?

This Bench takes cognizance of the case on a certificate granted by the Government Advocate as required by S. 12, Lower Burma Courts Act. This section is very similar to Cl. 26 of the Letters Patent of the High Courts and is practically in identical terms with S. 434, Criminal P. C. The powers given by this section have been considered in two cases by this Court and I will deal with those

cases. In *Hla Gyi v. Emperor* (3) the charge was one of murder and the Bench held that there had been misdirection in the charge to the Jury and illegality in dealing with the verdict. The final order was that the conviction and sentence be set aside and the accused released from custody. In considering whether any further order could be passed, Sir Harvey Adamson gives four reasons for not ordering a re-trial. With great respect I find myself unable to agree with any of those reasons. The first is because he could not find any instance in which a High Court in India has ordered a re-trial of a case tried by itself and it has never been done under S. 26 of the Letters Patent. The fact that there is no reported case in which this was done does not show it has never been done and further it has never been held that the Court had not the power to do so. The next reason is that the language of S. 12 is not nearly so wide as that of S. 423 read with S. 439 of the Code, which is said to include all the powers mentioned in S. 12 and include also by special mention the power of ordering a re-trial. The powers given by S. 12 are (1) to review the case or such part of it as may be necessary and (2) to finally determine the question, that is, the question referred. The section then proceeds:

"and may thereupon alter the judgment, order or sentence passed by the Judge, and pass such judgment, order or sentence as it thinks right."

Sections 423 and 439 specify the powers given to the Court in detail and this limits the Court's powers to those specified. S. 12 gives the Court power to pass "such judgment, order or sentence as it thinks right." I cannot think that this gives less wide powers. It appears to me to give the widest powers. It might have given specially mentioned powers or it might have given the powers given by S. 423 or S. 439 or both; the language used however does nothing of the kind but instead is couched in the widest terms. When a matter comes upon the certificate of the Government Advocate, it may often happen that the order must be to set aside the conviction and sentence and it might well be that there will be many cases in which an order for re-trial would be obviously the most appropriate order. The Legislature must have been aware of this. It

2 (1902) 25 Mad 61=28 I A 257(P.C.).

3. (1905-06) 3 L B R 75.

was held to be the most appropriate order in *Hla Gyi's* case (3). Had it been intended that such an appropriate power should be withheld, it appears to me the section would have been differently worded. The third reason is that that order was not passed in *Subrahmanya Ayyar's* case (2). Irwin, J.'s, judgment gives reasons why it may not have been passed in that case, and beyond these it must be remembered that the order to be passed must depend on the facts and circumstances of each particular case. The fact that an order of retrial is not passed in a particular case cannot mean that the Court has not that power. The last reason relates to two Calcutta cases in which the Advocate General entered a *nolle prosequi*, and I cannot agree that the course adopted in these leads to any inference as to the power of ordering a retrial. Sir Charles Fox held it was in that case unnecessary to decide whether the Bench had power to order a retrial. Irwin, J., held an order for retrial might be made. In the second, *Hassan Durrani v. Emperor* (4), Sir Charles Fox did not deal with the question of a retrial. I agreed with him that in that particular case we should merely set aside the conviction and sentence, but I announced the opinion that in an appropriate case the Bench has the power to order a retrial. Ormond, J., held:

"There being no precedent for ordering a new trial in such a case, I think the order should be that the conviction and sentence be set aside."

I am of opinion that having regard to the wide language used and to the fact that the Bench is given power to pass any order it thinks right, it has the power to order a retrial. As to whether it can review the evidence and decide the guilt or innocence of the prisoner, I am of opinion that it has that power in certain circumstances. If the misdirection amounts to an illegality the trial is void and of no effect and that being so, the Bench could not deal with the evidence. If, however, the misdirection is not of that character but is a wrong admission of evidence or an error such as occurred in this case, the trial is not void and the Bench can go into the evidence. This power is, however, limited by the principle recognized in *Subrahmanya Ayyar's* case (2). Where, however, the guilt or

innocence depends on evidence consisting of several separate and distinct parts and where the part tainted by the misdirection can be separated from the rest and it is clear that the misdirection has not affected in any way the finding of the Jury on the remainder of the evidence, it appears to me that the Bench can and should consider whether the finding is sustained if the objectionable evidence is left entirely out of consideration. If it is justified, I can see no reason why the matter should be left unsettled. The section gives the Bench the widest powers. The Bench would not be usurping the functions of the jury but merely reviewing and checking their finding. The prisoner would not be left with anxiety of a case before a trial hanging over him and the question of his guilt would be decided on evidence given when the facts were fresh in the memory of the witnesses. In the present case the misdirection affected the one central point in the case and involved evidence essential to a fair decision. I am of opinion, therefore, that we should not consider the evidence because the verdict might possibly have been other than it was. At the same time there is a good prima facie case against a jury. Of this I think there can be no question and, for these reasons, I would order a retrial.

Parlett, J.—This case comes before this Court on a certificate from the Government Advocate that the question should be further considered, whether there was a misdirection to the Jury in Sessions Trial No. 28 of 1917. Nga Thein Myin was tried for, and by a unanimous verdict found guilty of setting fire to a dwelling house and was sentenced to five years' rigorous imprisonment. There was evidence to show that he was seen in the house while the fire was still burning. His defence is that he left the house several hours before the fire occurred and did not return to it until after it had been put out, and he made a statement to this effect before the Committing Magistrate. He offered evidence of his movements on the night in question. Owing to a mistranslation his statement as read to the jury at the trial was to the effect that he returned to the house while the fire was still burning, and it was thus at variance with the defence he set up. The result was that his real defence was never fully before the jury

at all. There was clearly a material misdirection and the verdict cannot be allowed to stand. I agree that the judgment and sentence should be set aside.

The next question is what further order, if any, should be passed. Manifestly the most appropriate order is that the accused should be re-tried upon the former commitment. S. 12, Lower Burma Courts Act, appears to me to be worded sufficiently widely to allow of such an order being made, and had the matter been *res integra* I think it should have been made without hesitation. But in the two earlier cases of this Court *Hla Gyi v. Emperor* (3) and *Briscoe Birch v. Emperor* (4), where an order for re-trial seemed the appropriate order, it was not passed, though in each of them one of the three Judges held that there was power to pass it, and none of the other Judges held that there was no such power. I entirely agree with the views of Irwin, J., on this point, as expressed in the earlier case. I have referred to all the cases I can trace of reviews under S. 26 of the Letters Patent, but have found none in which an order of re-trial seemed to be called for. The absence of any reported case in which such an order has been passed does not, therefore, show that there is no power to pass it, still less that no such power is conferred by the wider wording of S. 12, Lower Burma Courts Act. It is possible that some remarks in *Hla Gyi v. Emperor* (1) may be read as expressing a doubt (clearly not shared by Irwin, J.) as to the High Court's power to order a re-trial. But the point was not necessary for that case, which was decided upon S. 439, Criminal P. C. For that reason I consider it was unnecessary in that case to decide whether a commitment order is exhausted by a completed trial following upon it, and with great respect I must say that I find the reasons for this view unconvincing. It appears to me that it is more consonant with the provisions of the Code and with the spirit of Indian Criminal Law, which aims at substantial justice with a minimum of technicality, that where a judgment and sentence have been set aside merely for misdirection, the order of commitment should subsist. In my opinion, therefore, the views expressed in *Hla Gyi v. Emperor* (1) should be dissented from, and the accused should be re-tried upon the former order of commitment and in the meantime should be

detained in custody as an undertrial prisoner.

Maung Kin, J.—The facts showing how this application comes before this Bench have been fully stated in the judgments of my learned colleagues and it is not necessary for me to repeat them. The statement read to the jury flatly contradicts the defence put forward by the accused and deposed to by his witnesses. It must, therefore, have appeared to the jury that the evidence adduced for the defence was, on the accused's own showing, false and unworthy of any consideration. That statement did not represent what the accused said owing to a mis-translation. If a correct translation of his statement was placed before the jury, it would appear to them that it was quite consistent with the evidence he adduced and that it was for them to consider that evidence and see whether it was worthy of belief. I am, therefore, of opinion that there was a misdirection in that what was put to the jury was something which was not evidence in the case. I also think that so far as the accused was concerned, the misdirection was upon a vital point in his defence, a point which, if decided in his favour, would be of material assistance to him. For this reason I think this Bench should set aside the conviction and sentence without going into the evidence in order to see whether or not the conviction and sentence are justified on the merits. The next question is whether we should go further and also pass an order we consider right. In my judgment an order for a re-trial on the former commitment is the most suitable order for all concerned and we should pass that order, if we have power to do so. I think we have that power. I am unable to agree with the learned counsel for accused that S. 12, Lower Burma Courts Act, does not give this Bench that power. In that section the words "and pass such judgment, order or sentence as it thinks right" follow immediately the words which give this Bench the power to set aside the conviction and sentence. So that after setting aside the conviction and sentence it is open to this Bench to consider further whether it will pass any other order also and if so, what order. Whether we decide to pass an additional order or no, our action must be such as is most agreeable to convenience, reason, justice and legal principles.

Let us now consider what will happen, if we pass no further order. The case is one which the Crown is not likely to drop. There will, therefore, be the re-arrest of the accused and probably other proceedings taken against him before he is again placed before a Judge and jury in this Court. We can imagine what all these will entail, the amount of public time and labour bestowed upon these proceedings, the inconvenience and injustice to the accused, who will have far more arduous work before him and incur far more expense in his defence than if he is ordered by this Bench to be re-tried on the same commitment. Again, how unjust it would be to allow such a serious criminal charge hanging over his head for longer than is really necessary. These considerations have led me to hold that an order for a re-trial would be one which would be in consonance with reason, justice and mercy. It is also in accordance with legal principles, for a re-trial in a proper case is allowed in appeal or revision under Secs 423 and 439 respectively, of the Criminal P. C. I, therefore, agree with my learned colleagues in ordering that the accused be re-tried on the former commitment.

K.N./R.K.

*Retrial ordered.***A. I. R. 1918 Lower Burma 109**

PARLETT, J.

Maung Thein Win—Petitioner.

v.

Steel Brothers and Co.—Opposite Parties.

Criminal Revn. No. 75-B of 1917, Decided on 4th May 1917.

(a) *Workman's Breach of Contract Act (1859), S. 2—Complainant recovering money under Act is not entitled to recover large fees for Advocate.*

A complainant who avails himself of the simple and summary manner of recovering his money provided by the workman's Breach of Contract Act is not entitled to recover large fees for an Advocate. [P 102 (1-2)]

(b) *Workman's Breach of Contract Act (1859), S. 2—Order of imprisonment simultaneously with order for payment of money is not valid.*

An order of imprisonment passed simultaneously with one for payment of the money is not legal. [P 103 C 2]

(c) *Workman's Breach of Contract Act (1859), S. 2—Scope of.*

The Act does not apply to a contract which is made by a person who is not himself an artificer, workman or labourer. A I R 1914 L B 163, Dist. [P 110 C 1]

Order.—The petitioner has been ordered to re-pay Rs. 698, balance of an advance made to him, together with costs amounting to Rs. 68.8 0 under S. 2, Workman's Breach of Contract Act, 13 of 1859, and has done so. Objection was taken to the order to pay costs, being Rs. 48.0 Court-fees and process fees, and Rs. 64 Advocate's fees. There is no provision in the Act for ordering payment of costs, and it has been several times held that payment of Court fee cannot be ordered: *Emperor v. Daodu* (1), *Queen Empress v. Budhu* (2), S. S. Criminal Ruling No. 6 of 1902, and it appears to me obvious that complainant who avails himself of the simple and summary manner of recovering his money provided by this Act is not entitled to recover large fees for an Advocate. This part of the order was certainly wrong. The Magistrate also erred in passing an order of imprisonment simultaneously with that for payment of the money, as has been repeatedly ruled and as the wording of S. 2 of the Act clearly shows. The petitioner however has from the outset contended that he is not an artificer, workman or labourer, and therefore the Act does not apply to him at all, and that is the first and a vital point to decide. The complainant now says the petitioner entered into a written agreement to personally work for them as their contractor from 1st December 1915 to 31st October 1916.

"We got labour for them and to personally supervise the felling of their teak timber felled by them in the Mawaing Forest to the Mawaing Stream Bank."

The agreement, a lengthy printed one, was filed and Cl. 22 is relied on by complainants. It runs: The contractor shall not sublet this contract or any part of it without the permission of the company and shall devote the whole of his time and attention to the work to be done by him under the agreement, and shall personally supervise such work. Complainant's manager says that on several occasions he saw the petitioner "working in the forest." The nature of the work he was doing is not specified. There is nothing to indicate that it was anything more than supervision. The Magistrate purported to follow *Scin Yin v. Ah Moon Shoke* (3) and held petitioner was a lab-

1. (1901) 6 B. & L. R. 255.

2. Bom H C Cr Ruling No. 2 of 1891; Rat. Un Cr Cas 531.

3. A I R 1914 L B 163=23 I C 187=7 L B R 782

ourer within the meaning of Act 13 of 1859. He appears to me to have misunderstood that ruling. The respondent there was a carpenter, i. e., an artificer and it was held that he came under the Act in respect of an advance for carpenter's work which he contracted to get done, though he did not himself work with his own hands upon it but his part was limited to supervision. The decision rested upon the fact that he was himself a carpenter. If he had not been, decision would, no doubt, have been different. As pointed out in *Asgar Ali v. Swami* (4) the Act does not apply to a contract which is made by a person who is not himself an artificer, workman or labourer. The present petitioner is not an artificer, nor do I think he is shown to be a workman or labourer. He describes himself and is described by the complainant as a contractor, and his contract was for the supply of men and beasts to drag the timber to the stream under his personal supervision. There is no evidence that his duties under the contract extended to anything more than that, much less that he ever in fact handled the timber or drove the animals or was even competent to do either. It appears to me from the evidence that he was not a workman or labourer within the meaning of Act 13 of 1859, and that therefore the proceedings under that Act could not properly be instituted against him. The order is reversed and the fees Rs. 76-8-0 will be refunded to the petitioner.

K.N./R.K.

Order set aside.

4. (1902-03) C B R Vol 13.

A. I. R. 1918 Lower Burma 110

PARLETT, J.

S. C. Paul—Accused—Applicant.
v.

Emperor—Opposite Party.

Criminal Revn. No. 282 B of 1916, Decided on 1st March 1917, from the order of Dist. Magistrate, Rangoon, D/- 8th of August 1916.

(a) Burma Municipal Act (1898), S. 142—Committee can frame bye-laws imposing conditions on pawn-brokers.

Section 142, Burma Municipal Act, empowers Municipal Committee to make bye-laws for rendering licenses necessary for pawnbrokers and determining the conditions subject to which they shall be granted. [P 110 C 2]

(b) Burma Municipal Act (1898), S. 142—Licenses issued to pawn-brokers—Condi-

tion binding rate of interest chargeable by pawn-brokers is not ultra vires.

A condition in pawnbrokers' license issued under S. 142, Burma Municipal Act, limiting the rate of interest chargeable by pawnbrokers does modify and restrict the law which allows freedom of contract, but it is not on that account ultra vires of the Municipal Committee inasmuch as the power to limit the rate of interest is reasonably implied in the power to determine the conditions of such licenses. [P 111 C 1, 2]

(c) Easements Act (1882), S. 52—Licensee cannot object to terms of license.

It does not lie in the mouth of a licensee to object to the terms of a license which gives him rights and privileges which he would not enjoy without such license. [P 111 C 1]

(d) Burma Municipal Act (1898), S. 142—Rangoon Municipality—Pawn-brokers must conform to conditions in license whatever they are.

Any one who wishes to carry on the business of a pawnbroker within the Rangoon Municipality must have a license and must carry on his business in conformity with the conditions of that license, whether or not they modify the law under which business for which no license is required are carried on. [P 111 C 2]

Higinbotham—for the Crown.

Order.—Applicant has been convicted of disobeying a bye-law made by the Rangoon Municipal Committee, by carrying on the business of a pawnbroker within the Municipality without a license from the Committee. There is no doubt upon the evidence that he was in the habit of taking goods and cattle in pawn for loans of money of small amount, and that he did carry on the business of a pawnbroker as defined in the bye laws, though that may not have been the only description of business which he carried on. Admittedly he had no license. The case put forward for him was that the Committee had not power to make the bye-laws for breach of which he has been convicted. S. 142, Burma Municipal Act empowers the Committee to make bye-laws, among other purposes.

"for rendering licenses necessary for pawnbrokers and determining . . . the conditions subject to which they shall be granted."

It is perfectly clear, therefore, that the Committee has been expressly empowered to make a bye law that no one shall carry on the business of a pawnbroker within the Municipality without a license from the Committee. It has also been expressly empowered to make bye-laws determining the conditions subject to which such licenses shall be granted and may be revoked. These conditions are embodied in Bye-law 6, which also provides that the license may be revoked for breach of any of those conditions. It

was argued that the Committee had no power to impose certain of these conditions as they conflicted with the provisions of the Contract Act. The conditions objected to are 5, 4 and 10. The first limits the rate of interest chargeable on loans; the other two are as follows: 4. That the licensee shall not sell any pledge before the expiration of the time agreed upon for redemption thereof, or otherwise than in accordance with these conditions. 10. That the licensee, shall deliver all articles pledged for sums exceeding Rs. 20, and unredeemed at the time agreed upon for redemption thereof, to an auctioneer appointed by the Committee for sale; and shall not sell the same except through such auctioneer. It is objected that these two conditions give the pawnee a right of sale of unredeemed pledges which is not accorded to him by S. 176, Contract Act. Mr. Hingbotham, for the Crown, contends that the bye-laws leave the Contract untouched, and give no further right of sale than does that Act, viz., a right of sale after giving the pawnor reasonable notice.

It may be doubted if that was the intention of the framers of the bye-laws, but it appears to me unnecessary to decide whether or no the bye-laws as they stand do give a power of sale with notice, for two reasons; first, because it does not lie in the mouth of a pawnee to object to the terms of a license which gives him rights and privileges which he would not enjoy without such license, and secondly, because, in the view I take of the matter, it is immaterial whether the conditions of the license prescribed by the bye-laws do or do not modify the general law of contracts. Condition 5, limiting the rate of interest chargeable, does modify and restrict the law which allows freedom of contract, but I do not think it is on that account ultra vires of the Committee. Cl. (6), S. 142, Burma Municipal Act empowers the Committee to make bye-laws for the rates which may be demanded for hire of any conveyance hired for a period not exceeding 24 hours. It has not been, I do not think it could be, contended that bye-laws thus limiting the rates, though interfering with freedom of contract, would be ultra vires, since the Act gives express power to frame them. In the case of pawnbrokers' licenses though power to limit the rate of interest is not expressly given, I think it is reasonably

implied in the power to determine the conditions of such licenses. Moreover, the Committee have clearly power to forbid the carrying on the business of a pawnbroker without a license and to determine the conditions of the license. Any one who wishes to carry on that business within the Municipality must have a license and must carry on his business in conformity with the conditions of that license, whether or no they modify the law under which businesses for which no licenses are required are carried on. This disposes of the other objection to condition 10 that it limits the right to sale through the auctioneer appointed by the Committee. In my opinion the Committee was right and I dismiss this application.

K.N.B.K. *Application Dismissed.*

A. I. R. 1918 Lower Burma 111

MAUNG KIN, J.

Maung Tha So and another—Appellants.

v.

Maung Lu Pe—Respondent.

Civil Misc. Appeal No. 100 of 1916.
Decided on 13th June 1917.

Buddhist Law—Adoption—Kittima Apatitha—Claim based on Kittima cannot be amended in appeal by alternative claim based on apatitha—Civil P. C. (1908), O. 6, R. 17.

Kittima and apatitha are two distinct forms of adoption to which totally different considerations apply. Therefore when a claim is based on kittima adoption, it cannot be amended in appeal by advancing an alternative claim based on apatitha, inasmuch as the effect of the amendment would be to change the suit into one of a substantially different character. [P 112 C 2]

Sin Hla Aung—for Appellants.

Maung Thin—for Respondent.

Judgment.—The plaintiff sued for inheritance as the kittima son and sole heir of the deceased. The Trial Court held that the alleged adoption was not proved. On appeal the lower appellate Judge was of the same opinion and held that: "the utmost that the evidence can be held to establish in favour of the plaintiff is that the deceased Ma Kayut used to speak of him as her son and sometimes even told people that he was her adopted son (mwe za the tha) and that it was generally understood that he was her adopted son."

But there was another ground taken in the memorandum of appeal, viz., that the lower Court should at least have held that the plaintiff was an apatitha son. The learned Judge considered the question whether the plaintiff should be allowed

in appeal to put forward such an alternative claim and came to the conclusion that he should be, and then proceeded to hold that he was the apatittha son of the deceased and that the fact that at the time of the death of the deceased he was living separately from her was immaterial inasmuch as the plaintiff was blood relation, a nephew of her. The case was accordingly remanded to the Trial Court with the direction that it be determined afresh. I understand this direction to be that the Trial Court should try the question as to what share the plaintiff would be entitled to as against the deceased's next of kin, as the learned Judge before giving the direction had come to the conclusion that "it is only necessary for me to decide as I do that he is entitled to some share." Before me the defendant urges that the lower appellate Court was wrong in allowing the plaintiff to make the alternative claim for the first time in appeal. So far as I can see there is absolutely no authority to justify the permission granted by the lower appellate Court. In *Ma Sa Yi v. Ma Me Gale* (1), which was a case of alleged kittima adoption, the question arose before this Court as to whether an alternative claim as an apatittha child should be allowed in appeal, inasmuch as the apatittha adoption was an adoption of a different character to that of the kittima form. Birks, J., pointed out that in *Maung Aing v. Ma Kin* (2) the Judicial Commissioner of Upper Burma expressed an opinion that such a procedure was questionable. The question however did not arise in that case. Without deciding the point Birks, J., said that assuming that there was sufficient evidence of an apatittha adoption, the fact that the claimant was living separately from the alleged adoptive mother for eleven years of her life before the latter's death was sufficient to debar her from claiming any share. But Fox, J., as the claimant made no alternative claim on the basis of her being an apatittha daughter, did not think it necessary to consider what her rights to share in the inheritance possibly might be, if she had made such a claim.

In *Ma Mya Me v. Moun Ba Dun* (3) it was held that an alternative claim may be made, but the point did not arise. The

learned Judge held that the evidence justified the view that Ma Mya May was an adopted child but whether she was a kittima or apatittha it was unnecessary to determine, as the fact that she was an adopted child was sufficient for holding that it was preferable to grant her Letters of Administration to the estate than the opposite party who was adjudged to be unfit, though he was the natural and only son of the deceased. The case was not a regular suit but was one in which both the parties applied for Letters of Administration and the Court had to choose between the two to grant letters. In my judgment the lower appellate Court was wrong in allowing the alternative claim to be made in appeal. We are certain as to what a kittima adoption is, but as regards the apatittha form it is really difficult to say what it is exactly but, it is certain that it is different from the kittima form. In S. 16 of Kinwun Mingyi's Digest the term apatittha is described in various ways. In *Tet Tun v. Ma Chein* (4) Hartnoll, J., after noticing the section came to the conclusion that the principle underlying the definition of the term seems to be that an apatittha adoption is a compassionate one; which takes place in consequence of the child being destitute with no one to maintain it through abandonment by, or the decease of, its natural parents or some such similar cause. I have been referred to Mr. May Oung's book on Buddhist Law in which he submits that these views of Hartnoll, J., are not correct and gives his views at pp. 122, 123 and 129 of the book.

Whichever view is correct, totally different considerations will have to be applied in the case of an apatittha adoption to those which have to be applied in the case of a kittima adoption. The two forms are entirely different. Therefore in allowing the alternative claim to be made the Court will be contravening the rule that an amendment should not be allowed where it would have the effect of converting the suit as originally laid into a suit of a different character. Although O. 6, R. 17, which relates to amendment of pleadings is very wide in its terms, it is clearly understood that an amendment would not in general be allowed, if it changes the suit into one of a substantially different character which would more conveniently be the subject of a

1. 7 Bur L R 295=2 L C 181.

2. (1892-96) U B R 2 Buddhist Law 22.

3. (1903-04) 2 L B R 224.

4. (1903-10) 5 L B R 216=8 I C 978.

fresh action. I am therefore of opinion that the alternative claim should not have been allowed to be made. In this view it is unnecessary to decide whether on the evidence the plaintiff is an *apatittha* child of the deceased or not. The appeal is allowed with costs throughout.

K.N./B.K. Appeal allowed.

* A. I. R. 1918 Lower Burma 113

MAUNG KIN, J.

Maung Ba Kyaw and another—Plaintiffs—Appellants.

v.

U Lan—Defendant—Respondent.

Second Appeal No. 45 of 1917, decided on 27th March 1918.

* Civil P. C. (5 of 1908), O. 21, R. 63—Creditor can sue for declaration of property belonging to his judgment debtor though attachment withdrawn apart from O. 21 R. 63—Suit is not barred by proviso to Specific Relief Act I of 1877, S. 42.

Independently of the provisions of O. 21, R. 63, Civil P. C. a decree-holder may sue for a declaration that certain property attached in execution of his decree belongs to the judgment-debtor, although at the time of the suit the attachment might have been withdrawn and the property may not be in the possession of the decree-holder. To such a suit the proviso to S. 42, Specific Relief Act, does not apply.

IP 113 C. 21

Ba U—for Appellants.

Maung Tin—for Respondent.

Judgment.—In execution of their decree against one Tin Ula, the plaintiffs-appellants attached two bullocks as the property of their judgment-debtor. The defendant-respondent applied for the removal of the attachment. Thereupon the plaintiffs withdrew their attachment and filed the present suit for a declaration that the two bullocks were liable to be attached and sold in execution of their decree. The trial Court decreed the suit. The lower appellate Court held that the suit, not being under O. 21, R. 63 of Civil P. C. but under S. 42, Specific Relief Act, did not lie, inasmuch as there was no prayer for consequential relief. Evidently the learned Appellate Judge thought that, as the bullocks were in the possession of the defendant the plaintiffs should have asked for their possession. It has not been contended here that the suit is one under the Civil Procedure Code. That it cannot be held to be such a suit there is no doubt, as there was no investigation of plaintiff's claim in the attachment proceedings owing to the attachment being with-

drawn. The wording of R. 63, O. 21, is quite clear. Nor is it disputed that independently of a suit under the Civil Procedure Code the decree holder may sue for a declaration that the property attached belonged to their judgment-debtor. In fact this latter proposition was expressly laid down in *Soerata Coloniale Italiana v. Shree In* (1) following *Raghunath Mukund v. Soorash K. R. Kama* (2). I have followed this ruling in *Chan Tat Phai v. The Lat* (3). But the argument of the defendant's Advocate is that the plaintiff could not sue for a bare declaration, as the bullocks were in the possession of the defendant, and that the proviso to S. 42, Specific Relief Act applies. Exactly the same argument was advanced in *Allageppa Chetty, P. L. A. N. v. Nazamat Ali Chaudhry* (4) and Irwin, J., unpowered it in these words:

"I can see no reason for making any distinction between the mode in which plaintiff must establish his right if he has previously applied for a summary order and the mode in which he must establish his right if he has not applied for a summary order. In either case a declaration is sufficient. When plaintiff obtains a declaration, the Court which executed the decree must respect the declaration and give satisfaction. . . . The object of the proviso is to prevent a plaintiff from getting a declaration in one suit, and consequential relief afterwards in another. Here there is no suit for any subsequent relief. The relief must be given by the Court which sold the land in execution."

It may be said that the suit in that case was one by the claimant for the property attached but not by the decree-holder. In this case the suit is by the decree-holder. But the remarks of Irwin, J., must apply, *mutatis mutandis*, to this case. When the plaintiff gets the declaratory decree he asks for, he can proceed to attach the same property in execution of his previous decree and the execution Court will be bound to recognize the attachment as being just and proper. The declaratory decree will be binding on the present defendant in the subsequent execution proceedings and he will not be able to object that the plaintiff has no right to attach the property. Then there is my own ruling in *K. Y. K. M. Chetty Firm v. S. N. V. R. Chetty Firm* (5) in favour of the plaintiff. There I followed *Sappohadi Chetty v.*

1. (1907-08) 4 L. B. R. 252.

2. (1899) 23 Bom. 266.

3. (1916) 33 I. C. 124.

4. (1907-08) 4 L. B. R. 263.

5. (1916) 34 I. C. 125.

Maung In (6) and *Kristnam Sooroya v. Pathma Bee* (7). I would, therefore, hold that the proviso to S. 42, Specific Relief Act, does not apply. The appeal is allowed and the case is remanded to the lower appellate Court to be decided on the merits. Costs will abide the result. The appellant will be granted a certificate for the return of the Court-fee paid on the memorandum of appeal under section 13, Court Fees Act.

K.N./R.K. *Appeal allowed.*

6. P J L B 481.

7. (1906) 29 Mad 51.

A. I. R. 1918 Lower Burma. 114 (1)

ORMOND, J.

O. R. M. Ramaswamy Chetty—Appellant.
v.

Ma U Tha—Respondent.

Second Appeal No. 101 of 1916, decided on 31st August 1916.

Civil P. C. (1908), O. 21, Rr 66 and 90—Execution—Sale—Omission to give notice to Judgment-debtor renders sale void.

Omission to give notice to the judgment-debtor of an execution sale of his property is more than a mere irregularity and renders the Court sale void: 6 Cal 103, Ref. [P 114 C 2]

Naidu—for Appellant.

Judgment.—The respondent applied on 16th August 1911 to set aside a Court sale made on 3rd March 1910. She has been successful in the lower Court, both of which found that the appellant had kept the knowledge of the sale from the respondent by fraud. The appellant was the assignee of a mortgage decree for Rs. 3,800, plus costs, against the respondent and her husband. Appellant's name was put on the record as decree holder before 2nd September 1909, on which date the warrant of attachment issued. On 3rd November 1909 all parties were either present or represented by pleaders, and it was agreed that the sum of Rs. 87-1-6 was due to the appellant. On 10th January 1910 Pleadings of both parties being present, execution was granted as prayed for. On 21st January 1910 an order was made for the sale of this property on 3rd March 1910; the respondent was not represented. No notice was even issued by the Court to the respondent as to the date of the sale. The appellant and the process server both state that the proclamation of sale was posted on respondent's house in the presence of certain witnesses. Two of these witnesses, whom

both Courts have believed, have stated that that was not so, namely, that no proclamation was ever posted up in respondent's house in their presence. Both Courts have found that the respondent did not know of the sale until she learned it from a Pleader subsequently. It is contended that though the respondent did not receive a notice or that no notice issued, it was not the fault of the appellant; and that no fraud can be imputed to the appellant whereby he prevented the respondent from knowing of this sale.

I am not disposed to interfere with the concurrent findings of both the lower Courts; the fact that the property was bought by the appellant for Rs. 1,000 where as according to the price realised by the other half which had been previously sold by Court, the price should have been over Rs. 3,000, and the fact that the appellant tries but fails to prove the posting of the proclamation of sale would go to warrant the finding that the appellant was guilty of fraud and intentionally kept the knowledge of this sale from the respondent. But even if the appellant is not guilty of fraud, a Court sale without any notice having been issued by the Court renders that Court sale void; it is more than an irregularity: see the case of *Ramessuri Dass v. Doorga Dass Chatterjee* (1). The appeal is, therefore, dismissed.

K.N.R.K. *Appeal dismissed.*

(1) (1881) 6 Cal 103.

A. I. R 1918 Lower Burma 114 (2)

ORMOND, OFFG. C. J. AND PARLETT, J.

Ma Ba U—Appellant.

v.

Maung Pe Lan and another—Respondents

Civil Misc. Appeal No. 45 of 1917, Decided on 23rd July 1917.

Civil P. C. (1908), Sch. 2, Para 17—Arbitration—Death of arbitrator—Agreement to refer becomes void—Court cannot under para. 17 Cl (4) make reference to arbitrators who are willing to act.

Apart from any enactment, an agreement to refer a matter to certain specified arbitrators becomes void and of no effect if one or more of the arbitrators die or refuse to act, and thus make the agreement incapable of performance.

In such a case the Court has no jurisdiction under Cl. 4, Para. 17, Sch 2, Civil P. C. to make a reference to the arbitrators who are willing to act. [P 115 C 1]

Giles and Po Han—for Appellant.
Lentaigne—for Respondents.

Judgment.—The appellant and respondents agreed to refer a matter to the arbitration of six persons who were named, one of whom refused to act from the commencement and another died. Fourteen months later the respondents applied to the District Court to file the agreement in Court under para. 17, Sub. 2, Civil P. C. Under Cl. 4 of the paragraph the District Judge made an order of reference to the four of the six arbitrators who apparently were willing to act. It is from that order that this appeal is preferred, on the ground that the Court had no jurisdiction to make the order of reference. Cl. 4 is as follows:

"Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed in accordance with the provisions of the agreement or if there is no such provision and the parties cannot agree the Court may appoint an arbitrator."

Apart from any enactment, an agreement to refer a matter to certain specified arbitrators becomes void and of no effect if one or more of the arbitrators die or refuse to act, and thus make the agreement incapable of performance. The provisions of this agreement were that there should be six specified arbitrators and the Court had no jurisdiction under Cl. 4 to make an order of reference except to those six arbitrators, which was impossible. It is contended for the respondents that para. 19 gives the Court power to act under para. 5. Para. 19 is as follows:

"The foregoing provisions, so far as they are consistent with any agreement filed under para. 17 shall be applicable to all proceedings under the order of reference made by the Court under that paragraph to the award and to the decree following thereon."

Under para. 5 the Court would have the power to appoint arbitrators in the place of the arbitrator who died and the arbitrator who refused to act; but para. 19 only comes into operation when an order of reference has been made under para. 17. The appeal is allowed and the order of the District Judge is set aside. The appellant will have her costs in both Court.

K.N./R.K.

Appeal allowed.

A. I. R. 1918 Lower Burma 115

ORMOND, J.

Shwe Zan U—Plaintiff—Appellant.
 v.

Shwe Pru—Defendant—Respondent.

Second Appeal No. 152 of 1916, Decided on 14th February 1917.

Principal and Surety—Payment by surety by taking fresh loan—Suit against principal is maintainable.

Where a surety has in fact paid off the debt, he is entitled to recover its amount from the principal and it makes no difference that the payment was made by incurring a fresh obligation to the same creditor and that the money was not actually handed over to the surety and paid by him to the creditor: 20 Mad. 322 and 14 W. R. 453, *Ref.* [P 115 C 2]

Lambert—for Appellant.

Judgment.—The defendant borrowed Rs. 2,500 from the Bank of Bengal, which she secured with surety for, on 26th October 1915, payable 75 days after date, the due date was 14th January 1916. The Bank demanded payment and on 30th June 1916 the plaintiff borrowed Rs. 2,500 from the Bank on a promissory note which he executed in favour of Ma law, who endorsed the same to the Bank, payable after the three months, and the plaintiff paid the discount or interest in advance on that loan in cash. The money on that loan was taken to repay the previous loan, which was wiped out. The plaintiff then sued to recover amount. Both the lower Courts dismissed the suit upon the authority of *Patti Nara. Appanatha Appan v. Marimutha Pillai* (1). Therefore, in doubt, certain English authorities which show that if the surety incurs a fresh obligation, he cannot recover against the creditor as if that fresh obligation had operated as a payment of the old debt. *Troylucko Nath Roy v. Kasher Nath Roy* (2) is an authority in favour of the plaintiff. The question is, was the old debt paid off by the surety? This was a fresh debt which the plaintiff had contracted and, in my opinion, it matters not whether he incurred the fresh obligation to the same Bank or to another Bank. Neither does it matter that the money was not actually handed over to the plaintiff and returned to the Bank. The Bank was in fact paid off by the plaintiff with the moneys which the Bank advanced to him by way of a new loan. The appeal is allowed and there will be a decree for

1. (1907) 26 Mad. 322.

2. (1916) 14 W. R. 453 = C B L R 633.

the plaintiff for the amount claimed with costs in all Courts. The appeal was *ex parte*.

K.N./B.K.

Appeal allowed.

A. I. R. 1918 Lower Burma 116

PARLETT, J.

N. Subramonia Iyer—Accused—Appellant.

v.

Thirumudi Mudaliar—Complainant—Respondent.

Criminal Appeal No. 87 of 1917, Decided on 27th April 1917, from order of Western Sub-Divl. Magistrate, Rangoon, D/- 29th January 1917, in Cr. Trial No. 472 of 1916.

(a) Penal Code (1860), S. 499—Defamation—Whole criminal law of libel in India is contained in Penal Code.

The whole criminal law of libel in India is contained in the Penal Code and defamatory statements are punishable unless they fall under one or more of the exceptions to S. 499 of the Code. [P 117 C 1]

(b) Penal Code (1860), S. 499—Exception—Maintenance proceedings—Defamatory written statement is not privileged.

A written statement filed by a respondent in maintenance proceedings is not privileged: 36 Mad. 216 and 88 Cal 880, *Dix. from*: [P 117 C 1]

Judgment.—This is a squalid case from which few of those concerned have emerged with any credit. Complainant was a clerk in Government service at Pyinmana, and had a daughter, hereinafter referred to as Kamala, who in 1914 was about 17 years of age. Accused was a clerk in the office of the Inspector-General of Civil Hospitals and Manickam Pillay was a subordinate in that department, being Sub-Assistant Surgeon at Pyinmana. The latter was a friend of accused and introduced him to the complainant's family. Both accused and Manickam Pillay posed as apostles of theosophy, the former being treasurer of the Burma branch. It was arranged for Kamala to go to a Theosophical College in Benares ostensibly to improve her knowledge in some branches in which she was backward and to qualify her for admission to the Benares College, she came to accused's house in September 1914 and remained there till November. After a short visit to Pyinmana she accompanied accused to India and eventually got to Benares. While in his house accused seduced her, and continued to have intercourse with her, there and on the journey. In the spring she returned to Pyin-

mana for the holidays, where she was found to be pregnant and on 13th August 1915 she gave birth to a child. She applied for maintenance in Pyinmana in January 1916, but accused succeeded in balking her by a plea of want of jurisdiction. In April 1916 she applied in Rangoon and accused again tried the same tactics, but was defeated, and finally on 20th July 1916 on his own admission, she obtained an order for maintenance. In the course of that case accused on 21st June 1916 filed a written statement containing certain allegations in respect of which complainant prosecuted him for defamation. He was convicted and has appealed. The alleged defamatory statements were as follows: First,

"her parents' house was near some houses of ill-fame and there were frequent disturbances at night. In order to remove her from such environments and for her health Dr. Manickam suggested that she and her mother should come and live in Rangoon",

meaning thereby that complainant was indifferent to his daughter's welfare and morals and that he (accused) must come in and save his child from her father's indifference.

Now it appears to me that the meaning complainant wishes to read into this passage is extremely far-fetched and not one which the paragraph as a whole would convey to a person reading it. At this appeal complainant's counsel gave another sinister meaning to the passage, namely, that it was a covert suggestion that Kamala got her child from some one visiting the neighbouring brothels. This is even more far-fetched, and emphasizes the uncertainty whether any one reading the passage would attach to it any and what definite meaning defamatory of the complainant. The accused explains, and there is some evidence to bear him out, that the girl was hysterical and that she was disturbed at night by noises in the quarter. I do not think this passage can be held to be defamatory of complainant.

Secondly, "she and her parents were keenly intent on destroying the child yet unborn, but we both strongly forbade that. We both (i. e., accused and the Doctor) offered marriage and protection of a house to the petitioner in her plight."

This passage contains the gravamen of the charge and will be referred to later.

Thirdly, "this sort of behaviour opened my eyes to the fact that the petitioner or her immediate advisers did not desire education or protection, but wanted to extort money."

meaning thereby that complainant was practising the crime of extortion against accused. The accused alleges that by her immediate advisers he did not mean her parents, and he points with force to the fact that whenever in the written statement he refers to her parents he does so expressly. In the next place the effect of the passage and its context as a whole is that Kamala was trying to get money out of him, though he was not sure if her action was spontaneous or was promoted by her advisers. Under the circumstances it may be doubted whether the passage conveys an imputation against the complainant himself. Coming to the principal item in the charge, the statement complained of is obviously defamatory and it is for the accused to show that he was protected in making it. It is contended for him that his statement was absolutely privileged, on the strength of *Potaraja Venkata Reddy v. Emperor* (1), where the Madras High Court, affirming a previous decision in *Alraja Naidu, in the matter of* (2), held that the statement of a person accused of a criminal offence is absolutely privileged. This is not the view of other High Courts, though in a recent case *Golap San v. Bhola Nath Khetry* (3) the Calcutta High Court has departed from its earlier decisions and held that a complaint is absolutely privileged. In any event the Madras decision would not govern a case like the present, which was not that of a statement made by an accused person on his trial for committing a criminal offence, but a written statement filed in proceedings which, though before a Magistrate partook largely of a civil nature, by a person who was not only a competent witness, but who clearly ought to have gone into the witness-box.

It appears to me, however, that the sounder view is that which was adopted by the Court after an exhaustive examination of the authorities then available in *Mya Thi v. Henry Po Saw* (4), and that the whole criminal law of libel in India is contained in the Indian Penal Code, and that defamatory statements are punishable unless they fall under one or more of the exceptions to S. 499. In this case, therefore, accused must show

that he made the statement in good faith for the protection of his own interest. It is contended that he has succeeded in doing so. Briefly his case is that an allegation was made in the maintenance case that the accused had endeavoured to obtain abortion: he was therefore justified in putting before the Court his version of the facts, namely, that so far from desiring abortion, he had frustrated the girl's father's attempt to procure it. It is necessary, therefore, to consider the course of the maintenance proceedings and what allegations were made therein and at what stage. I may remark that the exhibits in the defamation case were dealt with in a very slipshod manner by the Court, and neither complainant's nor respondent's advocates took the trouble to properly prove the various documents on which they relied. Both are to be regretted and as the matter is largely a formal one, I have read the whole of the proceedings in both cases and shall briefly refer to such of documents as appear to me to bear upon the point now for decision. The maintenance petition was filed on 20th April and on 29th accused's pleader objected to the Magistrate's jurisdiction. His objection was overruled on 1st May and he was ordered to file the witness story, but was directed to file written statement at once. He did so, introducing his objection as to jurisdiction and a notice to the witnesses and the petition closed the case. The 17th May was fixed for taking evidence, but for taking the evidence the District Court adjourned adjournment to date the hearing till the next day. The petitioner and her witnesses were under examination on various days from 18th May to 21st June, and a large number of documents were put in up to 8th June. It was on 21st June that the second written statement containing the defamatory statement was filed. In her evidence Kamala stated that accused's intercourse with her covered the period September to December 1914. In the latter month they were at Madras and speaking of events that happened there she said:

"The respondent consulted a native Doctor because my menses stopped. The Doctor gave some purgative and about two hours later the respondent brought me a phial with some pills. He himself administered one pill to me and he told me to take the pills regularly."

Three of accused's letters were filed, Exs. P, Q, R, written on his return to Rangoon. Exs. P and Q are dated 17th

1. (1911) 33 M.L.J. 261; 11 C. 630.

2. (1917) 20 M.L.J. 222.

3. (1911) 33 Cal.S.F. 111; 11 C. 311.

4. (1905-06) 3 L.B.R. 265.

January and are to the girl and her father. In the former he wrote:

"The medicine that was given to you is not for anything wonderful to come out but slowly after two months or so to give you more blood in the body and to regulate your menses etc.," and then followed directions to take it for alternative fortnights. To the father he wrote at length about the girl's scanty menses, that she had been medically examined and declared weak and anaemic and that "some pills were prescribed for increase of blood and regulating the menses properly." In Ex. R written to the girl on 21st January he said:

"Your monthly course period is 15th January. Please see if you do not get, and if not then consult the Doctor you say who visits you every morning."

These passages form the sole foundation for accused's plea that he had been charged with attempting to procure the girl's abortion. I am quite unable to hold that they amount to anything of the kind. They are certainly strong evidence to refute accused's denial of paternity. This abnormal interest in the girl's menstruation shows that he hoped that its stoppage was due to temporary causes and would be remedied by a course of medicine. There is no suggestion that when he discovered that conception had taken place he was prepared to go to the length of procuring abortion. It is true that complainant in this case when cross-examined on 9th December 1916 said:

"My complaint was that accused having put my daughter in that position was trying to cause abortion. Accused said that this was not true but that I and my daughter were wanting to abort. The accused himself gave pills to cause abortion."

This was nearly six months after the written statement in the maintenance case was filed. There is not a shred of evidence as to when complainant voiced his suspicions of accused's conduct in regard to the pills, much less any proof that he had done so before accused's written statement was filed. I can find nothing in the record to warrant the inference that when accused made the allegation complained of, he was justified in making it in the protection of his own interests in reply to a charge made against him that he had attempted to procure abortion. Still less can I find anything to indicate that he made the allegation in good faith. It is true that when Kamala wrote to him on 26th April 1915 (Ex. 18) announcing her pregnancy, she suggested his getting her

some medicine to bring about a "cure," if not too late to do so. Later when the wretched girl's misery became acuter, she more than once in her letters expressed her desire that the child should not live. The one thing which throughout the case may be to accused's credit is that, whether from fear of the consequences or not, he firmly dissuaded her from taking any measures to prevent the child being born alive. As to the complainant, however, accused's allegation against him rested solely upon a single episode referred to in Manickam's evidence and his letter to accused on 29th April, Ex. 19. When the poor man first learnt the foul wrong done to him and his daughter by their traitorous friend, his natural impulse was to try and avoid publishing abroad their shame, so his first prayer to Manickam was to "try and dissolve the pregnancy." Manickam of course refused; the complainant at once acquiesced in the refusal and the request was never repeated. The letter, Ex. 19, shows clearly that on 29th April accused knew complainant had abandoned the idea, for Manickam therein assured him that he had secured the safety of the unborn child. There is clearly not the smallest justification in fact for the allegation that the girl's father was "keenly intent on destroying the child." He clearly was not, and I am amazed that accused's pleader, who had access to Ex. 19, which was in accused's possession, should make such an allegation in the written statement he drafted. Still more disgraceful is it that that pleader should repeat the allegation that the girl's parents were eager to destroy the child in a written argument which he presented to the Court on 5th July. For in his written statement of 21st June the accused withdrew his denial of liability to maintain the child, the only possible course in view of the overwhelming proof of paternity furnished by his own letters produced against him, and the sole matter in issue in the proceedings subsequent to that date was the amount of maintenance to be ordered. There was, therefore, no justification whatever for repeating the libel on 5th July, when the only question open to argument was the amount of accused's means.

The libel was cruel, none could well be crueller, and it was deliberate, not suddenly provoked by the string of cross-

examination, but carefully framed in the calm of his pleader's office. He cannot shield himself behind the miserable tactics of his pleader, who not merely tolerated, but admittedly advised his avoidance of the witness-box; nor can he altogether escape the consequences of the repeated slander of 5th July. The records of these two cases show accused to be a heartless scoundrel, a canting hypocrite and a contemptible coward. I think his sentence was richly deserved and I dismiss his appeal. His bail bond will be cancelled and he will be remanded to jail to serve out his sentence.

K.N./B.K.

*Appeal dismissed.***A. I. R 1918 Lower Burma 119**

MAUNG KIN, J.

Hla Gyaw and others—Plaintiffs—Appellants.

v.

Aung Pyu and another—Defendants—Respondents.

Special Second Appeal No. 62 of 1916, Decided on 18th June 1917.

Limitation Act (1908), Sch. 1, Arts. 123, 142—Suit to set aside invalid sale of joint share and for possession is governed by Art. 142 and not by Art. 123.

A suit to set aside an invalid sale to the extent of the plaintiff's joint share and for possession of the same is governed by Art. 142, Lim. Act, and not by Art. 123 which governs suits for a distributive share of an estate.

[P 119 C 2]

Campagnac—for Appellants.*Sin Hla Aung*—for Respondents.

Judgment.—The land in dispute at one time formed part of the estate of O Pauk Ke, who died about 15 years ago leaving 16 shins of land and four children, namely, Mg. Hla Gyaw, Me Dok, Mg. Kyaw and Mg. Lon. Mg. Hla Gyaw was the eldest, son Mg. Lon the youngest son. Mg. Lon mortgaged the lands in dispute to Aung Pyu, the defendant and later on made them over in satisfaction of the mortgage debt. Some time afterwards Mg. Lon sued Aung Pyu for the redemption of the land and failed to get a decree. This was followed by the present suit in which Hla Gyaw, Me Dok and the heirs of Maung Kyaw since deceased sued Mg. Lon and Aung Pyu for 3/4ths of the lands on the ground that they formed part of an undivided estate left by O Pauk Ke and that they had an interest jointly to the extent of 3/4ths of the lands. The Sub-divisional Judge in

his judgment describes the suit as one for a distributive share of an estate and this has somewhat strengthened the contention that Art. 123, Lim. Act, applies and as O Pauk Ke died 15 years before the suit it was barred by time. I do not think the Subdivisional Judge's description of the suit is correct. Although the plaintiff asked for 3/4ths, which was their joint share in the property the suit must be held to be one in which they asked the sale to Aung Pyu to be set aside to the extent of their joint share and for the possession of that share. That being the case Art. 123 does not apply but according to the ruling in *Ma Ko U v. Tan E* (1), Art. 142 would apply. The sale was in 1272 B. E., which would be the time when the plaintiffs were dispossessed. The suit is, therefore, not time barred.

The next point to be considered is whether as a fact there had been a division of the estate the result of which was that the land in suit fell to the share of Mg. Lon. The Subdivisional Judge held that there had been no such division. I think he was right, for the evidence shows that the three older heirs of O Pauk Ke had been working portions of the estate by arrangement without having had their shares distributed among them and that when Mg. Lon got married, he was allowed to work the lands in suit which had been worked by Mg. Kyaw, who had by that time died. The next point to consider is whether as held by the Divisional Judge, the sale to defendant Aung Pyu was with the consent of the plaintiffs. It is quite clear that of the three parties, Mg. Hla Gyaw, Me Dok and the heirs of Mg. Kyaw, Hla Kyaw, the eldest son and the eldest son of Mg. Kyaw gave their consent but that was as they say, to the mortgage. They do not appear to admit giving consent to the alleged outright transfer. The evidence is very unsatisfactory on this point but the burden is on the defendant Aung Pyu to prove the consent of all those who were interested in the property. I am unable to hold that he has discharged it.

However that may be neither the mortgage nor the sale was valid because neither was by a registered instrument as required by S. 59 and S. 54 respectively, of the T. P. Act. It is not clear whether there was at first a mortgage and then a sale

1. (1905-06) 3 L B R 7.

or whether there was only one transaction which Aung Pyn called a sale and the plaintiffs a mortgage. However that may be the transfer to Aung Pyn whether it was a sale or mortgage was invalid and must be set aside. I allow the appeal by reversing the decree of the Divisional Court and by passing a decree that the transfer to Aung Pyn be set aside and that the defendant Aung Pyn do give the plaintiffs possession of $\frac{3}{4}$ ths of 16.50 acres which is equal to 12.37 acres. The respondent will pay costs throughout.

K.N./R.K.

*Appeal allowed.***A. I. R. 1918 Lower Burma 120**

RIGG, J.

*Esoof Mahomed Baroocha—Appellant.**Hayatoonnisa—Respondent.*Special Second Appeal No 21 of 1916,
Decided on 19th December 1916.

(a) Mahomedan Law—Gift—Doctrine of mushaa—Applicability of.

The doctrine of mushaa is inapplicable to gifts where possession is given: 2 I. A. 87 (P C) and 11 All. 440, (P C) Ref.; 38 Cal. 518, Rel. on. (P 121 C 1)

(b) Mahomedan Law—Gift—Doctrine of Mushaa—It should not be applied to Mahomedans residing for years in Burma

Doctrine of Mushaa ought not to be applied to Mahomedans who have resided for years in Burma and have become imbued with Burmese law.

(P 121 C 1)

*A. J. Robertson—for Appellant.**J. R. Das—for Respondent.*

Judgment.—The parties in this case were divorced after a few months of married life. The divorce was followed by arbitration over the property, but the diamond earrings and necklace in dispute in this case were not included in the reference. Hayatoonnisa sued for these things on the ground that they were given her at the time of the marriage by the bridegroom's father and the bridegroom respectively. The claim to the necklace was dismissed. The Trial Judge decreed her the ear-rings but on appeal the Divisional Judge allowed her only half a pair of ear-rings. Her husband again appeals.

In the first plaint filed, the ear-rings were alleged to be part of the dower but in an amended plaint it was stated that they were a gift to her from her father-in-law. When examined in Court, Hayatoonnisa said that they were a joint gift at the time of the marriage to her husband and herself. Esoof pleaded that the ear-

rings were a gift to himself and were intended to be a family heirloom. When he gave evidence, he said that he had told his father that he did not want money, but preferred ear-rings. The father admits that he went to buy the ear-rings with the father of the bride. The evidence leaves no room for doubt that these ear-rings were mentioned in an awbasa as amongst the wedding gifts and were made over to the newly married couple. They were worn by the bride on the marriage day and on subsequent occasions. The parties are Mahomedans resident in Burma and I think that in making the gift, Esoof's father was under the influence of Burmese customs. I agree with the Courts below that ear-rings were a gift, and with the findings of the Divisional Court that they were a joint gift. The point however, chiefly argued at the Bar is whether this gift is invalid in law on the ground that the doctrine of mushaa applies to the case. In *Ameeroonissa Khatoon v. Abedoonissa Khatoon* (1) their Lordships of the Privy Council say:

"That a rule of this kind does exist in Mahomedan law with regard to some subjects of gift is plain. The *Hadaya* gives the two reasons on which it is founded; First, that complete seisin being a necessary condition in cases of gift, and this being impracticable with respect to an indefinite part of a divisible thing the condition cannot be performed; and secondly, because it would throw a burden on the donor he had not engaged for, viz., to make a division. Instances are given by text writers of undivided things which cannot be given, such as fruit unplucked from the tree and crops uncovered from the land. It is obvious that with regard to things of this nature separate possession cannot be given in their undivided state and confusion might thus be created between donor and donee which the law will not allow."

In the later case of *Mahomed Mumtaz Ahmed v. Zubaida Jan* (2) their Lordships remarked:

"The doctrine relating to the invalidity of gifts of mushaa is wholly unadapted to a progressive state of society and ought to be confined within the strictest rules."

The latest case I have been able to find on the subject of gifts on mushaa is *Abdul Aziz v. Fatch Mahomed Hazi* (3), where a Bench of the Calcutta High Court declined to apply the doctrine on the ground that possession had been given. In this case, a gift was made by A to B of a 4-anna share in a kaimi raiyati holding, and after the gift donor and donee jointly enjoyed a

1. (1874-75) 2 I. A. 87=23 W. R. 208 (P C).

2. (1889) 11 All. 440=16 I. A. 405 (P C).

3. (1911) 38 Cal. 518=9 I. C. 635.

the land. Mr. Abdul Rahim in his Mahomedan Jurisprudence, p. 298, points out that even according to the strict Hanafi law, a gift of an undivided share in a thing that is not capable of division without impairing its utility is valid, provided such possession is given as the nature of the property admits of. In the present suit it is not the donor that is challenging the gift, but one of the joint donees. Possession has been given, and in my opinion, it does not lie with him to say that the gift is altogether invalid. Even if the validity of the gift has been disputed by the donor, I should not have applied the doctrine of *mu-baa* where possession has been given. Such a doctrine is, in my opinion, unsuitable to Mahomedans who have resided for years in Burma and have become imbued with Burmese ideas. The doctrine was not even pleaded in the written statement. This appeal is dismissed with costs.

K N./R K.

*Appeal dismissed.***A. I. R. 1918 Lower Burma 121 (1)**

MAUNG KIN, J.

Po So—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 109 of 1917, Decided on 19th March 1917.

Penal Code (1860), S. 75—Previous conviction subsequent to commission of offence charged—S. 75 does not apply.

An accused charged himself with enhanced punishment under S. 75, I. P. C., only if there was a previous conviction against him before he committed the offence with which he stands charged. But where the previous conviction was subsequent to the commission of the offence charged, S. 75, I. P. C., has no application.

[P 121 C 2]

Judgment.—I am satisfied that the evidence establishes the guilt of the accused and that the offence he committed is robbery. The learned District Magistrate has awarded him seven years' transportation, owing to there being three previous convictions against him. The use of S. 75, I. P. C., in this case is illegal, because the previous convictions are not such as come within the purview of that section. The offence of which the accused was convicted in this case was committed in April 1907, the previous convictions were in November 1909, May 1910 and November 1911, so that they are "previous" only in the sense that they were had before the conviction in the present case and they are subsequent to the com-

mission of the offence of which the accused is now convicted. The meaning of the section is very clear. It provides that if any person, having been convicted of any offence punishable under Chas. 12 or 17, I. P. C., shall be guilty of any offence punishable under either of these parts of the same Code, he shall for every such subsequent offence be liable to the penalties therein declared. The words italicized indicate that the offence for which enhanced punishment is awardable must be one committed after the convictions by reason of which it is claimed that the accused is liable to enhanced punishment. In other words, the accused renders himself liable to enhanced punishment by reason of there having been previous convictions against him before he committed the present offence. The other convictions should not, therefore, have been taken into account. The point appears to me to be quite simple, but if authorities are required, the following may be cited: *Reg v. Sakya* (1), and *Empress of India v. Megha* (2). The conviction under S. 392, I. P. C. is hereby confirmed, but the sentence under S. 392, and 75, I. P. C. is hereby quashed.

In considering what measure of punishment should be imposed on the accused, I shall not allow myself to be influenced by the fact of there having been other convictions previous to this conviction. I shall treat this offence, as the accused is entitled to have it treated, as if before the commission of it he had a clean sheet. The sentence is altered to one of two years' rigorous imprisonment.

K N./R K.

Sentence altered.

1. (1868-69) 5 H H C R Cr 36.

2. (1875-76) 1 All 637.

A. I. R. 1918 Lower Burma 121 (2)

OBMOND, J.

Thein Me—Applicant.

v.

Po Gywe—Opposite Party.

Criminal Revn No. 71-B of 1916, Decided on 7th September 1916

(a) Buddhist Law—Burmese—Dissolution of marriage Dhammathats—Wife driven away from husband by his cruelty cannot be said to have left house.

A wife who is driven away from her husband by his cruelty cannot be said to have "left the house not having affection for the husband" within the meaning of the Dhammathats.

[P 122 C 2]

(b) Criminal P. C. (1898), S. 488—Burmese husband cannot evade liability to maintain

wife by declaring marriage to have been dissolved by reasons of wife's absence from him—Wife refusing without reasonable cause to rejoin husband is not entitled to maintenance.

A wife who refuses to rejoin her husband without sufficient reason or who is living apart from her husband by mutual consent is not entitled to maintenance; but a husband under Burmese Buddhist Law, who is bound to maintain his wife, cannot evade that liability by declaring that the marriage has been dissolved by reason of the wife's absence from him. [P 122 C 2]

Sutherland—for Applicant.

Ginwala—for Opposite Party.

Judgment.—The applicant, Ma. Thein Me, applied under S. 488, Criminal P. C., for maintenance against her husband. The application was dismissed on the ground that the wife had left her husband and lived separately from him for more than 4½ years and that the husband by opposing this application had shown his election, which he had, of treating the marriage as dissolved.

The parties were married in November 1906. In February 1912 the wife left her husband; in July 1912 the husband took a lesser wife; in July 1913 the wife applied for maintenance for herself and her son; maintenance for herself was refused because she delayed the progress of the case, without prejudice to her right to bring another application. In August 1913 the husband sued for restitution of conjugal rights and in December 1913 his suit was dismissed on the ground of cruelty. In July 1915 the wife made this application for maintenance. There is no doubt that after a husband's suit for restitution of conjugal rights has been dismissed the husband is liable to maintain his wife; but it is contended for the husband that the wife had deserted her husband for more than a year since the decree in that suit, and that it is clear by the husband's opposition to this application for maintenance that he has elected to treat the marriage as being dissolved under Burmese Buddhist Law. The Dhammathats (Richardson, Vol. 5, S. 17) says:

"If the wife, not having affection for the husband, shall leave the house where they were living together, and if during one year he does not give her one leaf of vegetables or one stick of fire-wood, let each have the right of taking another husband and wife. They shall not claim each other as husband and wife. Let them have the right to separate and marry again."

In my opinion that passage refers to the voluntary desertion by the wife without the consent of the husband. And

the wife who is driven away from her husband by his cruelty cannot be said to have 'left the house not having affection for the husband.' A wife who refuses to rejoin her husband without sufficient reason or who is living apart from her husband by mutual consent is not entitled to maintenance; and I doubt if a husband under Burmese Buddhist Law, who is bound to maintain his wife, can evade that liability by declaring that the marriage has been dissolved by reason of the wife's absence from him. The order of the Magistrate is therefore set aside. Maintenance of Rs. 15 a month has been granted for the son and an order will be made for maintenance of the applicant at Rs. 30 a month.

K.N./R.K. *Application allowed.*

A. I. R. 1918 Lower Burma 122

FOX, C. J. AND ORMOND, J.

Khoo Eo Khwee—Appellant.

v.

Nanigram Jaganath Firm—Respondts.

First Appeal No. 158 of 1915, Decided on 1st February 1917.

(a) Contract Act (1872), S. 102—Negotiability of contract.

Negotiability can be attached to documents by mercantile usage. [P 126 C 1]

A document is negotiable if by the custom of the money market it is transferable as if it were cash; and its bona fide transferee obtains a good title of it (because of its currency) although his transferor might have stolen it. [P 128 C 1]

(b) Contract Act (1872), S. 102—Document of title, test of, stated.

The test whether a document is a "document of title" or a "document showing title" to goods is whether the document in question is used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or delivery, the possessor of the document to transfer or receive the goods thereby represented. [P 127 C 2]

(c) Contract Act (1872), S. 102—Delivery order may or may not be negotiable.

A delivery order is a document of title to the goods to which it relates and the property of the transferor in the goods passes to the transferee by delivery of the document; but when once delivery has been made to the person entitled, the delivery order is exhausted and ceases to have any effect. [P 128 C 2]

A delivery order may or may not be negotiable according to the conditions attached to it or according to the usage of trade under which it is issued: *Case-law discussed.* [P 126 C 2]

(d) Contract Act (1872), Ss. 102, 108 and 178—Document showing title to goods—Transferability of—Transfer of Property Act (1882) S. 137.

A document may be negotiable although it contains conditions, but when a seller of goods issues a document the real effect of which is that

he will hand over certain goods to anyone producing the document provided he has them and he has been paid his price and all charges in connexion with them, no usage or custom of trade can compel him to hand the goods over if he has not the goods or has not been paid the price and stipulated charges. [P 126 C 1]

A document showing title to goods represents the goods to which it relates and the law governing its transferability is the same as the law which governs the transferability of the goods themselves and is contained in Ss. 108 and 178, Contract Act. [P 126 C 1]

C. R. Connell—for Appellants.

Bilimoria—for Respondents.

Fox, C. J.—Khoo Beng Ok was a Chinese merchant who had a rice mill on the Dalla side of the Rangoon river and his office in Rangoon. By two contracts in forms usual in the trade he sold 660 bags of boiled rice to S. P. S. Hoosain Nyna, a dealer in rice. According to the terms of the contracts delivery of the rice was to be taken ex-hopper into the buyer's gunny bags; but the bags could not be removed from the mill until the price of the rice in them and other charges (if any) in respect of it had been paid for. Nyna took delivery of the rice ex-hopper and on 7th February he paid for it by giving Khoo Beng Ok a Cheffy's cheque on one of the European Banks. In exchange for this Khoo Beng Ok gave Nyna his receipted bills for the rice and an order to his godown keeper at the mill which is in the following terms:

(ON FRONT OF SHEET.)

No. 55.

Rangoon, 17th February 1913.

Subject to Terms of Contract No.

Dated 4th February 1913, 21st January 1913.

(Chinese characters)

KHOO BENG OK RICE MILL.

No. 1, Angyi Creek Dalla

To Godown Keeper.

Deliver to Messrs. S. P. S. Hoosain Nyna or bearer 660 bags, say six hundred and sixty only Boiled rice.

Gunnies and twines supplied by the buyer

Marks

Weight 160/lbs

Bill No. 54/55

M/N No. 43/37

Seal

KHOO BENG OK RICE MILL

One anna stamp

Sd. in Chinese character

Khoo Beng Ok Rice Mill.

N. B.—This note is subject to our re-

ceipt of the gonnies receipt which has been granted.

(ON BACK OF SHEET)

Special attention of holders of this delivery note is drawn to the following paras. copied from the contract subject to which this delivery note has been issued.

9. Payment to be made in cash before any rice is removed, but not in any case later than immediately after milling. Payment on completion of each day's milling if required.

12. Sellers have the option of disposing of the rice by private or public sale. . . . account should. . . . fail to take delivery ex-hopper as above or fail to pay for it as above within two days of presentation of the bill.

13. All risk of fire, damage by rats and other contingencies to be borne by . . . from the time the rice is milled.

14. Sellers have the right of removing the rice together than mill godowns at risk of. . . after 24 hours' notice has been given.

15. Godown rent at the rate of Rs. 5 per 100 bags per week will be charged to. . . should. . . fail to remove the rice on or before 15 days after milling.

16. Sellers to have a lien on the rice until it has been paid for as above and until all godown rent and other charges are paid.

17. . . cannot claim the right of leaving the rice in sellers' godown after the 15 days allowed for removal have elapsed.

18. Accidents to machinery, strikes or sickness of mill hands or coolies always excepted.

19. No claim whatever to be made by. . . after delivery of rice has been taken ex-hopper.

ACKNOWLEDGMENT OF RECEIPT.

Date 191 . . .	Boat No.	Mark.	Quality.	Quantity.	Net weight.	Initial.

On the same day a durwan or messenger from Nyna went to the mill to take away

the rice. He did not bring the delivery order but said that on his signature the delivery order could be obtained next day in Rangoon. Khoo Beng Ok's eldest son, who was at the time in charge of the mill, referred to his father in Rangoon by telephone, and was authorized by him to allow the rice to be removed by the durwan on his signing for it. The bags were loaded into cargo boat No. 914 and shipped on the same day on the S. S. Oxfordshire for Colombo. The Bought Note and the Bill of Lading represent S. S. A. S. Sochalingam Chetty, the man who had given the cheque in payment of the rice, as the shipper, and the consignee at Colombo was S. S. A. S. Palaniappa Chetty. It does not appear what rights this firm had over the rice, but having given a cheque for the price of it, and got the shipping documents for it made out in its name, the firm in all probability had the rights of at least a pledgee in respect of it.

There is no evidence as to how Khoo Beng Ok was induced to authorize removal of the rice from his mill without production of the delivery order. His evidence was not available in the case because he died shortly after the suit was filed. He did not get back the delivery order next day or at all. There is no evidence as to his having made any attempt to get it back. On 21-5 February Nyna went to the plaintiff firm which lends money on the security of delivery orders, and told the plaintiff's son that he had to pay for rice on the following day. The terms of an advance were arranged, and next day Nyna came to the plaintiff's office with a durwan who had the delivery order and receipted bills given by Khoo Beng Ok to Nyna on 17th February. Nyna said that this man was the mill owner's durwan. The plaintiff's son gave Nyna a cheque on a Bank for Rs. 4,000 which Nyna endorsed and handed over to the durwan, to whom was also paid Rs. 1,584-10-0, and the durwan gave the delivery order and Khoo Beng Ok's receipted bills to the plaintiff's son. The latter believed that the durwan was the employee of the miller, and understood that the money and cheque were going to the miller.

Nothing happened in connexion with the delivery order until early in the following May, when it became known that Nyna had absconded. The fraud committed by him in connexion with the

delivery order in suit was not the only one he committed. He apparently used forged delivery orders also, and is undergoing imprisonment on account of such offences. After presenting the delivery order in suit to Khoo Beng Ok and calling on him to deliver the rice mentioned in it, the plaintiff firm, on this being refused filed their suit for Rs. 5,584-10-0, the price of the rice under the contracts with Nyna, and for Rs. 217-12, the cost of the gunny bags and twine supplied by Nyna. They also claimed interest. They based their claim on the ground that by the custom of the rice trade the delivery order which they held was a negotiable instrument entitling the bona fide holder of it for value to the delivery of the bags of rice mentioned in it. In 1890 the Recorder of Rangoon held in *Vyavon Chetty v. Oung Zay and Mohr Bros., Ltd.* (1) that a delivery order from the office of a rice milling firm in Rangoon to one of its mills in the outskirts was neither (1) a document of title to the rice referred to in it; nor (2) a negotiable instrument. He also held that it had not been proved in the case that there was a trade custom prevalent in Rangoon by which holders of delivery orders for rice can claim the rice mentioned therein free from the vendor's lien for the price and the charges thereon.

The first of the above propositions was based on *LeGeyt v. Harvey* (2). From the recent decision of their Lordships of the Privy Council in *Hamdas Vithaldas Durrbar v. Amarchand & Co.* (3), it seems to follow that what was decided in *LeGeyt v. Harvey* (2) is no longer good law. The second proposition that delivery orders could not be negotiable instruments was based on *Crouch v. Credit Foncier Co.* (4). In that case Blackburn, J., one of the most eminent of commercial lawyers, laid down in effect that no instrument made in England could be a negotiable instrument unless it was so under the law merchant, or it had been made so by legislation. In *Goodwin v. Roberts* (5) in the Exchequer Chamber Cockburn, C. J., an equally eminent lawyer, expressly dissented from this proposition and held that negotiable

1. 2 Bur L R 1

2. (18-4) 8 Bom 50

3. A I R 1916 P C 7=10 Bom 680=25 I C 954 (P C)

4. (1879) 8 Q B 74=21 W R 946.

5. (1875) 10 Ex 337.

lity could be attached to documents by the usages of a trade. The following are extracts from his judgment:

"While we quite agree that the greater or less time during which a custom has existed may be material in determining how far it has generally prevailed, we cannot think that if a usage is once shown to be universal, it is the less entitled to prevail because it may not have formed part of the law merchant as previously recognised and adopted by the Courts." We cannot concur in thinking that if proof of general usages had been established, it would have been a sufficient ground for refusing to give effect to it that it did not form part of what is called 'the ancient law merchant'."

It has been suggested by Mr. Willis in his work on Negotiable Securities, (1901), W. Willis' Law of Negotiable Securities 37 that the above two decisions are reconcilable, and that the decision in *Crouch v. Credit Foncier Co.* (4) was still good law, but Kennedy, J., in *Beshuanaland Exploration Company v. London Trading Bank* (5) and Bigham, J., in *Edelstein v. Schuler and Co.* (7) held that the ruling of Blackburn, J., to which I have referred, had been overruled. In a note on p. 275 of Edn. 12 of Sir William Anson's English Law of Contract it is said:

"This extension of the range of negotiability by recent usages may perhaps need confirmation by Courts of appeal."

In *Gilbertson & Co. v. Anderson and Colman* (6), Wilis, J., refused to attach the attribute of negotiability to a delivery order by the vendor of goods on board a ship addressed to the master purter of a ship. Whatever may be the future decision of the English Appeal Courts in England on the controverted ruling of Blackburn, J., this Court has to be guided by the decisions of their Lordships of the Privy Council, and it appears to me that in *Ramdas Vithaldas Durbhar v. Amerchand & Co.* (3), their Lordships' decision involves the acceptance of the proposition that negotiability can be attached to documents by mercantile usage. In that case the main question was whether a railway receipt was a "document of title" or "a document showing title," but the question of negotiability was also involved, and their Lordships held that by S. 102, Contract Act, the legislature intended to assimilate other documents of title to bills of lading for the purpose of determining the right of stoppage in

transit in favour of a bona fide purchaser for value. As regards the question whether the railway receipt in question was a "document of title" or a "document showing title," their Lordships remark:

"In their Lordships' opinion the only possible conclusion is that whenever any doubt arises as to whether a particular document is a 'document showing title' or a 'document of title' to goods for the purposes of the Contract Act, the test is whether the document in question is used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise either by endorsement or delivery the possessor of the document to transfer or receive the goods thereby represented."

They held that the railway receipt in question satisfied this test and that a pledgee who advanced money on the security of a railway receipt was entitled to the goods as against an unpaid vendor. The effect of S. 137, T. P. Act, is that in the case of the documents mentioned in the explanation to it, a transfer in writing and notice to the holder of goods is not necessary in order to constitute a valid transfer of goods mentioned in them. Amongst the documents mentioned in the explanation is an order for the delivery of goods. In *Anglo-Indian Jute Mills Co. v. Omademull* (9), a delivery order from the agents of the Company in Calcutta to the Manager of one of its mills to deliver goods to a named firm or order was held to be a document of title, and the evidence establishing that delivery orders of the nature of the one in suit passed from hand to hand by endorsement and were sold and dealt with in the market, and that according to the invariable course of dealing in the Calcutta jute trade delivery orders were only issued on cash payment and were dealt with in the market as absolutely representing the goods to which they related free from any lien of the seller, the Mill Company were held liable to pay the plaintiffs the amounts they had advanced on the delivery order, although a post dated cheque which the buyers had given in payment for the goods was dishonoured and the Mill Company had never received payment. The company by issuing the delivery order lost its seller's lien on the goods in its possession.

The main ground of the decision was that the company had represented that the delivery order would pass and confer a good title to the goods, and they had put it in the power of the buyers to endorse

9. (1911) 38 Cal 127=10 I C 859.

6. (1898) 2 Q B D 658.

7. (1902) 2 K B 144.

8. (1902) 18 T L R 224.

the delivery order with this representation to the plaintiffs who, dealing in good faith and for value, were induced to alter their position on the faith of the representation so made. The form of delivery order in the present case differs considerably from the form in an order for delivery without any condition; in the present case the form expressly states that the order for delivery is subject to conditions, one of which appears on the front of the sheet of paper and the others on the back. Although it may be said that by it the miller undertakes to deliver the bags of rice mentioned in it to whoever produces it to the godown keeper, the document itself gives notice to anyone asked to advance money on it that he may not be able to obtain the rice at all by means of it if the rice has been destroyed by fire, and that he will not obtain it if the price and all godown rent and other charges in respect of it have not been paid. The conditions set out are sufficient to put a prudent man on enquiry as to whether the rice was still in existence and as to whether the price and all charges payable to the miller have been paid, when he is asked either to buy the rice or to advance money on the order.

With such conditions plainly stated in the order itself it is difficult to see how the miller can be held to have made a representation to every one into whose hands the documents might come bona fide that he would hand over the rice even if he had not been paid its price. The ratio decidendi in the *Calcutta* case does not appear to me to apply in the present case, because of the terms of the delivery order giving every one who reads them notice that the rice may not be in existence, and if in existence, may not have been paid for, and that the seller retains his lien for everything due in respect of it. No doubt a document may be negotiable although it contains conditions: a bill of lading usually contains many conditions absolving the carrier from liability for not delivering the goods covered by it, but when a seller of goods issues a document the real effect of which is that he will hand over certain goods to anyone proceeding the document provided he has them, and that he has been paid his price and all charges in connexion with them, can any usage or custom of trade compel him to hand the goods over if he has not the goods and has not been paid his

price and his stipulated charges? I think not. The above appears to me to be the effect of the delivery order which we have to deal with in the present case, and the right of any one claiming under it must, in my judgment, be determined by the terms of the document itself. Under prov. 5, to S. 92, Evidence Act, a usage or custom by which incidents not expressly mentioned in a contract are usually annexed to contracts of that description may be proved, provided that the annexing of such incidents would not be repugnant to or inconsistent with the express terms of the contract. The usage sought to be applied to the delivery order in this case is that the miller who issues such a delivery order is bound to hand over the goods mentioned in it to anyone who produces the document notwithstanding he has not been paid for them. Such a usage would, in my opinion, be repugnant to and inconsistent with the express terms of the document under which the seller expressly has a lien on the rice mentioned in the delivery order until it has been paid for and until all godown rent and other charges have been paid.

How then can such delivery orders be said to have become negotiable instruments by virtue of a custom or usage in the trade when the custom or usage in the trade cannot be proved? In my judgment *Khoo Beng Ok* was not liable to the plaintiff and his representatives are not. So far as it goes, no doubt the evidence shows that delivery orders by mill owners to their mill managers are used to obtain advances on in Rangoon, but I should require better and more cogent evidence than was produced in this case before being satisfied that the general body of mill owners in Rangoon regard their obligations in respect of delivery orders issued by them to their mill managers in the same light as the witnesses for the plaintiff in this case. It would be surprising if mill owners had given up the distinctly advantageous position in which the decision in *Vyavon Chetty v. Oung Zay and Mohr Bros. Ltd.* (1) placed them. If money-lenders choose to advance money without reading and having regard to the terms of the documents on which they are asked to advance, they do so at their own risk. *Khoo Beng Ok* fulfilled the contract in respect of which he gave the delivery order. The order itself contains no guarantee or undertaking that he

would hold the goods and not deliver to anyone except some one who produced the order. The terms of this order put every one asked to advance money on it on inquiry as to whether the goods exist, and whether the mill owner will deliver them without payment. I am unable to hold that by issuing such a document Khoo Beng Ok estopped himself from denying that he had delivered the goods to the person with whom he had contracted, or to hold that he and his representatives are liable to the plaintiff on the ground of estoppel. I would allow the appeal, set aside the decrees of the original Court and dismiss the suit, ordering the plaintiff to pay the defendants' costs of the suit and of this appeal, allowing the defendants extra costs of 10 gold mohurs a day for three days in the original Court.

Ormond, J.—The respondents are the legal representatives of Khoo Beng Ok (deceased), who owned a rice mill and sold under two contracts 660 bags of boiled rice to Nyna, a dealer in rice. On 17th February Nyna paid for the rice and the miller gave him receipted bills and a delivery order on his godown keeper (Ex. A). The document is expressed to be subject to the terms of the two contracts and directed delivery to be given to Nyna or bearer. The goods were ascertained and were the property of Nyna in the custody of the miller. Later, on the same day Nyna obtained delivery of the goods without giving up the delivery order, saying that it was in Rangoon and that he would return it the next day. Nyna at that time was in possession of the delivery order. On 22nd February Nyna fraudulently obtained from the plaintiff Rs. 5,584.10.0 on the two receipted bills and the delivery order; and in May he disappeared. The plaintiff then sued the miller to recover this amount which was also the value of the goods covered by the delivery order. The plaintiff obtained a decree and the defendant now appeals. The evidence shows that Ex. A, which is in a form well known in the trade, is transferable by delivery; that it is not issued until the goods have been paid for; that receipted bills showing such payment are attached to the delivery order and the documents are passed on; that Banks will advance money on the delivery order when they are satisfied that the goods have been paid for; and that delivery is given upon production of the document.

In the case of *Vyavaran Chetty v. Oung Zay and Mour Bros Ltd.* (1) (which was decided by the Recorder of Rangoon in 1890) the transferee of delivery orders, similar to Ex. A, sued the miller. He obtained a decree on the delivery order, the goods for which had been paid for; but this claim on the delivery orders, the goods for which had not been paid for, was dismissed on the ground that the delivery orders were not negotiable instruments and that the vendor had not lost his lien. It was also held in that case that the delivery orders were not documents of title—following the English decisions—but a decree was given to the plaintiff against the miller in respect of the rice which had been paid for on the ground that the miller could not have refused to deliver to his buyer and that, therefore, he could not refuse to deliver to the holder of the delivery order. The test whether a document is a document of title or merely a token of authority to receive possession, is laid down by the Privy Council in *Ramdas Vithaldas Durbar v. Amerchand & Co.* (3), where it is said:

"The test is whether the document in question is used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or delivery, the possession of the document to transfer or receive the goods thereby represented."

Upon the evidence this delivery order must be taken to be a document showing title to goods. The delivery order expressly states that it is subject to the terms of the contract and that the goods are not to be removed before payment. It thus preserves the vendor's lien for the price of the goods (if not already paid for) and it shows that the person who acquires the property in the goods is subject to any liability which attaches to the original buyer under the contract. The learned Judge has held that this delivery order is not only a document of title to goods, but that it is also a "negotiable instrument", and that the plaintiff as the "holder", therefore, was entitled to recover as against the defendant; and he also held that the defendant was estopped from saying that the delivery order was exhausted by reason of delivery having been given to the buyer. The learned Judge has, I think, overlooked the fact that in all the cases where a document has been held to be a

"negotiable instrument" an essential element of the decision was that by the custom of the money market, the document was transferable as if it were cash. A bona fide transferee of cash obtained a good title to the cash (because of its currency) although his transferor might have stolen it. The document in such a case, therefore, had the element of "negotiability" properly so called; a bona fide transferee for value of the document acquired a good title even though his transferor had none. Upon this principle certain securities for money (such as bonds and scrip) have been held to be negotiable instruments, although they would not be covered by the Bills of Exchange Act, 1882. But a document showing title to goods is on a different footing: the document is taken to represent the goods to which it relates and the law governing its transferability is the same as the law which governs the transferability of the goods themselves. And this law, apart from any question of estoppel, is to be found in ss. 108 and 178, Contract Act. In Scrutton on Charter Parties at p. 155, Note 1, it is said:

"'Negotiable' is a term which perhaps strictly should be reserved for instruments which may give to a transferee a better title than that possessed by the transferor. A bill of lading is not 'negotiable' in this sense; the endorsee does not get a better title than his assignor. A bill of lading is 'negotiable' to the same extent as a cheque marked 'not negotiable', i. e., it is 'not transferable'."

Blackburn, J., in *Cole v. North Wes. tern Bank* (10) says:

"The possession of bills of lading or other documents of title to goods did not at Common Law confer on the holder of them any greater power than the possession of the goods themselves. The transfer of a bill of lading for goods in transitu had the same effect in defeating the unpaid vendor's right to stop in transitu that an actual delivery of the goods themselves under the same circumstances would have had. But the transfer of the document of title by means of which actual possession of the goods could be obtained had no greater effect at Common Law than the transfer of the actual possession."

And Lord Campbell, C. J., in *Gurney v. Behrend* (11) says:

A bill of lading is not, like a bill of exchange or promissory note, a negotiable instrument which passes by mere delivery to a bona fide transferee for valuable consideration, without regard to the title of the parties who make the transfer. Although the shipper may have endorsed in blank a bill of lading deliverable to his

assigns, his rights is not affected by an appropriation of it without his authority. If it be stolen from him or transferred without his authority, a subsequent bona fide transferee for value cannot make title under it as against the shipper of the goods. The Bill of Lading only represents the goods, and in this instance the transfer of the symbol does not operate more than a transfer of what is represented."

The delivery order is a document of title to the goods to which it relates and the property of the transferor in the goods passes to the transferee by delivery of the document. This delivery order purported to be a document of title to certain specific goods belonging to Nyna in the custody of the defendant which were deliverable under certain contracts. But when the plaintiff acquired this title, the goods had ceased to exist and there was no title in Nyna; the plaintiff, therefore, acquired no title to any goods. No doubt the defendant, by giving delivery to Nyna without the production of the delivery order, did so at his own risk; and if Nyna had pledged the delivery order with the plaintiff before he received delivery, the defendant would be liable to the plaintiff for having wrongfully disposed of the plaintiff's property. But Nyna was then in possession of the delivery order and was the person entitled to delivery. When once delivery has been given to the person entitled, the delivery order is exhausted. Channell, J., in *London Joint Stock Bank v. British Amsterdam Maritime Agency* (12) says:

"If Messrs. Palmers were the persons entitled at that time to have the goods delivered to them, then it seems to me that the bill of lading would be exhausted." See also Scrutton on Charter Parties pp. 185 and 273."

Delivery having been given to the person entitled the delivery order ceased to have any effect.

Section 178 and 108, Exception 1, of the Contract Act do not help the plaintiff because there were no goods and the delivery order having become exhausted there was no delivery order. Moreover, Nyna was not, and never had been, in possession of the document by the consent of the owner (defendant); for Nyna was himself the owner of the delivery order until he took delivery and after delivery, though the defendant was entitled to have the document given up to him, it was not by his consent that Nyna retained it. As to estoppel, if A issues a mercantile document to which, by the

10. (1875) 10 C P 354.

11. (1854) 3 El & Bl 622.

12. (1911) 16 Com Cas 102.

custom of the trade, certain incidents are attached, he is estopped from denying that he is bound by those incidents, unless there is something in the document to show the contrary. Thus the maker of a delivery order which by the custom of the trade relates to goods which have been paid for, is estopped from saying that they have not been paid for and he loses his lien: *Merchant Banking Company of London v. Phoenix Bessemer Steel Company* (13). In *Goodwin v. Roberts* (5), followed by *Rumball v. Metropolitan Bank* (14), it was decided that upon the ground of estoppel a person who deposits with an agent a security on the face of it payable to bearer, cannot recover it from a bona fide holder for value to whom the agent had fraudulently transferred it, whether it be a negotiable instrument, recognized by law as such or not, because he had made a representation on the face of the scrip that it would pass with a good title to anyone who took it in good faith and for value. But as pointed out by Lord Selborne in *France v. Black* (15) and by Lord Esher in *Fine Art Society v. Union Bank* (16) the fact that the document in that case was treated as a "negotiable instrument" by the mercantile world was essential to the decision. And Lord Bramwell in *Colonial Bank v. Cady* (17) says:

"I cannot, with all respect to Lord Cairns, see any ground for applying the doctrine of *Pickard v. Sears* (18) in *Goodwin v. Roberts* (5). The plaintiff there was not making a claim inconsistent with anything he had theretofore said or done."

It clearly could not have been intended to decide that the maker of every document, which is transferable by delivery, is estopped from denying that it is a negotiable instrument, when it is not a negotiable instrument either at law or by custom. In the present case there was no implied representation by the defendant that he would deliver the goods to anyone who was a bona fide transferee for value of the document: but merely that he would deliver the goods to anyone who had a good title to the delivery order, and that an endorsement of the delivery order was not necessary

in order to pass the title. If the bailee had notice that the person presenting the delivery order was not entitled to the delivery order, and he gave him delivery he would do so at his own risk. Lastly it is urged that the defendant is estopped by his negligence in not taking back the delivery order; and that by his omission to do so, he enabled Nyna to perpetrate the fraud on the plaintiff. There is no question as to the bona fides of the defendant. No duty was cast on the defendant to recover the document. Nyna was not the defendant's agent, and the defendant was not responsible for him. So far from there being any negligence on the part of the defendant, he could not possibly have recovered the document if Nyna did not intend to give it up. Nothing on the part of the defendant but actual notice to the plaintiff could have prevented Nyna from perpetrating this fraud on the plaintiff. Though the defendant might have foreseen the possibility of Nyna making a fraudulent use of the document, he could not foresee who the victim might be; and consequently he could not give notice to the plaintiff. The omission by the defendant was not the proximate cause of the loss; but rather the plaintiff's omission in not making inquiries from the defendant and satisfying himself that the document was a genuine delivery order and that the goods were in existence: see the judgments of Bramwell and Brett, J.J., in *Berendse v. Bennett* (19).

I would allow the appeal, set aside the decree and dismiss the suit with costs to the defendant in both Courts. On the original side the plaintiff was given extra costs of 10 gold mohurs a day for three days—the defendant should have there extra costs.

K.N./R.K.

Appeal allowed.

19, (1878) 3 Q.B.D. 525.

A. I. R. 1918 Lower Burma 129

MAUNG KIN, J.

Kadir Pakiri—Applicant.

v.

Emperor—Opposite Party.

Criminal Rev. No. 89-B of 1917, Decided on 1st June 1917, from order of 2nd Addl. Magistrate Moulmeio, D/- 16th February 1917.

(a) Criminal P. C. (1898), ss. 195, 360, and 476—Sanction for prosecution on ground of perjury—Depositions to which procedure

13. (1877) 5 Ch.D. 205.

14. (1877) 2 Q.B.D. 191.

15. (1884) 26 Ch.D. 257.

16. (1886) 17 Q.B.D. 705.

17. (1891) 15 A.C. 207.

18. (1877) 6 Ad. & E. 469.

under S. 360 is not applied cannot be used—Evidence Act (1872), Ss. 80, and 91.

For the purpose of granting sanction for a prosecution on the ground of perjury, depositions to which the procedure laid down in S. 260 Criminal P. C., has not been applied cannot be properly used, inasmuch as under S. 90, Evidence Act, the document embodying the deposition is the only evidence of the statement charged having been made, and under S. 80 of the same Act it is admissible only if it was taken in accordance with law: 1 *U. B. R.* 1, 123; 12 *C. W. N.* 845; 28 *Mad.* 308 and 36 *Cal* 955, *Foll.*; 7 *I. C.* 414, *Diss. from.* [P 130 C 2]

Order.—In this case there was an enquiry under S. 476 Criminal P. C., resulting in the order for the prosecution of the applicant for perjury under S. 193, I. P. C., in respect of certain statements made by him in Criminal Regular No. 128 of 1916 of the Second Additional Magistrate's Court, Moulmein. The statements were made in the course of a deposition which was not read over to the applicant in the presence of the accused or his pleader. The learned Sessions Judge has on the authority of *Nga San Myin v. Emperor* (1), recommended that the Magistrate's order directing the prosecution of the applicant be set aside.

The case cited is supported by *Mohendra Nath Misser v. Emperor* (2), which followed *Kamachinathan Chetty v. Emperor* (3), and *Jyotish Chandra Mukerji v. Emperor* (4). In the last case *Jenkins, C. J.*, in dealing with the argument that S. 360 was directory and not obligatory, observed:

"Such a departure from the terms of the Criminal Procedure Code might lead to considerable embarrassment, and place a serious impediment, in the proper administration of justice, for there are cases in which it has been held that, for the purposes of a prosecution on the ground of perjury, depositions to which the procedure laid down in S. 260 has not been applied, cannot be properly used."

There is a contrary view expressed by *Miller, J.*, in *In re Bogra* (5), where the Madras case cited above was disapproved. The disapproval was expressed in these words:

"When the deposition has been read over to the witness and he has admitted it to be correct, there seems to be no good reason why that admission should not, so far as he is concerned, be regarded as a proof of its correctness. I cannot see why a deposition irregularly recorded is necessarily to be treated as a nullity for all purposes even as against the man who made it and

who has admitted that it represents what he said."

The difficulty in following *Miller, J.*, lies in the facts that under S. 91, Evidence Act, the document embodying the deposition is the only evidence of the statement charged having been made, and that under S. 80 of the same Act it is admissible only when it was taken in accordance with law. As stated in the judgment of the Upper Burma case above cited, it is from this point of view that the illegality arises. I am of opinion with due deference that *Miller, J.*'s view cannot be adopted. The Upper Burma case, as supported by Calcutta and Madras as shown above, should therefore be followed. I, therefore, accept the Sessions Judge's recommendation and set aside the Magistrate's order directing the prosecution of the applicant for perjury.

K.N./R.K. Application accepted.

A. I. R. 1918 Lower Burma 130

Rigg, J.

Ma Myaing—Applicant.

v.

Maung Shwe The—Opposite Party.

Civil Revn. No. 112 of 1916, Decided on 7th December 1916.

(a) Tort—Negligence—Damages—*M* making over buffaloes to *N* for tending—Buffaloes known to be vicious by both—One buffalo goring to death one of plaintiff's buffaloes—Suit for damages—Held *N* alone was liable.

M made over two buffaloes to *N* to tend on payment of a certain sum. One of these animals was vicious and was known to be so both by *M* and *N*. Whilst the buffaloes were in charge of *N*'s son, a small boy, they gored to death one of plaintiff's buffaloes. Plaintiff sued *M* and *N* for damages:

Held: that *N* alone was liable, inasmuch as at the time that the goring took place he was exercising an independent calling as an agister and was, therefore, in the position of a bailee and not that of a servant. [P 131 C 1]

(b) Tort—Negligence—Damages—True test is to ascertain relation between party charged and party actually doing injury.

The true test is to ascertain the relation between the party charged and the party actually doing the injury. Unless the relation of master and servant exists between them the act of the one creates no liability in the other: *Milligan v. Wedge*, (1840) 12 *Ad. & E.* 737, *Rel. on.*

[P 131 C 1]

Hay—for Applicant.

Hla Baw—for Opposite Party.

Judgment.—The defence set up Ma Myaing's written statement has been abandoned, and the facts in the case are not now in dispute. Ma Myaing owns two

1. (1912) 1 *N B R* 123=15 *I C* 985.

2. (1908) 12 *C W N* 845.

3. (1905) 28 *Mad* 308.

4. (1909) 36 *Cal* 955=4 *I C* 416.

5. (1910) 7 *I C* 414.

buffaloes and made them over to Maung Ne Dun to tend on payment of eight baskets of paddy. One of these animals was vicious and was known to be vicious both by her and Ne Dun. Whilst the buffaloes were in charge of a small boy named Maung Thin, son of Ne Dun, they gored to death one of Maung Shwe The's buffaloes. Maung Shwe The sued Ma Myaing and Maung Thin for damages: the Township Judge held that Ma Myaing was not liable and dismissed the suit against her, but the appellate Court reversed this decision. The District Judge based his judgment on the negligence of Ma Myaing in not seeing that her buffaloes' horns were cut, and in not taking care that a mere boy was not left in charge of them. The real point in issue was whether Ma Myaing, having made over her buffaloes to Ne Dun's charge, was any longer responsible for any damage they might cause. Ne Dun accepted the charge of the animals with knowledge of their nature. The appellate Court did not consider the real issue in the case at all, and in failing to do so, acted with illegality according to the ruling in *Zeya v. Ma On Kra Zan* (1). The answer to the question as to whose the responsibility is in a case such as the present must, I think, depend on whether Ne Dun after taking charge of the buffaloes for hire was Ma Myaing's servant. Ne Dun was an agister who received Ma Myaing's buffaloes to tend on hire. He was exercising an independent calling at the time the goring took place and was not under orders from Ma Myaing. He seems to me to have been in the position of a bailee and not of a servant. In *Milligan v. Wedge* (2), the facts were that the owner of a bullock employed a drover to drive it from Smithfield where he had bought it. The drover employed a boy, through whose careless driving mischief was caused. It was held that the owner of the bullock was not liable. Coleridge, J., said:

"The true test is to ascertain the relation between the party charged and the party actually doing the injury. Unless the relation of master and servant exists between them, the act of the one creates no liability in the other."

The negligence in the present case was that of Ne Dun, who left his young son to look after fourteen buffaloes. The decree of the District Court is set aside and that of the Township Court is restored.

1. (1903-04) 2 L B R 233.

2. (1840) 12 Ad & E 737.

Maung Shwe The will pay Ma Myaing's costs throughout.

K.N. R.K.

Decree set aside.

A. I. R. 1918 Lower Burma 131

MAUNG KIN, J.

Appan Charan—Plaintiff—Appellant.

Kyausa Ma—Defendant—Respondent.
Special Government Appeal No. 105 of 1916.
Decided on 4th May 1917.

(a) Limitation Act (1903), Sec. 1, Art. 142—Suit for possession on ground of dispossession—Limitation runs from date of dispossession—Suit is governed by Art. 142.

Where a plaintiff's claim is based on the ground that he and his predecessor have been dispossessed or discontinued possession, the period from which limitation runs is the date of dispossession or discontinuance of possession, and the burden is on the plaintiff to show that he or his predecessor's title has been in possession within 12 years of the date of suit, and the article applicable to the suit is Art. 142 Limit. Act.

(P 181 C 2; P 182 C 1)

(b) Limitation—Statute of Limitation applicable to suit—Objection of simple laches does not apply until expiration of time allowed by law—Laches and acquiescence—Difference between.

Where there is a Statute of Limitation applicable to the suit, the objection of simple laches does not apply until the expiration of the time allowed by the statute. But acquiescence is a different thing: it means more than laches. If a party who can object lies by, and knowingly permits another to incur an expense in doing an act under a belief that it would not be objected to and a kind of permission may be said to be given to another to alter his condition, he is said to acquiesce.

(P 184 C 1)

Charu and Ray—for Appellant.

Broadbent—for Respondent.

Judgment.—Both the lower Courts have held that the defendant-respondent did encroach on the plaintiff-appellant's lands to the extent sued for, by building on it. The main defence is, however, involved in the question whether Art. 142 or 144, Limit. Act, applies. The plaintiff alleges that he was in possession when the encroachment took place in 1908 or 1909, and that he was thereby dispossessed of the land taken up. Following the ruling of their Lordships of the Privy Council in *Mohana Chunder Mozoomdar v. Mohesh Chunder Neoghi* (1) a Division Bench of this Court in *Moung Ya Gyaw v. Ma Nywe* (2) has held that if a plaintiff claims on the ground that he and his predecessors have been in possession but have been dispossessed or have discon-

1. (1882) 16 Cal 473=16 I A 23 (P C).

2. (1903-04) 2 L B R 56.

tinued possession, the period for which limitation runs is the date of dispossession or discontinuance and the burden is on the plaintiff to show that he or his predecessors-in-title have been in possession within 12 years of the date of suit. No other ruling of this Court contrary to that ruling has been cited before me. It must, therefore, be held that Art. 142 applies and that the onus is upon the plaintiff to show that he was dispossessed within 12 years of the date of the suit, that is to say, that the defendant built her house within that period.

On this point the Court of first instance held that the defendant did build her house about six years before the suit. The District Court on appeal disagreed with that finding. The plaintiff's witnesses on this point are Maung Po Thaing, Maung Tun Baw, Maung Po Thin, Kannuswami and Rahim Bux. The Township Judge believed the evidence of the first three, but did not attach much importance to the evidence of the last two. The District Judge explained away the evidence of the three relied on by the Township Judge by holding in effect that they had nothing to go on in their recollections of the time when the encroachment took place. In my view Maung Po Thaing's evidence is absolutely reliable. The witness is a joint sub-registrar and a pensioned thugyi and has lived long at Kyauktan in his official capacity as a talk thugyi and has had much to do with the buildings of that place. He remembers that in 1892 there was a space of ten feet between the two houses which were respectively standing on the two sites in question. "The man on the north of it," he says, "owned five feet of it; the man on the south of it owned five feet of it." The next thing he remembers is that about six or seven years ago the defendant's present house was built by her husband, since deceased, the plaintiff having built his present house before then. The witness goes on to say that the plaintiff built his house exactly on the space taken up by the old house, but that the defendant's husband built his, taking up not only his five feet of the vacant space between the two houses but also one foot of plaintiff's land. Maung Po Thaing also remembers that 17 years ago there was a dispute between the owners of the two houses as regards the

boundary line within the two houses and he settled it. Here the witness is talking evidently about the predecessors-in-title of the parties to this suit. He therefore has had much to do with the two sites and remembers a great deal about them. He has held a responsible position in which he must have had many opportunities of looking into matters concerning the small group of houses known as the town of Kyauktan. I do not think that such a person's evidence can lightly be disregarded, when he says that a certain house was built such and such a time ago. It cannot be said that he said so in an irresponsible way. He must be credited with some sense of responsibility and must be taken to have thought over the matter and given the time after due consideration. That he assigns no reason for remembering the date of defendant's building is not a matter which can be used against his testimony. It was for the defendant to ask the necessary question. Again, it must be borne in mind that Maung Po Thaing says that the plaintiff's present house was built before the defendant's present house. The plaintiff bought that site with the old house thereon in July 1902 and the suit was brought on 9th October 1915, a little over thirteen years from the date of the purchase. This being so, Maung Po Thaing's estimate of the length of the time that has elapsed since the building of defendant's house must be held to be reliable. This fact will be presently developed into one of great importance in this case. Regarding the evidence of Maung Tun Baw and Po Thin the learned District Judge says that if their evidence stands alone, he would agree with the Township Judge that it should be accepted but that he thinks Ah Waing's evidence is against their testimony.

Now I think that Ah Waing's evidence when analysed carefully is not reliable one way or the other. I have no doubt that he had a good reason to remember the date of the defendant's building of the present house before the reason assigned by the District Judge but the question is whether as a fact he remembers it or not. I do not think that he does. Ah Waing says that the plaintiff's present house was built five or six years before the defendant's present house. If that was all he says, there would be no doubt that his evidence supports Maung Po

Thaing, Tun Baw and Po Thio, for the plaintiff's deed of purchase is dated July 1902 and the present house must have been built after the purchase. But Ah Waing goes on to say that the defendant's house was built 12 or 13 years ago. This cannot be true in view of the date of the plaintiff's deed of purchase; if what he said previously is true, if both the statements are true, the witness has driven himself into an absurdity, for the plaintiff would then appear to have built the house five or six years before the date of his purchase. Ah Waing's evidence is therefore unreliable, although it may be said that he appears to be an honest witness. In the result it is, in my opinion, the proper thing to place reliance upon the evidence of Maung Po Thaing and the other two Burman witnesses. I therefore hold that the plaintiff succeeded in discharging the onus that was on him. Counsel for the defendant argued that, even if the plaintiff's case was established in its entirety, the defendant should not be compelled to pull down her house which she had occupied for so long, but that she should be ordered to pay such compensation as was reasonable under the circumstances. The reason urged for this contention is that the plaintiff waited six or seven years before he filed his suit, without having previously made any complaint. Mr. Broadbent cited *Brommo Moyee Debia Chowdhraim v. Komondinee Kant Banerjee* (3) and *Nil Kant Sahoy v. Jujoo Sahoo* (4). In the first case there were two appeals, in the second of which the suit was to have a privy erected upon a very small bit of land, about four cowries demolished.

Both the lower Courts had concurrently held that the privy had been erected for seven years or so with the consent of the plaintiffs. The consent appears to have been inferred from the facts that the plaintiffs had been aware of the facts that the privy was erected, and that they allowed it to be completed and to remain standing for many years. The learned Judges of the High Court held that the consent had been rightly inferred and dismissed the appeal of the plaintiffs. In the second case the plaintiff claimed to enforce his right to an easement. Upon the facts it was held that he had not proved such use as would be necessary for the purpose of establish-

ing the right of easement claimed, but the learned Judge went on to say:

"We will add that, supposing that the plaintiff had the right which he alleges in this case, he could not be allowed in equity to stand by and see the defendant building a house and erecting a chubootaran before he complained in any way of his right being infringed by those acts. He was bound at once to do his best to prevent the defendant from putting a permanent obstacle in the way of the enjoyment of his rights. If he silently stands by and permits himself to go to the expense of erecting a building upon his own land before he complains, a Court of equity ought to be every day to listen to his complaint when the consequence of giving effect to that complaint will be to cause a very considerable damage and loss to the defendant."

With due respect I am unable to accept the law as laid down in either of these cases, for in my opinion it is too general in expression and too wide in effect. The law was laid down in somewhat similar terms to that in the above cases by a Superior Judge in *Gopi v. Bisheshar* (5):

"It is unnecessary for me to build upon his land and with the knowledge that the building is being erected, stand by and does not prevent the other from doing so, then, no doubt, equity comes in, and by the rules of equity, which in this respect are the same as the rules of law, he cannot object that either person,"

and their Lordships of the Privy Council in *Beni Ram v. Kundal Lal* (6) remarked that it was to be regretted that the loose and inadequate statement of the rule of equity reported in *Gopi v. Bisheshar* (5) should have been accepted apparently without much consideration by the learned Judges of the High Court. I shall first of all deal with the English law on the subject of laches and acquiescence:

"A plaintiff in equity is bound to prosecute his claim without undue delay. This is in pursuance of the principle which underlies the statutes of limitation, vigilantibus et non dormientibus lex succurrit. A Court of equity refuses its aid to stale demands, where the plaintiff has slept upon his right and acquiesced for a great length of time. He is then said to be barred by his laches. The defence of laches however is only allowed where there is no statutory bar. If there is a statutory bar, operating either expressly or by way of analogy, the plaintiff is entitled to the full statutory period before his claim becomes unenforceable. (Halsbury's Laws of England, Vol. 13, p. 105, S. 203)."

But there appears to be a distinction between laches and acquiescence. In *Archbold v. Scutty* (7) Lord Wensleydale points out the distinction in the following words:

3. (1874) 17 W. R. 406.

4. (1878) 20 W. R. 325.

5. (1881) A. W. N. 100.

6. (1891) 21 All. 41 = 2, 1 A. 28 (P. C.).

7. (1861) 2 H. L. C. 30.

"I take it that where there is a Statute of Limitations, the objection of simple laches does not apply until the expiration of the time allowed by the statute. But acquiescence is a different thing; it means more than laches. If a party, who could object, lies by and knowingly permits another to incur an expense in doing an act under the belief that it would not be objected to and so a kind of permission may be said to be given to another to alter his condition, he may be said to acquiesce; but the fact of simply neglecting to enforce a claim for the period during which the law permits him to delay without losing his right, I conceive, cannot be any equitable bar."

With these observations must be read what was said by the same learned Judge and Lord Chancellor Cranworth in *Ramsden v. Dyson* (8). There both their Lordships declared that if a stranger builds on the land of another supposing it to be his own and the owner does not interfere but leaves him to go on, equity considers it dishonest in the owner to remain passive and afterwards to interfere and take the profits. But if a stranger builds on the land of another knowingly, there is no principle which prevents the owner from insisting on having back his land, with all the additional value which the occupier has imprudently added to it; and Lord Wensleydale added that, if a tenant does the using same thing, he cannot insist on re-to give up the estate at the end of his term. It was his own folly to build. This was stated in the Allahabad case of *Uda Begam v. Inamuddin* (9) as the effect of the observations of their Lordships and was adopted as law applicable to India.

"These dicta" say the learned Judges of the Allahabad High Court, "of the highest authority illustrate the application of the general rule. There must be something more than a mere delaying in instituting proceedings to deprive a man of his legal remedies."

Then the learned Judges in dealing with the facts of the case proceed to say that the appellant, knowing that the respondent was building on her lands, abstained from commencing proceedings for one or two years, that the respondents must have known that they had no claim to the land and that they could hardly have doubted that it belonged to the appellant, and that the delay in bringing the suit was therefore not sufficient to deprive the appellant of her right to relief. In *Beni Ram v. Kundan*

Lal (6) their Lordships of the Privy Council adopted the principle laid down by Lord Chancellor Cranworth and Lord Wensleydale in *Ramsden v. Dyson* (8). In *Fatehyab Khan v. Mahammad Yusuf* (10) the suit was for the removal of a building erected by the defendants upon certain land over which the plaintiffs alleged that all the residents of the mohalla where the parties lived had from time immemorial exercised a right of way to and from their residences, besides using it for social gatherings and other common purposes. *Ramsden v. Dyson* (8) was followed and Edge, C. J., observed on the facts:

"It appears to me that the acquiescence cannot possibly arise here. It is not suggested that there was any evidence that the plaintiffs had given their actual consent to the building; and the only evidence of acquiescence can be that they did not immediately protest. It appears to me that the defendants in creating this building must have known perfectly well that they were building upon a courtyard which their neighbours had a right sue."

It is clear from the foregoing that besides the plaintiff's delay in instituting proceedings the Court would have to go into the question as to whether or not the person building had reasonable grounds for supposing that the land built on was his own land. In *Muhammad Umar Daraz Khan v. Maru* (11) Karamat Hussain, J., following *Beni Ram's* case (6), laid down the law as follows:

"In order to constitute acquiescence and to raise the plea of equitable estoppel an abstinence from interference is not enough. In addition to this there must also be a mistaken belief in the builder that the land upon which he was building was his own property."

So that the defendant may show that he did not build on the land of another knowingly, but under a mistaken belief that it was his. Turning to the question of the fact whether the defendant's husband knew that he was building on a portion of the plaintiff's land or whether he had reasonable ground for believing that he was doing so on his own land but that he had made a mistake, I am unable to come to any other conclusion than that the defendant's husband built the house taking in a portion of the plaintiff's land knowingly and that there was no possibility of a mistake having occurred as to whose property that portion was. Maung Po Thaig's evidence makes it clear that originally there was

S. (1866) 1 H L 129.

9. (1875-78) 1 All 52.

10. (1887) 9 All 424.

11. (1909) 1 I C 321.

a well-defined boundary between the two houses in the shape of a fence, and that there was vacant space, 5 feet wide on either side of the fence and that when the defendant's house was re-built, not only was his own vacant space taken up, but a foot of land beyond the fence. This evidence is, in my opinion, reliable. Maung Po Thaio is the only witness in the case who could speak with some knowledge of the place and he speaks very clearly on all the matters he was examined. I hold therefore that the defendant's husband built his house knowing that he was thereby encroaching upon a portion of the plaintiff's land and that there was no possibility of his having made a mistake in thinking that the portion was his. The appeal is allowed. The decree of the District Court is set aside and that of the Court of first instance restored. The defendant-respondent will not however be ordered to pay any costs in any of the Courts, as I think the plaintiff should have brought his suit earlier than he did.

K.N./R.K.

*Appeal allowed.***A. I. R. 1918 Lower Burma 135 (1)**

ORMOND, OFFG. C. J. AND FARLETT, J.
Wor Lee Lone—Plaintiff—Appellant.

v.

A. Rahman—Defendant—Respondent.

Civil Misc. Appeal No. 187 of 1916,
 Decided on 30th April 1917.

(a) Provincial Small Cause Courts Act (1887), S. 16—Chief Court cannot entertain suit of small causes.

A Chief Court has no jurisdiction to entertain a suit of small cause jurisdiction. [P 135 C 2]

(b) Civil P. C. (1908), O. 37—Rules under Scope of.

Order 37, Civil P. C., lays down certain rules of procedure applicable only after the plaint has been admitted by the Chief Court. [P 135 C 2]

May Oung—for Appellant.

Lentaigne—for Respondent.

Judgment.—The plaintiff presented a plaint on the original side of this Court whereby he claimed Rs. 824 on a pro note and stated that he desired to proceed under O. 37 of the Code. The plaint was returned to be presented to the proper Court, i. e., the Small Cause Court. The plaintiff now appeals from this order rejecting his plaint. He contends that because R. 2, O. 37, refers to all suits upon bills of exchange, hundis or promissory notes, and because O. 37 does not apply to the Small Cause Court, he is, therefore, entitled to institute his

suit in the Chief Court. S. 15 of the Code says: "Every suit shall be instituted in the Court of the lowest grade competent to try it," and S. 16, Provincial Small Cause Courts Act, says:

"A suit cognizable by a Court of Small Causes shall not be tried by any other Court having jurisdiction within the local limits of the jurisdiction of the Court of Small Causes."

The suit was one on a promissory note for Rs. 824 and was cognizable by the Court of Small Causes and that Court was competent to try the suit. O. 37 lays down certain rules of procedure which are applicable only to the Chief Court, and such rules of procedure can only be applied after the plaint has been admitted. The rules do not in any way alter the nature of the suit, nor the jurisdiction of the Court. The Chief Court had no jurisdiction to entertain the plaint and it was rightly rejected. This view was adopted in the case of *Doulatram Vaidyas v. Holo Kanya* (1). The appeal is dismissed with two gold mohurs costs.

K.N./R.K.

Appeal dismissed.

L. (1911) 5 S L R 155=13 I C 244.

A. I. R. 1918 Lower Burma 135 (2)

ORMOND, OFFG. C. J. AND FARLETT, J.

P. T. Christenson—Plaintiff—Appellant.

v.

R. F. Commotto and another—Defendants—Respondents.

First Appeal No. 152 of 1915, Decided on 11th July 1917.

Civil P. C. (1908), S. 11—*Res judicata*—Determination of question—Plaint in previous suit must be construed in same way as done by former Court.

For the purpose of determining whether a claim is *res judicata*, the plaint in the previous suit must be construed in the same way that the Court that decided that suit construed it.

[P 136 C 1,2]

McDonnell—for Appellant.

Shaw—for Respondents.

Judgment.—The firm of Dominic and Co. of Rangoon had stevedoring contracts with certain shipowners in London. Dominic and Co. was a firm owned by Dominic alone. He employed the plaintiff to do the stevedoring for him at Moulmein on such ships as should go there. Defendant 1, Commotto, became a partner with Dominic. Then Dominic died and Commotto took defendant 2, McDonald, into partnership with him. The defendants became the stevedores for the

London shipowners in the place of Dominic and Co. The plaintiff's agreement with Dominic and Co. was to last five years. Before the termination of the five years the plaintiff entered into a stevedoring agreement with these defendants on 17th January 1913 and these defendants terminated that agreement on 13th March 1913. The plaintiff then instituted a suit on 11th April 1913, in which he sets out his agreement with Dominic and Co. and also his agreement with these defendants and asks for an injunction to restrain the defendants from preventing him from doing stevedoring work under these agreements at Moulmein. One of the defences taken in that suit was that the plaintiff had no right of suit because he was merely Dominic's agent and the suit was dismissed on that ground. The plaintiff then filed the present suit for damages for breach of the agreement between the plaintiff and these defendants. The suit has been dismissed on the ground that these damages having accrued at the time that the first suit was instituted the present claim is barred under O. 2, R. 2, sub-Cl. 3; and it is also dismissed on the ground that, as regards the plaintiff's claim for battens supplied, his claim is *res judicata*, i. e., that the plaintiff is debarred from suing in his own name. We think the learned District Judge has misunderstood the plaintiff's claim as to this. Plaintiff's claim is for damages against the defendants for breach of contract made between the plaintiff and the defendants. The former suit was dismissed because it was taken to be a suit on the Dominic contract; in the present suit he is suing on a contract between plaintiff and defendants.

It is contended by Mr. Shaw for the defendants that this suit was rightly dismissed under O. 2, R. 2, sub-Cl. 3, because the plaint in the former suit shows that his cause of action there was based not only on the Dominic contract but also on the present contract. We agree with him that that would be a proper construction of that plaint, but it clearly was not so construed by the Court that dismissed that suit, and the view taken by the Court in that suit was the view that was pressed upon it by the defendants' Advocate. For the purposes of *res judicata* we clearly must construe the plaint in the same way that the

Court that decided that suit construed it, i. e., that it was based solely on the contract between the plaintiff and Dominic and Co., and had nothing to do with the present contract. Consequently O. 2, R. 2, sub-Cl. 3, has no application and this suit was wrongly dismissed. The appeal is allowed, the decree is set aside and the case will be sent back to be retried on its merits. There will be a refund of the appellate court-fees under S. 13, Court-fees Act, and costs ten gold mohurs allowed.

K.N./R.K.

*Appeal allowed.***A. I. R. 1918 Lower Burma 136**

MAUNG KIN, J.

Yagappa Chetty — Plaintiff — Appellant.

v.

K. Y. Mahomed and others—Defendants—Respondents.Special First Appeal No. 176 of 1916.
Decided on 4th May 1917.

(a) Limitation Act (1908), S. 21 (b)—Payment of interest by one heir does not save limitation against others.

Payment of interest by one of his heirs on a debt due by a deceased person does not save limitation as against the other heirs: 14 I. C., 128, *Rel. on.* [P 137 C 1]

(b) Civil P. C. (1908), S. 34 (2)—Decree silent as to interest from date of payment—Separate suit to recover it does not lie.

Where a decree is silent with respect to further interest from date of decree to date of payment, the Court must be deemed to have refused such interest and a separate suit will not lie for its recovery. [P 137 C 2]

The matter must be treated as if the Court had exercised its discretion and refused to give interest, unless it can be shown that its silence was due to oversight or mistake: 37 *Bom.* 326, *Rel. on.* [P 137 C 2]*Kastgir*—for Appellant.*J. R. Das*—for Respondents.

Judgment.—This appeal arises out of a suit in which the defendants-respondents were sued on a pro-note in their representative capacity. The pro-note was executed by K. Y. Cassim, since deceased. Defendant 1 is the elder brother, and defendants 2 and 3 are daughters of the deceased. Defendant 4 is the deceased's nephew. Defendant 3 is a minor and appeared by her guardian ad litem even in this Court. She was 11 years old, when the suit was filed. Of the defendants the first three only are the heirs of the deceased, defendant 4 Mahomed not being an heir at all. The plaintiffs claim that the suit is not

barred by limitation on the ground that defendant 1 made two part-payments which save limitation as against all the defendants. Defendant 1 did not appear to contest the suit. I have to take it that the alleged part-payments have been proved as the suit has been decreed as against defendants 1 and 4. The finding has not been assailed here either. Now it has been held in *Arjun Ram Pal v. Rohima Banu* (1) that the payment of interest by one of his heirs on a debt due by a deceased person does not save limitation against the other heirs. But it is alleged that defendant 1 made the part payments on his own behalf as well as on behalf of defendants 2 and 3 as their duly authorized agent, inasmuch as he was then the manager and head of a joint family of which defendants 2 and 3 were members. This the latter defendants deny. And there is not a scrap of evidence to show that defendant 1 was such a head. Moreover although the case-law shows that the head of a joint Hindu family might have the necessary authority, it does not appear that the same rule prevails among the Mahomedans.

The learned Judge below observed in his judgment that it is not alleged that defendant 1 was the natural guardian of either of defendants 2 and 3. But it has been argued before me that defendant 1 was the lawful guardian of defendant 3 and as such was a person who falls within the meaning of the words "agent duly authorized in that behalf" in Ss. 19 and 20 Limitation Act, as defined by S. 21 (1) of the same Act. Ss. 107 and 109 of Wilson's Digest of Anglo-Mahomedan law show that failing all the female relatives mentioned in S. 107, the custody of a minor girl under the age of puberty belongs to the father, and failing him to the nearest male paternal relative within the prohibited degrees, reckoning proximity in the same order as for inheritance. In Mahomedan law puberty is presumed on the completion of the 15th year in the case of both males and females, unless there is evidence to show that puberty in the particular case was attained earlier. Defendant 3 was only 11 years old at the date of the institution of the suit and as the part payments were made nearly three years before, she must have been about eight years old then.

1. (1912) 14 I C 128

Defendant 1 was, therefore, the natural guardian of the person of the minor defendant, which means according to the books that the guardianship is for custody and education. I find also that even if the minor defendant had attained puberty defendant 1 would be the guardian of her person (failing father), executor of father's will and father's father H. H. S. provided the minor is unmarried. See S. 111 of Wilson's book. But this is not, in my opinion, sufficient for the purposes of S. 21 (1), Limitation Act. I think defendant 1 should be the guardian of the minor's property as well, because the act in question of his is sought to be made binding on the minor's estate.

Section 112 of Wilson's book gives a list of the natural guardians of the property of a minor indicating the order of priority among them. The father's brother is not included in that list and the section goes on to say that failing all of these it is for the Court to appoint a guardian or guardians. I hold, therefore, that defendant 1 was not "a person duly authorised within the meaning of S. 51 (1), Limitation Act. The result is that the payments made by defendant 1 cannot bind defendants 2 and 3. The appeal is, therefore, dismissed as against defendants 2 and 3 with costs. Defendants 1 and 3 have not appeared before this Court and as against them the plaintiffs ask for interest at 6 per cent. per annum from the date of institution of the suit till realization. They say that they ask for that in their plaint and the learned Judge below failed to deal with their prayer.

Section 34 (2) provides that where a decree is silent with respect to the payment of further interest from the date of the decree to the date of payment, the Court shall be deemed to have refused such interest, and a separate suit therefor shall not lie. The matter must, therefore, be treated as if the lower Court had exercised its discretion and refused to give interest, unless perhaps the plaintiff can show that the silence of that Court upon the point was due to an oversight or mistake, but there is nothing to show this. That being the case, the proper course is to follow the case of *Hiralal Ichhalal Majumdar v. Desai Narainlal Chaturbhujdas* (2) of

2. (1913) 37 Bom L.R. 26=18 I C 309=10 I A 68 (P.C.).

which the facts were similar to those in this case, and which decided that the High Court was right in declining to allow the prayer. The appeal is dismissed as against respondents 2 and 3 with costs, the costs in this Court being confined to one advocate's costs, as at the hearing. Mr. Das appeared for both and Mr. Judge, though set down as an advocate for respondent 3, did not appear. The appeal against respondents 1 and 4 as regards the interest asked for is dismissed. The lower Court's decree against them will stand. There will be no order as to costs in their favour, as Mr. A. C. Dhar who, the list shows, was appearing for respondent 1 did not appear and defendant 4 was absent.

K.N./R.K.

*Appeal dismissed.***A. I. R. 1918 Lower Burma 138**

PARLETT, J.

Noor Mahomed—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 49-B of 1917, decided on 27th April 1917, from order of Sub-Div. Mag. Yandoon, D/- 23rd January 1917.

(a) Evidence Act, (1872) S. 91—Applicability of—Contents of special diary under S. 172 Criminal P. C. (1898).

S. 91, Evidence Act, has no application to matters entered in a special diary under S. 172, Criminal P. C. [P-138 C 2]

(b) Evidence Act, (1872) S. 91—Statement to police—Proof of—Oral evidence—Admissibility of.

Oral evidence is admissible to prove statements made to the Police by witnesses who heard them made: 19 All. 390 commented on. [P 138 C 1]

Order.—The petitioner has been convicted of giving false evidence in a judicial proceeding. He appealed, through an Advocate, on the facts and his appeal was dismissed. He now applies in revision on the ground of inadmissibility of certain evidence. The facts are that a bundle of stolen clothing was found by a police Officer in petitioner's presence on the premises which he occupied, and he told the Police Officer that the bundle had been left there by one Abdulla Meah. At the trial of Abdulla Meah petitioner gave the evidence in respect of which he has been convicted. That evidence consists of two main parts—one is to this effect:

"I know nothing in this case. I do not know about Police seizing a bundle of clothes. No bundle of clothes was found either in my possession or in the building where I lived;" the other is:

"do not state before any Police Officer that accused Abdulla Meah entrusted to me a bundle of clothes."

There was evidence against the petitioner of persons who saw the clothes found in his presence on his premises and of persons who heard him make the alleged statement to the Police Officer. No question has been raised as to the admissibility of the evidence on the first point, and, therefore, the conviction was justified, and it is really unnecessary to decide as to the admissibility of the evidence on the second point which has been questioned. I have, however, considered the point raised and will decide it. It was this, that a Police Officer investigating an offence under Ch. 14, Civil P. C. is bound to incorporate in the diary prescribed by S. 172 (the special diary) the statements of the witnesses examined by him; consequently by S. 91, Evidence Act, no evidence of such witnesses, statements shall be given except the diary itself. This somewhat startling proposition is based upon some remarks of the Judges in *Queen Empress v. Mannu* (1), where four Judges held that all statements reduced to writing under S. 161, Criminal P. C., should be in the special diary and not elsewhere. Two other Judges, however, held to the contrary that such statements if entered in the diary are not an integral part of it and are not privileged, but an accused person or his agent is entitled to see them.

The point being especially dealt with in this case was the power of the Court to allow an accused person to see, or to have copies of witnesses' statements when such statements were recorded in the special diary. So far from the case being an authority that matters contained in the special diary can only be proved by production of the diary, the entire Full Bench held the exact opposite, namely, that entries in the special diary cannot by themselves be taken as evidence of any date, fact or statement therein contained. It appears to me clear that S. 91 has no application to matters embodied in a special diary for if it had, no proof at all could be given of such matter, inasmuch as S. 172 forbids a special diary being used as evidence except for certain limited purpose. This view has been expressed with respect to such lists in *Solai Naick, In re* (2), where it was held that even if the narrative of

(1) (1897) 19 All. 390.

(2) (1917) 34 Mad 349 = 5 I O 178.

an extensive fact must by law be reduced to writing, it may still be proved by oral evidence. At the conclusion of their judgment the learned Judges remarked:

"We need hardly point out that if the provisions of S. 91 were to apply to the case of a search list prepared under S. 103, Criminal P. C. the results would be startling and there would be grave risks of miscarriage of justice in many trials in criminal cases."

The results would be still more startling and absurd if the Legislature should be interpreted as having enacted that most of the most vitally important matters relating to the investigation of criminal offences should, by being reduced to writing, be excluded altogether from proof at the trial. So far as this Province is concerned, the Executive Government have forbidden the incorporation in special diaries of witnesses' statements in extenso (see para. 613, Burma Police Manual). Even were that not so, the provision in S. 172, Criminal P. C. that the circumstances ascertained in the investigation should be noted in the special diary, could not, in my opinion, be held to require the statements of witnesses to be taken down as they are made in that diary, and if the Allahabad decision really affirmed the contrary, which I doubt, I most respectfully express my dissent from it. There is, in my view, no rule whatever excluding oral evidence being given of statements made to the Police by witnesses who heard them made. Accordingly the evidence as to that part of the present case was also admissible. The application is dismissed.

K.N./R.K. *Application dismissed.*

A. I. R. 1918 Lower Burma 139

MAUNG KIN, J.

Mi So Ma Shwe—Appellant.

v.

Chit Ma U and another—Respondents.

Special Second Appeal No. 203 of 1915,
Decided on 22nd June 1917.

Buddhist Law (Burmese) — Succession—
Three marriages—Children from each marriage—Shares of.

Where there have been three marriages and there are children of each marriage, the children of the marriage during which the property was acquired get two out of four shares and the children of the other two marriages one for each.

[P 140 C 2]

Ba Dun—for Appellant.

Bose—for Respondents.

Judgment.—The following genealogical table will show the relationship between the parties:—



It will be seen that both *Mra Do Aung* and *Mi Hla Ma*, now dead, were *eindaung-yis* before they married each other. *Mra Do Aung* had by his former wife a son, *Nyo Aung*, who is said to be alive. *Mi Hla Ma* had by her former husband two daughters, *Ma Tha Da Bon* and *Ma Than Dha Rhi*, of whom the former died before the suit leaving three children of whom *Aung Baw* was one. He married *Mi So Ma Shwe*, the defendant. He too died before the suit leaving *Mi So Ma Shwe* his widow. *Mra Do Aung* and *Mi Shwe Ma* got three children of whom *Gaung Ma* and *San Ma Kyi* died before the suit, also *Mi San Rhi Ma*, but the latter left *Mi Pein U*, a daughter, who is the plaintiff. According to the defence *Gaung Ma* and *San Ma Kyi* left children of their own but we are not concerned with them in this suit. The land in suit was jointly acquired property of *Mra Do Aung* and *Mi Hla Ma*. The plaintiff *Mi Pein U* claimed to have three-fifths share in it as the surviving grand-daughter of *Mra Do Aung* and *Mi Hla Ma* sued to redeem that share for Rs. 42 from *Mi So Ma*, who was in possession. The ground of the suit appears from the following allegation:—*Mra Do Aung* and *Mi Hla Ma* mortgaged the whole land in suit for Rs. 70 to *Shwe Eik Ke* and *Mi Ah Nyo*, husband and wife respectively. After their deaths, *Mi Than Da Bon* and *Mi Than Dha Rhi*, daughters of *Mi Hla Ma* by her former husband, redeemed the property for the mortgage amount with the consent of the other heirs of *Mra Do Aung* and *Mi Hla Ma*. What the plaintiff meant by this last allegation was that those two sisters took over the mortgage from the original mortgagees and came to stand in their shoes and their interests in the property came to be those of the mortgagees under that mortgage. After

this so-called redemption the two sisters entrusted the land into the possession of Aung Baw, a son of Mi Tha Da Bon. Aung Baw died possessed of it and his widow the defendant was now in possession. The plaintiff as the sole surviving grand-daughter of Mrs Daw Aung and Ma Hla Ma by their daughter, Mi San Rhi Ma, now sued Mi So Ma Shwe for redemption of what she claimed to be her share in the ancestral property, namely, three-fifths.

Mi So Ma Shwe, the defendant's case was that her husband, Aung Baw, and she bought the property from Shwe Eik Ke about thirty years before the suit and that the suit was barred by limitation. The first point to consider is whether there was a mortgage of the property by Mrs Do Aung and Mi Hla Ma to Shwe Eik Ke and his wife. I have no doubt in my mind that the evidence of Mi Than Dha Rhi and of Maung Hla Pyu, son of Shwe Eik Ke, who is himself 67 years old proves conclusively that Mrs Do Aung and his wife did mortgage it and that it is not true that they sold it. The next point is whether Mi Than Da Bon and Mi Dha Rhi took over the mortgage from Shwe Eik Ke and his wife. Here again Mi Than Dha Rhi's evidence makes it clear that she and her sister did do so. The third point for consideration is, how the land got into the possession of Aung Baw. Mi Than Dha Rhi says that she and her sister entrusted the land into the possession of Aung Baw. There is no reason why this old lady should not be believed. This evidence creates at least a *prima facie* case against the defence. There being no evidence to the contrary on the side of the defence, the *prima facie* case so proved must be accepted. I shall, therefore, accept it. In these views the suit cannot be barred by limitation, for when it is treated as a suit for redemption of the mortgage, it is well within time. When it is treated as a suit for redemption from the mortgagee's trustee, there is no question of limitation. The possession of the defendant does not count as it was of very recent origin.

The only other question left for consideration is whether the plaintiff can claim three-fifths in the property. The property is of one marriage, and the plaintiff belongs to that marriage. There are those who belonged to the other two marriages. The division has to be between

the children of these three different marriages. Counsel for both sides have agreed, and it is correct, that the children of the marriage during which the property was acquired should get two out of four shares and the children of the other two marriages one each lot. The plaintiff as representing the offspring of the marriage during which the property in suit was acquired will be entitled to sue for redemption of half of the property. The decree passed by the District Court is varied to the effect that the plaintiff is allowed to redeem only half of the land in suit. There will be no order as to costs in this Court, as both parties have been successful partially. But the appellant will pay costs in the lower Courts.

K.N./R.K. *Appeal Partly accepted.*

A. I. R. 1918 Lower Burma 140

MAUNG KIN, J.

C. Kaliyaparama padiyachi—Defendant—Appellant.

v.

C. U. A. R. Chetty Firm—Plaintiff—Respondent.

Civil Revn. No 20 of 1916, Decided on 15th February 1917.

(a) Civil P. C. (1908), S. 115—"Jurisdiction"—Meaning of—Jurisdiction means power of administering justice according to means which law has provided.

The term "jurisdiction" in S. 115, Civil P. C., in its broad legal sense, may be taken to mean the power of administering justice according to the means which the law has provided, and subject to the limitations imposed by that law upon the judicial authority: 7 *All. 345*; 11 *Cal 6 (P. C.)*, *Ref.* [P 141 C 2, P 142 C 1]

(b) Civil P. C. (1908), S. 115—Question of limitation not considered by lower Court—High Court can interfere.

Where a lower Court does not apply its mind to the question of limitation, the High Court has the power to interfere in revision: 11 *Cal 6 (P. C.)* and 1 *C. W. N. 67, Ref.* [P 142 C 1]

(c) Limitation Act (1908), S. 3—Provisions of S. 3 are mandatory.

The provisions of S. 3, Lim. Act are mandatory, where the bar of limitation appears on the face of the plaint and there is no question of fact involved: 31 *Cal. 241, Ref.* [P 142 C 1]

May Ba—for Appellant.

A. B. Banerji—for Respondent.

Judgment.—The respondent was plaintiff in a case in the Township Court of Kyauktan fixed for hearing on 12th October 1915. He went to Kyauktan for the case, but as he heard that there was a criminal warrant out against him in Rangoon, he returned to Rangoon leaving a clerk behind to inform the Court of

what had happened. The clerk went to the Court, but the Judge held that as he had no power-of-attorney from the plaintiff he could not legally put in an appearance for his master. The suit was, therefore, dismissed for default. There was no appearance on the part of the defendants either. On 12th November 1915, the plaintiff applied to have the order of dismissal set aside saying that he had to go back to Rangoon suddenly, owing to a criminal warrant being out against him there and that the clerk he had sent to the Court did not inform him of the dismissal order until "now". Apparently the Court did not notice that the application was out of time by one day and no objection was taken by the defendant on the ground of limitation. The Court set aside the dismissal order, finding that the plaintiff had sufficient excuse for not being present on the 12th October. The defendant invoked the revisional powers of this Court under S. 115, Civil P. C., on two grounds, namely, (1) that the Township Court should not have entertained the application of the plaintiff, as it was time-barred on the face of it, and (2) that that Court erred in holding that the plaintiff had sufficient excuse for not appearing on the date fixed. At the hearing ground (2) was given up by the learned counsel for the defendant. He, however, very strongly pressed ground 1. He contended that the provisions of S. 3, Lim. Act, are mandatory and in view of the stringent requirements of the section, which casts upon the Judge the duty of applying the rules of limitation even when they are not pleaded, the Township Court failed to exercise a jurisdiction vested in it by law.

The learned Advocate for the plaintiff urged that S. 115 of the Code gives discretionary power to the High Court to interfere or not and that the Court is not bound to act in every case. When the plea, he contended, is one of limitation raised for the first time in revision, the Court should not interfere. He read out passages in the notes to S. 115 of the Code by Woodroffe in support of his argument, and I may now deal with the cases upon which, I gather he laid especial stress. In passing, I may say that in this case there is no question of the Township Court having exercised its discretion under S. 5, Lim. Act, for there was no application under that section before him:

Vasudeva v. Chinnasami (1). In this case the District Court admitted an appeal presented out of time on certain grounds. It was held that the High Court could not interfere on revision, Turner, C. J., saying, "We cannot interfere on revision with an exercise of discretion".

Sunder Singh v. Dora Shankar (2). The head-note which correctly represents the ruling is that the fact that a Court, having power to decide whether or not a certain matter was barred by limitation, wrongly decided that it was not barred and proceeded to deal with it affords no ground for revision under S. 622 (now S. 115) Civil P. C. The third case is *Ramgopal Jhoonjhojwallah v. Joharmall Khemka* (3). There it was held that an error by the Small Cause Court on a question of limitation does not justify the interference of the High Court under S. 115 of the Code. The 1th and last case which may be noticed is *Avunda Lall Addy v. Deendra Lall Addy* (4), where it was held that a wrong decision on a question of limitation is not open to revision by the High Court. These cases are distinguishable from the case before me, inasmuch as it is one in which there has been no decision on the question of limitation at all. It is a case in which the learned Judge of the Township Court has failed to discharge his duty in that he did not look into the question, whether the application was within time or not. Mr. Mya Bu for the defendant cited *Har Prasad v. Jafar Ali* (5), where it was held that a Court, which admits an application to set aside a decree *ex parte* after the true period of limitation, acts in the exercise of its jurisdiction illegally and with material irregularity within the meaning of S. 622 of the Code of 1882 and such action may, therefore, be made the subject of revision by the High Court. Mahmood, J.'s observations in that case are especially instructive.

"The term 'jurisdiction', as used by their Lordships of the Privy Council in *Amir Hassan Khan v. Shoo Bahadur Singh* (6)",

he said,
"in its broad legal sense may be taken to mean the power of administering justice according to the means which the law has provided, and sub-

1. (1883) 7 Mad 584.

2. (1896) 20 All 18.

3. (1912) 29 Cal 473=15 I C 517.

4. (1897) 2 C W N 331.

5. (1885) 7 All 745.

6. (1885) 11 Cal 6=11 I A 227 (P C).

ject to the limitations imposed by that law upon the judicial authority."

In *Kailash Chandra Halder v. Bissonath Paramanic* (7) it was held that where the lower Courts have entertained an application which is on the face of it barred by limitation without adverting to the question of limitation, the High Court can interfere in revision. Pathe-ram, C. J., observed:

"The period of limitation which is fixed for making this application is 90 days, so that the time had long expired on the 18th September, and the only way in which the matter could then be brought within the period of limitation was by the operation of S. 18, Lim. Act. S. 18, Lim. Act, has not been dealt with by the District Judge in his judgment, and unless he could come to the conclusion that he could deal with it in that way and as it appeared on the face of this record that the matter was barred, unless it could be brought within that section, it appears to us that he had no jurisdiction to deal with the matter and, therefore, we have jurisdiction to interfere under S. 622, Civil P. C."

The two last cases cited above clearly show that where the lower Court has not applied its mind, as in this case, to the question of limitation, the High Court has the right to interfere in revision. On the question whether the provisions of S. 3, Lim. Act, are mandatory, the last word has been said by the Special Bench of seven Judges of the Calcutta High Court in *Balaram v. Mangta Dass* (8), where six of the Judges held that the provisions of a similar section of the old Limitation Act are mandatory, where the bar appears to be on the face of the plaint and there are no questions of fact involved. There is one more argument of Mr. Banurji, which I might deal with. That is that assuming that the lower Court acted improperly and with material irregularity in admitting the application which was on the face of it out of time, the High Court should not interfere, as the defendant did not raise the plea of limitation, for the effect of the interference by this Court would be to prevent the plaintiff from bringing his suit owing to its being now time-barred and thus cause an injustice to him.

This contention was based upon *Dayaram Jagjivan v. Govardandas Dayaram* (9) and it is a sound one as a proposition of law. But the difficulty is that the facts do not fit in with it. The suit was upon a pro-note dated 1st September 1914 and

it would not be barred by limitation until 1st September 1917, so that the plaintiff has quite a long time left in which he may bring a fresh suit. I hold that the present application should be allowed on the ground that the original application to set aside the dismissal order was out of time and it is accordingly allowed with costs.

K.N./R.K. Application allowed.

A. I. R. 1918 Lower Burma 142

MAUNG KIN, J.

Maung Shwe Hla—Defendant—Appellant.

v.

Maung Chet and another—Plaintiffs—Respondents.

Special Second Appeal No. 141 of 1916
Decided on 22nd June 1917.

Contract Act (1872), S. 17—Mere failure to fulfil promise does not amount to grant—Fraud alleged subsequent to execution of deed—It cannot be proved by parol evidence—Evidence Act (1872), S. 92.

A mere failure to fulfil a promise is not fraud, unless from the outset the promisor intended not to fulfil it. It is only in connexion with the entering into and execution of the document which is contested that fraud can be proved by oral evidence under S. 92, Evidence Act, but where fraud is alleged subsequent to the execution of a deed it cannot be proved by parol evidence. [P 143 C 2]

Wiltshire—for Appellant.

Naidu—for Respondents.

Judgment.—This appeal arises out of a suit for the cancellation of a deed of sale. The plaintiffs allege that in 1277 B. E. they were unable to pay a debt amounting with interest to Rs. 150 and that they, therefore, executed a deed of sale of land in suit. They further allege that it was agreed between them and the defendant that if they paid the defendant the sum of Rs. 180 at any time within three years from the date of the deed of sale, the defendant was to return the land by causing a mutation of names to be made in the Revenue Registers. As regards the embodying of this agreement in the deed of sale, they say that they asked defendant to do so several times but the defendant said that it would not matter and that trusting the defendant they signed the deed of sale. Within the period they went to offer the sum of

7. (1897) 1 C W N 67.

8. (1907) 34 Cal 941.

9. (1904) 28 Bom 458.

Rs. 180 but the defendant refused to re-transfer the land. They then got a copy of the deed from the Registration Office and found that there was nothing about the arrangement in it. These are the allegations of the plaintiffs. It will be seen that they do not allege that they were asked to sign on the false representation that the deed contained provisions regarding the arrangement for the return of the land within three years on the repayment of Rs. 180. The last allegation that on a copy being obtained the document was found to contain nothing about it, seems to pre-suppose that the plaintiffs thought that it contained a clause regarding it but that is not borne out by the evidence he tenders. I think I am justified in saying that the plaintiffs' case is not that there was fraud in that the defendant fraudulently induced them to sign the deed in the belief that it contained a clause for a re-purchase within three years.

I will quote the trial Judge's summary of the evidence on their side, as, in my opinion, it is a correct summary:

"The plaintiffs called five witnesses. The evidence of petition-writers Maung Po On and Maung Po Thaw tends to show that the parties came and requested them to write a bond for the sale of a piece of land for Rs. 180 by the plaintiffs, Maung Chet and his wife, to the defendant Maung Shwe Hla and the bond was read out when it was written, then the plaintiffs requested them to add one condition in the bond to redeem the land within three years on payment of Rs. 180 and they informed the plaintiffs that the bond would become invalid, if the required condition be (sic) added in it. The witnesses further state that they heard the defendant Maung Shwe Hla promising the plaintiffs to redeem the land on payment of Rs. 180 within three years, when they asked the plaintiffs to execute another bond but the parties did not turn up after they had left. This was supported by the evidence of Mg. Kua Gyi, Ng. Mya and Mg. Hman."

It is unnecessary to comment upon the conduct of the petition-writers in telling the plaintiffs that the insertion of the condition would invalidate the deed of sale. That is neither here nor there. The defendant has nothing to do with that conduct. The fact remains that the plaintiffs signed the deed of sale knowing it to be a deed of absolute sale, nothing more or less, and that they were told to have another document embodying the condition but they did not do so. It is evident that they relied on the verbal promise made by the defendant to allow

them to re-take the land on payment of Rs. 180. If there was this promise and the defendant broke it afterwards, there would be fraud in the popular sense, but not necessarily as understood in law, unless it is proved that the defendant from the outset never intended to perform the promise, a state of circumstances, given in S. 17, Contract Act, as constituting fraud. There is, however, nothing to show that the defendant did not intend to perform the promise from the outset. Therefore it must be taken upon the evidence as summarised above that the plaintiffs signed the deed of sale knowing it to be what it was and that as stated in their plaint they trusted the defendant. Plaintiff Po Chet's evidence that he signed the deed, thinking it contained the condition he now sets up, cannot be believed for it appears to me that it is the result of desire to get over the ruling in *Maung Bin v. Ma Hlaing* (1). Apart from the question of fraud, it is clear from that ruling that the oral agreement to allow repurchase cannot be proved by parol evidence. If there was fraud practised upon the plaintiffs by the defendant at the time of the execution of the deed parol evidence would be admissible under prov. 1 to S. 92, Evidence Act. In the case quoted above, Fox, J., observed:

"The fraud relied on was fraud subsequent to the execution of the deed of sale. Notwithstanding the remarks of Melville, J., in *Paksh Lal v. Lakshman v. Lakshman* (2), the wording of S. 92, Evidence Act, appears to me to make it quite clear that it is only fraud in connexion with the entering into and execution of the document which is contested that can be proved by oral evidence."

The fraud, if any in this case, is fraud subsequent to the execution of the deed and cannot, therefore, be proved by parol evidence. After a very careful consideration of the case it will be seen that I have been unable to agree with the following observations of the learned District Judge:

"It is nothing but fraud on the part of the defendant if he comes now and seeks to evade his obligation by taking advantage of either the plaintiffs' carelessness or his own cunning in not having reduced that obligation to writing."

The first part is incorrect law and the second is not justified by the evidence. I have held that the failure to fulfil the promise is no fraud unless from the out-

1. (1905-06) 3 L B R 100.

2. (1879-80) 4 Bom 594.

set the promisor intended not to fulfil it and that there is no evidence of the latter circumstance. For the above reasons I hold that the plaintiffs' suit must fail. The appeal is allowed. The decree of the District Court is set aside and that of the Township Court restored. The respondents will pay costs throughout.

K.N./R.K. *Appeal allowed.*

A. I. R. 1918 Lower Burma 144

ORMOND, OFFG. C. J.

Oomersee Raisee & Co. — Plaintiffs—Appellants.

v.

J. P. Hardiman — Defendant—Respondent.

First Appeal No. 132 of 1915, Decided on 19th March 1917.

(a) Contract Act (1872), S. 38—Buyer must have reasonable opportunity of examining goods.

Section 38, Contract Act, only requires a seller to give the buyer a reasonable opportunity of examining the goods sold: 6 Bom 692, *Rel. on.*

[P 144 C 2]

(b) Shipping—Bill of Lading—Value of.

The date on a Bill of Lading is very strong prima facie evidence of the date of shipment: *Bowes v. Shand*, (1877), *App Cas* 455, *Rel. on.*

[P 144 C 2]

Giles and N. M. Cowasjee—for Appellants.

Mc Donnell—for Respondent.

Judgment.—The plaintiffs-appellants sued the defendants-respondents for damages for wrongfully refusing paddy tendered by the plaintiffs under a contract. The paddy was rejected on the ground that it was not up to the quality contrac-

ted for. The paddy was Bengal hill paddy which was shipped from Calcutta and the contract was for August shipment. The learned Judge on the original side found that the statement in the Bill of Lading that the goods were shipped on the 30th August was not evidence in this case, and that it was impossible to give the plaintiffs a decree because they had prevented the defendants from placing their side of the case before the Court, i. e., of taking samples or having a survey.

The paddy was sent to defendants' mill in 11 cargo boats, one of which was three days at the defendants' mill and the remaining 10 were from 7 to 15 days there. The plaintiffs have given evidence that the paddy came under a Bill of Lading dated 30th August and arrived in Rangoon on 5th September. The date on the Bill of Lading is very strong prima facie evidence of the date of shipment: see *Bowes v. Shand* (1). If the defendants had any reason for thinking that the date of shipment was not correct, the onus lay on them to rebut it by taking evidence in Calcutta. S. 38, Contract Act, only requires the seller to give the buyer a reasonable opportunity of examining the goods and this defendants clearly had. They took sample from each boatload as it arrived and informed the plaintiffs that it was not up to quality: see *Ruttonsey Morarji v. Jamnadas Pitamberdas* (2). The merits of the case must, therefore, be gone into by this Court.

[The remainder of the judgment is not required for the purposes of this report—Ed.]

K.N./R.K.

Appeal accepted.

1. (1877) 2 App Cas 455.
2. (1881-2) 6 Bom 692.

THE
ALL INDIA REPORTER
1918

UPPER BURMA SECTION

CONTAINING

FULL REPORTS OF ALL REPORTABLE JUDGMENTS OF
THE UPPER BURMA JUDICIAL COMMISSIONER'S COURT
REPORTED IN

(1) 3 UPPER BURMA RULINGS (2) 11 BURMA LAW TIMES
(3) 19 CRIMINAL LAW JOURNAL (4) 43 TO 48 INDIAN CASES

CITATION —A. I. R. 1918 UPPER BURMA

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NAGPUR, C. P.

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TO
THE LEGAL PROFESSION
IN GRATEFUL RECOGNITION OF
THEIR WARM APPRECIATION AND SUPPORT

UPPER BURMA JUDICIAL COMMISSIONER'S COURT
1918

Judicial Commissioners :

Mr. L. H. Saunders, I. C. S.

„ B. H. Heald, I. C. S.

Additional Judicial Commissioner :

Mr. B. H. Heald, I. C. S.

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UBR	AIR	UBR	AIR	UBR	AIR	UBR	AIR	UBR	AIR	UBR	AIR	UBR	AIR	UBR	AIR		
65	1919 UB	35	101	1919 UB	30	135	1919 UB	32	188	1920 UB	29	210	1920 UB	6			
67	" "	37	104	" "	19	137	" "	23	189	" "	43	212	" "	1			
69	" "	33	106	" "	24	139	" "	18	192	" "	41	217	" "	30			
73	1918	"	4	109	" "	25	141	1920	"	56	194	" "	50	228	" "	8	
75	1919	"	39	111	1920	"	62	154	1919	"	7	197	" "	46	234	" "	6
79	1918	"	3	114	1919	"	28	169	" "	26	198	" "	37	236	" "	7	
81	" "	16	115	" "	31	171	" "	29	200	" "	48	237	" "	"	"	11	
84	1919	"	38	117	" "	27	172	1920	"	39	201	" "	5	251	" "	25	
86	1918	"	23	118	" "	29	176	" "	35	202	" "	18	258	" "	"	19	
88	" "	12	119	" "	2	179	" "	42	204a	" "	20	261	" "	"	"	21	
91	" "	6	120	" "	17	182	" "	47	204b	" "	38	269	" "	"	"	45	
94	1919	"	1	123	" "	20	183	" "	43	207	" "	47	270	" "	"	28	
97	" "	16	125	" "	21	183	" "	28	208	" "	45	272	" "	"	"	51	
99	" "	27	128	" "	3	187	" "	"	"	"	"	"	"	"	"	"	

11 Burma Law Times—All India Reporter

Please refer to COMPARATIVE TABLE No. I in A. I. R. 1918 L. B.

19 Criminal Law Journal & 43 to 48 Indian Cases—All India Reporter

Please refer to COMPARATIVE TABLE No. I in A. I. R. 1918 Lahore

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12	47 IC 674	3	UBR 1	18	Cr L J 944	10	Bur L T 117
3	UBR 88	11	Bur L T 95				

THE ALL INDIA REPORTER 1918

UPPER BURMA J. C'S. COURT

A. I. R. 1918 Upper Burma 1 (1)

RIGG, J. C.

Nga Tun Sein—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 194 of 1917. Decided on 6th July 1917.

Whipping Act (1909), S. 3—Whipping must be given in lieu and not in addition to imprisonment.

Under S. 3, Whipping Act, a sentence of whipping may be passed in lieu of any punishment to which the offender may be liable under the Penal Code, but it cannot be passed in addition to such imprisonment, and the intention of the law is infringed by ordering a man to be whipped after he has already served part of a sentence of imprisonment. [P. 1 C. 2]

Order.—*Tun Sein*, a youth of 19 years of age, was convicted under S. 380, I. P. C., of the theft of property worth Rs. 12.3.0 and sentenced to five months' rigorous imprisonment by the Township Magistrate, Sathwa. The sentence was far too severe, and in view of the youthfulness of the offender was unsuitable.

The Magistrate failed to consider whether S. 562, Criminal P. C., ought to be applied to the case, or whether a sentence of whipping would not be more appropriate than one of imprisonment. The attention of Magistrates has frequently been drawn to the undesirability of sentencing young men to imprisonment where it can possibly be avoided. On revision before the District Magistrate the conviction was upheld but the sentence of imprisonment was altered to one of 30 stripes. At the time the order on revision was passed, the accused had already served a month and a half in the jail, and that term would have been more than sufficient punishment for the offence he had committed. The order of the

1918 U. B./1 & 2

District Magistrate, in altering the sentence from one of imprisonment to one of whipping is an illegal order. Under S. 3, Whipping Act, a sentence of whipping may be passed in lieu of any punishment to which the offender may be liable under the Penal Code, but it cannot be passed in addition to such punishment. The effect of the District Magistrate's order was to sentence the accused both to a term of imprisonment and to whipping. It has recently been pointed out in *Emperor v. Po Wan* (1) that the intention of the law is clearly infringed by ordering a man to be whipped after he has already served part of a sentence of imprisonment.

K.N./R.R.

Order accordingly.

1. (1917) 41 I C 119 = 8 L B R 416.

A. I. R. 1918 Upper Burma 1 (2)

SAUNDERS, J. C.

Maung Po U and another—Applicants.

v.

Maung Kyaw—Opposite Party.

Civil Revn. No. 16 of 1917, Decided on 22nd October 1917.

Contract Act (1872), Ss. 134 and 137—Suit against principal debtor and surety—Service of summons not effected on principal debtor—Plaintiff applying for his dismissal from suit—Principal held to be discharged—Plaintiff held to have no further right of suit against surety—Civil P. C. (1908), O. 9, R. 5.

Plaintiff sued a principal debtor and the surety for the price of goods sold. Service of summons could not be effected upon the principal debtor and the plaintiff applied that he should be dismissed from the suit. The suit proceeded against the surety alone and the plaintiff obtained a decree:

Held: that the legal consequence of the act of the plaintiff was to discharge the principal

debtor within the meaning of S. 134, so that he had no further right of suit against the surety.

[P 2 C 2]

L. K. Mitter—for Applicants.

C. G. S. Pillay—for Opposite Party.

Judgment.—The plaintiffs sued to recover the price of goods sold. Defendant 2 was the principal debtor and defendant 1 was the surety. The plaintiffs were unable to serve defendant 2, they applied that he should be dismissed from the suit and proceeded against the surety. They obtained a decree in the Court of the first instance which was reversed in appeal on the ground that the principal debtor having been discharged by the creditor, the creditor could not recover from the surety. Against this the plaintiffs now come to this Court in revision on the ground that the ruling relied upon by the lower appellate Court was not sound law. The lower appellate Court referred to *Maung Pho Tha v. Ko Min Pyn* (1). It is urged that the defendant did not abandon his claim or waive his claim against the principal debtor but that it should be taken that he was unable to ascertain the principal debtor's residence and that the order of the Court was passed under O. 9, R. 5, Civil P. C., and various Indian rulings of which *Nathabhai Tricamlal v. Ranchodlal Ramji* (2) is the latest, are relied upon. In that suit it was held that there was some difficulty in serving defendant 1 whose name was struck out; as a year had not elapsed, presumably this was done if not at the request, at least with the consent, of the plaintiff, and that the striking off of defendant 1's name was a procedure under O. 9, R. 5, rather than under O. 23, R. 1. It was said that

"all the authorities in all the Courts of India who have had this question under consideration, . . . are in agreement that the mere omission of the plaintiff to pursue his suit against one of the defendants with the result that that defendant's name is struck off and the suit dismissed against him under O. 9, R. 5, does not discharge the surety, provided the suit be still in time against the principal."

The terms of O. 9, R. 5, Civil P. C. are as follows:

"Where, after a summons has been issued to the defendant, or to one of several defendants, and returned unserved, the plaintiff fails for a period of one year from the date of the return made to the Court by the officer ordinarily certifying to the Court returns made by the

serving officers, to apply for the issue of a fresh summons and to satisfy the Court that he has used his best endeavours to discover the residence of the defendant who has not been served, or that such defendant is avoiding service of process, the Court may make an order that the suit be dismissed as against such defendant."

And Cl. 2 lays down that in such a case the plaintiff may, subject to the law of limitation, bring a fresh suit. I am at a loss to understand how a Court can be said to be adopting a procedure under this section which expressly enables it to take certain action after the period of one year when it takes that action before the expiry of the year. But assuming the view taken in the Bombay case to be correct, it would appear that there the Court struck defendant 1's name off without any application in that behalf by the plaintiff. In the Lower Burma case relied upon by the lower appellate Court, it was pointed out that in the Indian cases there referred to, the plaintiff did not, by his own act, relinquish his claim, whereas in that case he expressly waived his claim against the principal, and the same distinction was drawn in the case of *Williams, F. G. v. King, T.* (3), where the plaintiff's advocate told the Judge that his principal debtor had absconded, he would waive claim against the principal and would obtain decrees against the sureties. I think that that distinction is sound. In the present case, the diary shows that the plaintiff informed the Court distinctly that he waived his claim against the principal debtor. . . . This entry in the diary was made on 26th February 1916, the suit having been filed on 8th January 1916. I am of opinion that this amounted to much more than mere forbearance within the meaning of S. 137, Contract Act. It was an act or omission the legal consequence of which was to discharge the principal debtor within the meaning of S. 234, for it was a distinct waiver of the plaintiff's claim against the principal debtor and the plaintiff had no further right of suit against the principal debtor. There are no grounds for interference on the facts and this application must be dismissed with costs.

K.N./R.K. Application dismissed.

3, (1912) 6 Bur L T 62=20 1 C 189.

1. (1900-02) 1 L B R 150.

2. A I R 1914 Bom 242 = 39 Bom 52 = 27

1 C 165.

A. I. R. 1918 Upper Burma 3

SAUNDERS, J. C.

*Maung Tha and another—Appellants—v.**Ma Pyu and others—Respondents.*

Second Appeal No. 164 of 1917, Decided on 30th January 1918.

(a) Limitation Act (1908), Arts. 165 and 181—Application by judgment-debtor to recover property delivered to decree-holder in excess of decree is governed by Art. 181 and not by Art. 165.

An application by judgment-debtor to recover possession of immovable property of which he has been dispossessed by the decree-holder in excess of the decree falls under Art. 181 and not Art. 165, L. M. Act. [P & C 2]

(b) Interpretation of Statutes—Language—Language of statute not covering case in express terms—Position of parties and context in which language is used should be considered.

In a technical matter where the language of the Statute relied upon does not in express terms cover the case, it is of the highest importance to realize the position of the parties and the context in which the language is used. Where the interpretation sought to be put upon the words is arrived at by implication and by reference, the Court ought not to adopt a construction which has a restricting and penalizing operation unless it is driven to do so by the irresistible force of language. [P & C 2]

L. K. Mitter—for Appellants.

L. N. Pershad—for Respondents.

Judgment.—The respondents, having obtained a decree for redemption of a usufructuary mortgage, paid the money into Court and the mortgaged land was made over to them on 5th January 1916 by the bailiff of the Sub-Divisional Court. On 20th May 1916 the judgment-debtors filed an application in the Sub-Divisional Court, alleging that the land made over by the bailiff was very much in excess of the land affected by the decree. The Judge dismissed the application on the ground that Art. 165, Sch. 1, L. M. Act, applied and that, more than 30 days having elapsed since the judgment-debtors had been dispossessed, the application must fail. The lower appellate Court confirmed this decision and the judgment-debtors now come to this Court in second appeal. There is no doubt that the cases relied upon by the lower appellate Court were authority for the view taken by it. In both *Har Din Singh v. Lachman Singh* (1) and *Ratnam Ayyar v. Krishna Doss Vithal Doss* (2) it was held that an application by a judgment-debtor, who had been dispossessed of immovable pro-

perty and disputed the right of the decree-holder to be put into possession, was included in the terms of Art. 165 as well as an application by a third person dispossessed. This view appears to have been generally entertained until February 1916, when it was expressly dissented from in the case of *Abdul Karim v. Islamunissa Bibi* (3). It appears to me that the reasoning on which this latter decision is based is sound. The Judges said that in a technical matter of this kind where the language relied upon does not in express terms cover the case, it is of the highest importance to realize the position of the parties and the context in which the language is used.

Where the interpretation sought to be put upon the words is arrived at by implication and by reference, the Court ought not to adopt a construction which has a restricting and penalizing operation unless it is driven to do so by the irresistible force of language. It was pointed out that, in the case of a person who was not a party to the suit the decree in which was being executed, an alternative remedy was open, since such person could apply either under O. 21, Rr. 100 and 101, or could bring a suit within 12 years. If he adopted the former alternative this was a privilege accompanied by restrictions, e. g., the application must be made within 30 days. The judgment-debtor, however, is expressly precluded from making an application under the provisions of Rr. 100 and 101, O. 21; nor can he file a separate suit since by the provisions of S. 47, Civil P. C., all matters in question between him and the decree-holder must be decided in execution and not by a separate suit. The effect of the earlier decisions would be that where a decree-holder succeeded in getting possession of a substantial area of immovable property under colour of the decree, the judgment-debtor would be deprived for ever of all title to such property if he did not make a summary application within 30 days. I agree with the learned Judges who decided this case that such a result was certainly never enacted in direct terms and that it is safe to assume that the legislature never intended it. I am of opinion that this application was governed by Art. 181 and not by Art. 165, Sch. 1, L. M. Act, and in this view the decrees of the Courts

1. (1908) 25 All 243.

2. (1898) 21 Mad 495.

3. (1916) 34 All 339=34 I C 231.

below must be set aside and the application must be remanded to the first Court for decision upon the merits. The respondents will pay the applicants' costs in this Court. Costs in the lower Courts will follow the result.

K.N./R.K.

*Decree set aside.***A. I. R. 1918 Upper Burma 4 (1)**

SAUNDERS, J. C.

Nga Hpay and another—Applicants.

v.

Nga Aung Baw and others—Opponents.

Criminal Revn. No. 758 of 1917, Decided on 13th October 1917.

Criminal P. C. (1898), Ss. 145 and 435 (3)—To deprive High Court of power of interference in revision proceedings must be proceedings under Ch. 12, in fact.

Orders passed under Ch. 12, Criminal P. C., are not subject to revision, being expressly excluded from the operation of S. 435 of the Code by Cl. (2) of that section. But in order to make the provisions of S. 435, Cl. (3) applicable, that is to say, to deprive the High Court of the power of interference in revision, the proceedings must be proceedings under Ch. 12 of that Code in fact, and not only in name. [P 4 C 1]

*Razak—for Applicants.**Mitter—for Opponents.*

Judgment.—This is an application to deal in revision with an order of the Headquarter Magistrate, Yamethin, passed or purporting to be passed, under the provisions of Ch. 12, Criminal P. C. The application is resisted on the ground that orders passed under Ch. 12, are not subject to revision being expressly excluded from the operation of S. 435 of the Code by Cl. 3 of that section. There is no doubt that this is the case and any conflict of opinion which may exist in India appears rather to be due to questions affecting the construction of the charters of Chartered High Courts than the meaning of S. 435, Criminal P. C. But there can be no doubt that in order to make the provisions of S. 435, Cl. (3), applicable, that is to say, to deprive the High Court of the power of interference in revision, the proceedings must be proceedings under Ch. 12 of that Code in fact, and not only in name. For instance in *Maharaj Tewari v. Har Charan Rai* (1) it was pointed out that the mere adding as a postscript to proceedings which were throughout taken under Ch. 8, Criminal P. C. that a final order has been passed under S. 145, will not make that order a proceeding under Ch. 12 of the

1. (1904) 25 All 144.

Code. The only point for decision here is whether the proceeding was under Ch. 12, Criminal P. C. It is alleged that there is no finding that there was likely to be a breach of the peace. It is true that there was no such finding in the final order, but in an order in the diary under 19th June 1917, the Magistrate recorded an order that from the papers filed it appeared that a dispute likely to cause a breach of the peace, existed. The procedure followed appears to have been in accordance with that laid down in S. 145, Criminal P. C.

The final order is attacked on the ground that the Magistrate went into questions of title and decided accordingly. But it is clear that the Magistrate did endeavour to ascertain and decide which of the parties was in possession and although he would seem to have decided erroneously in coming to a conclusion by questions of title, there is in fact a distinct finding that Aung Baw and Min Din were in possession of the land at the time of the order. I have no hesitation in holding that the proceedings were under Ch. 12, Criminal P. C., and this Court is not entitled to interfere in revision. The application must, therefore, be dismissed.

K.N./R.K. *Application dismissed.***A. I. R. 1918 Upper Burma 4 (2)**

HEALD, J. C.

C. V. C. T. N. Nachiappa Chetty—Petitioner.

v.

Maung Pe—Opposite Party.

Civil Misc. No. 62 of 1917, Decided on 25th March 1918.

Limitation Act (1908), S. 15—Partial stay of execution amounts to stay of execution within meaning of S. 15.

A partial stay of execution e. g., a stay of execution in respect of a particular property against which execution is sought, amounts to a stay of execution within the meaning of S. 15, so that in computing the period of limitation prescribed for an application for execution of a decree, the time during which the execution of the decree has been partially stayed should be excluded.

[P 5 C 2]

*Pillay and Pershad—for Petitioner.**Dutt—for Opposite Party.*

Judgment.—On 13th May 1909 petitioner applied for execution of a decree which he held against respondent. Execution of that decree, in respect of one of the lands against which execution was claimed, was stayed by order of the Court

from 24th June 1909 to 31st August 1910. On 14th May 1913 petitioner applied for execution by the arrest of respondent. Respondent was served with notice but failed to appear and petitioner took no further action at that time. On 9th March 1915 petitioner applied for transfer of the decree to another Court for execution, and the decree was transferred but execution was not effected. On 5th January 1916 petitioner again applied for transfer of the decree and respondent set up the defence that execution was time barred because more than three years had elapsed between the applications of 13th May 1909 and 14th May 1913. The District Court missed the point of this defence, and found that the application of 5th January 1916 was within time because the application of 14th May 1913 was a step-in-aid of execution. Respondent appealed to this Court, which held that the application of 14th May 1913 was time barred because it was made more than three years after the application of 13th May 1909. I am now asked to review that decision on the ground that the period between 24th June 1909 and 31st August 1910, during which execution was stayed by order of the Court, ought, under S. 15, Lim. Act, to have been excluded in computing the period of three years from 13th May 1909 allowed by Art. 182 for the application of 14th May 1913. I have heard counsel on both sides and I am of opinion that this contention is correct. Respondent's learned advocate suggests that a partial stay of execution, such as occurred in this case, cannot be regarded as a "stay of execution" within the meaning of S. 15 of the Act, but he has cited no authority to this effect.

In the case of *Rungiah Gounden & Co. v. Nanjappa Row* (1), decided before the amendment of S. 15, Lim. Act, the learned Judges of the Madras High Court said:

"It is only reasonable and proper that in computing the period of limitation prescribed for an application for execution of a decree, the time during which the . . . execution of the decree or a portion of it has been stayed . . . should be excluded."

and that view seems to have been adopted by the legislature in the amendment of S. 15 of the Act. The case of *Lal Gobind Nath v. Bhikar Sahu* (2) has been cited as an authority for the proposition that

"a stay of execution against one judgment debtor gave the decree-holder the benefit of S. 15 as against the other judgment-debtors also,"

but an examination of the judgment shows that it is not so, and I have been unable to find any case in which the question whether or not a partial stay of execution is sufficient to give rise to the operation of S. 15, Lim. Act, has been decided. S. 15 says that

"in computing the period of limitation prescribed for any application for the execution of a decree the execution of which has been stayed by injunction or order . . . the time of the continuance of the injunction or order shall be excluded,"

and the question which I have to decide is whether in this particular case execution was "stayed" within the meaning of that section. The section itself does not say that execution must have been wholly stayed, and I do not think that I should be justified in reading into the section more than it actually says.

There can be no doubt that in the present case execution was stayed, although it was stayed only in respect of one particular plot of land and not in respect of any other form of execution which might be open to the decree-holder, and as I can find no authority or reason for holding that the section ought to be construed so as to exclude such a case from the benefit of its provisions, I hold that in the present case the period of such stay, namely, the period between 24th June 1909 and 31st August 1910, ought to have been excluded in computing the period of limitation allowed by Art. 182 for the application of 14th May 1913. If that period be excluded, that application was filed well within three years after the application of 13th May 1909 and was within time, and if the application of 14th May 1913 was in time so also were those of 9th March 1915 and 5th January 1916. It follows that the decision of this Court in Civil Appeal No. 7 of 1917 was wrong. That decision is, therefore, set aside and the respondent's appeal is dismissed with costs. Respondent will pay petitioner's costs in respect of the present proceedings, advocate's fee to be one gold mohur.

K.N./R.K.

Petition allowed.

1. (1903) 26 Mad 780.

2. (1913) 20 IC 439.

A. I. R. 1918 Upper Burma 6

HEALD, J. C.

Maung Pwe and others—Appellants.

v.

U Inguya and another—Respondents.

Second Appeal No. 370 of 1916, Decided on 22nd April 1918.

Buddhist Law (Burmese)—Succession—Pongyi cannot inherit from lay relatives, after ordination.

A pongyi or rahan divests himself of all worldly possession at the time of his ordination and thereafter is incapable of inheriting property from his lay relatives. [P 6 C 1]

Pershad for C. G. S. Pillay—for Appellants.*Tha Gyew*—for Respondents.

Judgment.—The plaintiffs, U Inguya and U Nyannawun, are Burmese Buddhist priests. They sue their cousin Maung Pwe for partition and possession of their two-thirds share of the undivided estate of the common grandfather Tha Byo. Tha Byo had three children one son Maung Gyi and two daughters Ma Cheik and Ma Nge. U Inguya is a son of Ma Cheik, U Nyannawun of Ma Nge, and Maung Pwe of Maung Gyi. The plaintiffs' case is that the lands in suit, which belonged to Tha Byo, remained undivided in the hands of his descendants and are now in the possession of Maung Pwe, and that they, as representing Tha Byo's two daughters, are entitled to recover two-thirds of the estate from Maung Pwe who represents the son. Plaintiff 2 U Nyannawun also alleged that Maung Pwe had been paying him one-third of the produce of the land annually as his share of the income, and because Maung Pwe had refused to pay in the year 1275, he claimed to recover twenty baskets of paddy from Maung Pwe as arrears. Maung Pwe replied that Burmese Buddhist priests cannot inherit from their lay relations, that he had been in adverse possession of the lands for over twenty years, that the plaintiffs relinquished their rights in his favour some sixteen years ago and that even, if the plaintiffs could inherit, they would not be entitled to the shares which they claimed.

The trial Court framed issues as to (1) whether the plaintiffs, being pongyis, could inherit from their lay relatives, (2) whether their claim was barred by limitation, (3) whether they had relinquished their rights in favour of Maung Pwe, (4) what share they would be entitled to, supposing that they could inherit, and

(5) whether plaintiff 2 was entitled to recover arrears of his share of the produce. After recording evidence, the Court found on the authority of the ruling of this Court in *Ma Pwe v. Maung Myat Tha* (1) that the plaintiffs being pongyis could not inherit from their lay relatives and on this finding dismissed their suit. The plaintiffs appealed to the District Court which, holding on the authority of *Mi Taik v. U Wiseinda* (2) that it was settled law that pongyis could inherit, set aside the judgment and decree of the trial Court and directed that the suit should be re-admitted and decided on the merits. The trial Court then found that in view of the fact that the last of Tha Byo's children died some thirty years ago and Maung Pwe had been in undisputed possession ever since, the plaintiffs' claim was barred by limitation.

The plaintiffs again appealed, and the District Court held that the claim was not barred by limitation and again remanded the case for trial on the merits.

The trial Court then found that Maung Pwe failed to prove that the plaintiffs had relinquished their rights in his favour, and holding on the evidence that the plaintiffs succeeded in proving that they were each entitled to one-third of the estate and that plaintiff 2 was entitled to recover from Maung Pwe one-third of the produce of the lands from 1275 B. E. onwards, gave judgment for plaintiffs with costs. Maung Pwe appealed but his appeal was dismissed with costs. He now comes to this Court in second appeal under the provisions of S. 100, Civil P. C., and he still alleges that under Burmese Buddhist Law a priest cannot inherit from his lay relatives. The rulings of this Court on this point have undoubtedly been conflicting. In *Ma Pwe's* case (1), cited above, the learned Judicial Commissioner, Mr. Burgess, held that a Burman on entering the monastic order retained no interest in the property which he possessed before his ordination. In *Mi Taik v. U. Wiseinda* (2) another Judicial Commissioner, Sir George Shaw, expressed the opinion that there was nothing in Burmese Buddhist Law to prevent a monk from acquiring by inheritance property which he proceeds to devote to religious purposes. In *U Tilawka v.*

1. (1891-01) U B R 2 p. 51.

2. 2 Chan Toon's Leading Cases 235.

Nga Shwe Kan (3) my learned predecessor Mr. McColl said:

"I think it is clear that a monk is debarred by the rules of his order from mortgaging property descended from his ancestors, and indeed from owning such property."

All doubt in the matter seems now to have been set at rest by the decision of the Chief Court of Lower Burma in the case of *Shwe Ton v. Tun Lin* (4). In that case the question before the Full Bench for decision was whether the next-of-kin of a pongyi are entitled on his death to inherit from him lands, which he received after his ordination (a) as inheritance, or (b) as a gift. In order to decide the first part of this question the learned Judges found it necessary to decide whether a pongyi can inherit lands from his lay relatives after his ordination, which is the very question which arises in the present case. On this point the judgment of the Chief Court is as follows:

"We are not prepared to hold that a pongyi can inherit from his lay relatives. When a pongyi or rahan is ordained, his severance from his family is so complete that, if he was a married man before, he is regarded as having divorced his wife. He is certainly cut off as completely from his original family as if he had been adopted into another family. We consider it inconsistent with a pongyi's personal status that he should inherit from his natural family with whom all ties of relationships have been annulled."

This ruling supports the opinion of my learned predecessor and I have no hesitation in following it. Plaintiff 1 in the present case was admittedly ordained before his mother died, so there can be no doubt that he could not inherit from her and it is as her heir that he claims a share in the land in suit. His claim must clearly fail. Plaintiff 2 says that his parents both died when he was a child. If this is true he had already acquired the status of heir before he was ordained, and the question arises whether or not, after his ordination, he can still claim to be heir to his parents. There can be no doubt that Burmese Buddhist priests divest themselves of all worldly possessions at the time of ordination. That being so, plaintiff 2 must have divested himself of his rights as heir to his parents and grand parents when he entered the priesthood, and he cannot now claim to be heir to Tha Byo. His claim to a share

of Tha Byo's estate must, therefore, fail. But if he had no right to the land, he clearly had no right to any share of the produce, and the contribution of twenty baskets of paddy which he alleges Maung Pwe paid to him as his share of the produce must be regarded as a charitable gift, which is what Maung Pwe says it was. As a matter of fact it was not Maung Pwe who gave the paddy, but Maung Pwe's tenants, and the evidence goes to show that they gave it not by direction of Maung Pwe but as a result of the influence of the pongyi. However that may be, it seems clear that plaintiff 2 had no right to demand the payment and his claim under this head also must be dismissed. I find, therefore, that the plaintiffs were not entitled to claim any share of the estate in suit or of the income thereof and I set aside the judgments and decrees of the lower Courts and dismiss the plaintiffs' suit with all costs.

K.N./R.K.

Appeal decreed.

A. I. R. 1918 Upper Burma 7

SAUNDERS, J. C.

Amanath Mistry—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 687 of 1917, Decided on 25th September 1917.

Burma Municipal Act (1898), Sec. 2 (c) and 142 (d)—Lodging house need not be let in lodgings—House occupied to any extent in common by members of more than one family is still lodging house.

A lodging house need not be let in lodgings: it is still a lodging house if it is occupied to any extent in common by members of more than one family. The persons living in the lodging house are lodgers, whether they pay rent or not and the owner of the lodging house receives them when he allows them to occupy the building. [P 8 C 1]

J. C. Chatterjee—for Applicant.

H. M. Latter—for the Crown.

Judgment.—The applicant has been convicted and fined Rs. 30 under S. 142, (d), Burma Municipal Act for failing to take out a license for a lodging house kept by him. The application states that the learned Magistrate has erred in law in holding that the petitioner was bound to take out a license under the Lodging-house Bye-laws, although it was not proved that he received any lodgers in his house or rented any portion of his house to others. Apparently it is the contention of the learned advocate for

3. A I R 1914 U B 39=2 U B R 61=29 I C 613.

4. Civil Reference No. 1 of 1916.

the applicant that a lodger is a person who occupies rooms in a lodging-house upon payment of rent, and that it has not been shown that any rent was paid in respect of the premises here referred to. It is also urged that the premises do not constitute a lodging house, and that whatever the meaning of the term "lodging-house" might be, the bye-laws framed by the Mandalay Municipality already showed that the Municipality did not contemplate treating a building of the kind here in question as a lodging-house or requiring its owner to take out a license for it. It appears that the applicant is the owner of certain hackney carriages and that the premises are occupied by the drivers of these hackney carriages and the syces attending to the ponies which draw them. The Magistrate states that the applicant admitted that he kept 12 drivers, 6 syces and 2 watermen in the premises. He called witnesses who deposed that they drove the carriages on hire, that charges for food only were deducted from their wages, and that they did not pay any rent for the house.

"Lodging-house" is defined in S. 2 (6), Municipal Act, as a building or part of a building which is let in lodgings or occupied to any extent in common by members of more than one family. It is clear, therefore, that lodging-house need not be let in lodgings; it is still a lodging-house if it is occupied to any extent in common by members of more than one family. By a footnote it is explained that if there are kitchens, privies or other conveniences in common, the building will be a lodging-house, and I have no doubt that this is the case whether or no rent is paid either as rent or otherwise. It seems probable here that the fact that the applicant provides his employees with house room is taken into consideration in fixing their wages, and if this is so, no doubt their wages are less than they would be if they had to find lodgings for themselves, and in that case they certainly pay rent indirectly for the lodgings. But the definition does not make the question whether a building is a lodging-house or not depend upon the letting for rent; it is sufficient that the building is occupied in common by more than one family. I cannot see that the Lodging-house By-laws contemplate any condition of affairs inconsistent with or narrower than the terms of S. 2 (6), of the Act. The persons living in

the lodging-house are lodgers whether they pay rent or not, and the owner of the lodging-house receives them when he allows them to occupy the building. No doubt the definition is extremely wide, and the servant's quarters of a private house having a common latrine or kitchen would come within it. But this Court has to interpret the law as it is laid down, and it seems to me that there is no doubt as to the meaning of the words of S. 2 (6), Municipal Act. The application must be dismissed.

K.N./R.K. *Application dismissed.*

A. I. R. 1918 Upper Burma 8

SAUNDERS, J. C.

Nga Chit—Applicant.

v.

Nga Ya and others—Opponents.

Criminal Revn. No. 759 of 1917, Decided on 13th November 1917.

(a) Criminal P. C. (1898), Ss. 145, 435 (3) and 503—Proceedings under S. 145 and Ch. 12—Jurisdiction of High Court is not barred unless proceedings are in fact proceedings under Ch. 12.

An order passed under the provisions of S. 145, and proceedings under Ch. 12, Criminal P. C., is not subject to revision in view of the terms of S. 435 (3), of the Code. But that section does not deprive the High Court of jurisdiction unless the proceedings are in fact, and not merely in name, proceedings under Ch. 12, of the Code.

[P 9 C 1]

(b) Criminal P. C. (1898), S. 145—Proceedings under S. 145, are not in nature of trial—They are in nature of Police proceedings to prevent commission of offence.

Proceedings under S. 145 do not constitute a trial and are not in the nature of a trial. They are in the nature of Police proceedings in order to prevent the commission of offences, and the fact that there have been criminal charges brought by one or other of the parties against each other so far from being a bar to action under Ch. 12, constitutes evidence which may possibly prove the danger of disputes which it is desired to prevent.

[P 9 C 1]

(c) Criminal P. C. (1898), S. 145—Proceedings under S. 145—Prosecution and acquittal of party under S. 447, is no bar to proceedings.

Where it was found that one of the parties to a proceeding under S. 145, Criminal P. C., had already been prosecuted and acquitted under S. 447, of the Penal Code:

Held, that this was no bar to the proceedings.

[P 9 C 1]

Vasudevan—for Applicant.

Mitter—for Opponents.

Judgment.—This is an application to revise an order of the Sub-Divisional Magistrate, Madaya, passed, or purporting to be passed, under S. 145, Criminal P. C. It is objected that an order passed

under the provisions of that section and proceedings under Ch. 12, Criminal P. C. are not subject to revision in view of the terms of S. 435, Cl. 3, of the Code. This is no doubt the case, but that section does not deprive the High Court of jurisdiction, unless the proceedings are in fact, and not merely in name, proceedings under Ch. 12, Criminal P. C. There is a very general consensus of opinion of the High Courts in India on this point, see, for instance, *Jhingai Singh v. Ram Pratap* (1) and *In re Pandurang Govind Pujari* (2). Here there was an application by a person alleging possession of certain lands, that his possession was being interfered with by certain persons and that there was likely to be a breach of the peace. The Magistrate upon this in the diary recorded an order:

"I think I should take action under S. 145, Criminal P. C. Issue notices to respondents to put in written statements."

A written statement was put in and the Magistrate, then without further enquiry, held that one of the respondents and one other person having been prosecuted and acquitted under S. 447, I. P. C., under S. 403, Criminal P. C., he and the other respondents were not liable to be tried again in respect of the same subject-matter, and he dismissed the application. The order was clearly wrong. Proceedings under S. 145 do not constitute a trial and are not in the nature of a trial. They are in the nature of Police proceedings in order to prevent the commission of offences, and the fact that there have been criminal charges brought by one or other of the parties against each other, so far from being a bar to action under Ch. 12, constitutes evidence which may possibly prove the danger of disputes which it is desired to prevent. The order of the Magistrate is set aside and he is directed to proceed according to law, that is to say, to follow the procedure laid down in S. 145, Criminal P. C., and pass orders.

K.N./R.K.

Order set aside.

1. (1901) 31 All 150=1 I C 762.

2. (1901) 25 Bom 179.

A. I. R. 1918 Upper Burma 9

SAUNDERS, J. C.

Ma Kin Nyun—Applicant.

v.

Ma Tin—Opposite Party.

Civil Revn. No. 56 of 1917, Decided on 15th October 1917.

(a) Civil P. C. (1908), O. 22, R. 6—Death of party is not sufficient cause for refusing to deliver judgment or allowing withdrawal of suit—Court can deliver judgment although aware of death of party—Civil P. C., O. 23, R. 1.

The provisions of O. 22, R. 6, though they cover the case where a judgment is delivered in ignorance of the fact that a party has died between the conclusion of the hearing and the delivery of judgment, also provide for the delivery of judgment where the Court is aware of such death, and they make it clear that the death of a party is not sufficient cause for refusing to deliver judgment or allowing the withdrawal of a suit which has been completed in every respect except for such delivery of judgment. [P 10 C 1]

(b) Civil P. C. (1908), O. 23, R. 1—Application of.

The provisions of O. 23, R. 1, should not be arbitrarily applied. [P 10 C 1]

S. Mukerjee—for Applicant.

C. G. S. Pillay—for Opposite Party.

Judgment.—One *Ma Tin* filed a suit in the District Court, Magwe, sitting at Yenangyasing, against her husband, *Maung Po Kan*, for divorce and for partition of property. The suit was defended and proceeded to trial, witnesses were examined and arguments heard, and on 22nd December 1916 was adjourned for judgment till 3rd January 1917. On that date it was again adjourned for the same purpose till 20th January 1917. It appears that on 17th January 1917 the defendant died, and on the 20th January the plaintiff applied for leave to withdraw the suit. On this the Judge passed the following order:

"Plaintiff applies to withdraw the suit on the ground that the defendant died on 17th January 1917. She applies under O. 23, R. 1, and asks for permission to institute a fresh suit in respect of the property. Under O. 23, R. 1 (ii), plaintiff is permitted to withdraw from her suit on payment of the defendant's costs, with liberty to institute a fresh suit in respect of the property claimed."

On the 26th January one *Ma Kin Nyun*, claiming to be adopted daughter of the deceased, applied for pronouncement of judgment making her legal representative in place of the deceased. This application was refused and she now comes to this Court in revision under S. 115, Civil P. C. The application is in effect that the District Judge acted with material irregularity in allowing the withdrawal of the suit without sufficient grounds. The Judge's order does not state why permission was granted to the plaintiff to withdraw the suit. It is clear that Cl. (2) (a), O. 23, R. 1, did not apply and that he can only have given

permission under Cl. (2) (b). This clause lays down that permission may be given where the Court is satisfied that there are other sufficient grounds for allowing a plaintiff to institute a fresh suit for the subject matter of the suit or part of a claim. It is clear that the meaning of this is that a suit may be withdrawn where there are sufficient grounds for allowing the plaintiff to withdraw from a suit in order to institute a fresh suit for the subject matter thereof, or to abandon part of a claim continuing the suit as far as the balance of the claim is concerned. It is obvious here that the defendant having died, there could be no question of the plaintiff bringing a fresh suit for a divorce, nor did she desire to abandon a part of her claim continuing the suit for the balance. It would seem, therefore, that O. 23, R. 1, under which the Judge purported to act, had no application. Possibly the Judge was under the impression that the suit abated upon the death of the defendant, but if this was so, he would seem to have been in error in view of the terms of O. 22, R. 6, and if the suit abated, this was clearly not a reason for allowing its withdrawal. The provisions of O. 23, R. 1, are not to be arbitrarily applied.

They have been framed to allow a plaintiff to obtain an adjudication where, owing to some formal defect, or for other sufficient grounds, which must be bona fide grounds, urged in good time and not to the prejudice of the defendant, the plaintiff would but for this rule fail in his suit and be unable to obtain the assistance of the Courts in enforcing a just claim. The provisions of O. 22, R. 6, though no doubt they cover the case where a judgment is delivered in ignorance of the fact that a party has died between the conclusion of the hearing and the delivery of the decision, also undoubtedly provided for the delivery of judgment where the Court is aware of such death, and they seem to me to make it clear that the death of a party is not sufficient cause for refusing to deliver judgment or allowing the withdrawal of a suit which has been completed in every respect except for such delivery of judgment. It was pointed out in *Ramacharya v. Anantacharya* (1) that the practice in English Courts of equity was in such cases to disregard the fact of the

death of a party occurring while the Court was considering, and to deliver judgment and draw up the decree as though he was still living and the judgment of the Lord Chancellor of Ireland is quoted with approval in which it is stated that

"nothing is better settled than that where a cause is heard and merely stands over for consideration, the Court will pronounce judgment though the plaintiff or defendant died"

and in *Surendra Keshub Roy v. Doorgasoondery Dossee* (2), quoted in the same case, the Privy Council, notwithstanding the death of one of the parties pending consideration, delivered judgment and remitted the case to the Indian Courts for disposal without requiring the record to be amended. It is argued for the respondent that O. 22, R. 6, merely lays down that judgment may, in such case, i.e., after the death of one of the parties, be pronounced. The rule is not mandatory and this Court should not interfere if the Court fails to pronounce judgment, as a discretion is vested in it to deliver or not to deliver judgment. But this discretion must be exercised judicially, and I think it is clear that the Judge did not have the provisions of O. 22, R. 6, in his mind at all, nor did he purport to act under that rule. The case of *Mahipat Shamlu v. Nathu Vithoba* (3) may be referred to. It appears to be on the face of it desirable that judgment should be delivered in the present suit, which will then decide various matters in dispute between the parties by which the legal representatives of the defendant will be bound, whereas, otherwise, it will be necessary for one or the other of the parties to bring a fresh suit and to go largely into the same matters though upon a different cause of action. In allowing the plaintiff to withdraw her suit, the Court acted in the exercise of its jurisdiction with material irregularity within the meaning of S. 115 (c), Civil P. C., and there will be an order setting aside the order of the District Court allowing the suit to be withdrawn and directing the Court to proceed to deliver judgment. The respondent will pay the costs of this application.

K.N./R.K.

Order set aside.

2. (1892) 19 Cal 513=19 I A 108 (P.C.).

3. (1909) 83 Bom 722=4 I C 252.

A. I. R. 1918 Upper Burma 11

RIGG, J. C.

Nga Hmyin—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 391 of 1917. Decided on 10th July 1917.

(a) Criminal P. C. (1898), Ss. 213 and 215—Charge framed by committing Magistrate—Magistrate finding after hearing evidence that there are no sufficient grounds for putting accused to trial can cancel it.

A Committing Magistrate has a discretion, even after he has framed a charge, of cancelling it, if after hearing the evidence for the defence he considers that there are no longer sufficient grounds to put the accused on his trial. If he entirely disbelieves the evidence for the prosecution, however numerous the witnesses may be, he ought to discharge the accused. If he is in doubt as to their credibility but the evidence, if believed, would be sufficient for a conviction, he should not take on himself the functions of a superior Court, but commit the case for Sessions.

[P 11 C 2; P 12 C 1]

(b) Criminal P. C. (1898), S. 213—Direct evidence justifying conviction—It is not necessarily sufficient reason for commitment.

The fact that there is direct evidence against an accused person which if believed would justify a conviction is not necessarily a sufficient reason for committing a case to Sessions. [P 11 C 2]

(c) Criminal P. C. (1898), S. 215—Point of law.

Semble.—The absence of evidence to warrant a commitment is a point of law. [P 12 C 1]

Maung Tha Gywe—for Applicant.

Judgment.—This is an application under S. 215, Criminal P. C., to quash the order of commitment to Sessions of Nga Hmyin. The grounds for making the application are briefly: (1) that the evidence is quite insufficient to justify the order of commitment, (2) that the Magistrate has failed to consider whether the evidence is reliable or not, and has not exercised a discretion vested in him by law, and (3) that in his reasons for commitment, he has not shown that he has considered the evidence. S. 210, Criminal P. C., directs a Magistrate to frame a charge if, after taking evidence, he is satisfied that there are sufficient grounds for committing the accused for trial, while S. 213 (2) gives him the power to cancel the charge if after hearing the evidence for the defence, he is satisfied that there are not sufficient grounds for the commitment. If he decides to commit, he is also bound to record briefly his reasons for so doing. In his reasons the Magistrate mentions briefly the evidence for the prosecution and defence and then says: "as there is direct evidence against Nga Hmyin,

I consider that he should stand his trial before the Court of Sessions."

The fact that there is direct evidence against an accused person, which, if believed, would justify a conviction, is not necessarily a sufficient reason for committing a case to Sessions. *In the matter of the petition of Inshman v. Inshman* (1), Mathwood, J., said:

"The object of the law in providing that the inquiry shall be held by a Magistrate before the accused has to undergo a trial in the Court of Sessions, seems to be to prevent the commitment of cases in which there is no reasonable ground for conviction. The provision of the law formulated, on the one hand, to save the subjects from prolonged anxiety of undergoing trial for offences not brought home to them; and on the other hand, to save the time of the Court of Sessions from being wasted over cases in which the charge is obviously not supported by such evidence as would justify a conviction. I am of opinion that the power given to Magistrate, ... extends to the weighing of evidence and the expression 'sufficient grounds' must be understood in a wide sense."

In *In re the petition of Kalyan Singh* (2), it was said that the proposition that Magistrates, who had before them evidence that discloses a case for trial in some Court to which they might commit it ought to commit, is dangerously large. These cases were followed in *In re Bai Parvati* (3), where the High Court held that where a Committing Magistrate finds that there is no evidence or that the evidence tendered for the prosecution is unworthy of credit it is his duty to discharge the accused. In *Shobha Ram v. Emperor* (4) one of the learned Judges laid down the test to be applied as to whether a commitment ought to be made or not as this—assuming that the whole of the evidence telling against the accused is true, is there a case which a Judge at a trial could leave to the jury. If there is any evidence that calls for an answer, however great the preponderance in favour of the prisoner may be, the commitment is proper. With due respect to the opinion of the learned Judge, I venture to think that the proposition laid down is too wide, and is inconsistent with the provisions of Cl. (2), S. 213. The Magistrate has a discretion even after he has framed a charge of cancelling it, if after hearing the evidence for the defence he considers that there are no longer sufficient grounds to put the accused on

1. (1882) 5 All 161.

2. (1899) 21 All 265.

3. (1911) 35 Bom 163=8 S I C 681.

4. (1905) 9 C W N 829.

his trial. If he entirely disbelieves the evidence for the prosecution, however numerous the witnesses may be he ought to discharge the accused. If he is in doubt as to their credibility but the evidence if believed would be sufficient for a conviction, he should not take on himself the functions of a superior Court, but commit the case.

It is however, a waste of time and unfair to the accused to commit him to Sessions, where there is no reasonable probability that he will be convicted. The next point for consideration is whether this Court has power to quash a commitment once made, on the ground that the evidence is insufficient to justify such a commitment. In *Emperor v. Nga Taung Thu* (5) it was held that although both the police and the Committing Magistrate thought that the evidence for the prosecution was not credible, the commitment could not be quashed as no point of law was involved. A different view has been taken by the Calcutta High Court. In *Jogeshwar Ghose v. King-Emperor* (6) it was held that the absence of evidence to warrant the commitment is a point of law and may furnish a good ground for setting aside an order of commitment. The learned Judges said:

"Insufficiency of evidence has never been treated as a ground for quashing a commitment, but this Court, following the principle laid down by the Courts in England, has held that the absence of evidence to warrant the commitment is a point of law and may furnish a good ground for quashing the commitment. The Court has to consider whether there is such evidence as would justify the case going before a jury."

In *Sheobux Ram's* case (4), cited above the Judges also considered the same question. In the determination of fact there may be error of law. It was pointed out by their Lordships of the Privy Council that when there is no evidence to go to a jury, that does not raise a question of fact such as arises on the issue itself, but a question of law for the consideration of the Judge: *Anangamanjari Chowdhurani v. Tripura Sundari Chowdhurani* (7). In the present case, there are six eye-witnesses who profess to have seen the accused dash a stone against the deceased man's head. There may be good reason for disbelieving all of them, but the Magistrate has not stated that he did not

believe them, and I cannot interfere with the order of commitment. I think, however, there are sufficient reasons for allowing bail, and I direct that Nga Hmyin be released on his furnishing two sureties in Rs. 150 each for his appearance before the Court of Session.

K.N./R.K.

Bail allowed.

A. I. R. 1918 Upper Burma 12

SAUNDERS, J. C.

Maung Myo—Plaintiff—Appellant.

v.

Maung Kywet E—Defendant—Respondent.

Second Appeal No. 390 of 1917, Decided on 6th May 1918.

Tort—Defamation—Person charging another with offence and without delay making complaint to police or Court—He is protected from action for defamation in respect of allegations in charge Dismissal of complaint—Remedy of accused—is to obtain sanction under Criminal P. C. S. 195 or suit for tort, malicious prosecution.

Where one man charges another with an offence and without unreasonable delay makes that charge the subject of a complaint to the police or to the Court, he is protected from an action for defamation of character in respect of allegations contained in the charge. If the complaint is dismissed the accused has two remedies one by obtaining sanction for the prosecution of the complainant for bringing a false charge, and the other, if he has suffered loss or injury, by a suit for damages for false and malicious prosecution. [P 14 C 1]

G. S. Pillay—for Appellant.

Tha Gywe—for Respondent.

Judgment.—Plaintiff sued for Rs. 100 damages for defamation of character, on the ground that the defendant had falsely charged him with setting fire to his, defendant's, house. The defence was that the charge was true. The first Court gave plaintiff a decree for Rs. 60. On appeal the lower appellate Court stated that the suit was for damages for malicious prosecution according to the plaintiff-respondent's advocate, and on the authority of certain Indian cases dismissed the plaintiff's suit. The plaintiff now comes to this Court in second appeal under S. 13, Upper Burma Civil Courts Regulation. The plaintiff-appellant urges that his suit was not or was not merely for damages for false and malicious prosecution, and no statement of his advocate in the lower appellate Court could alter the nature of the suit which was to be ascertained from the record. This is undoubtedly the case. The plaint as filed alleged in para. 2 that the defendant had come to the plain-

5. A I R 1914 L B 9=7 Bar L T 26=23 I C 478.

6. (1901) 5 C W N 411.

7. (1887) 14 Cal 740=14 I A 101 (P C).

ciff's house, while the plaintiff was asleep with the headman and village elders, and had charged the plaintiff with having set fire to his house. The plaint went on to state that the defendant was on bad terms with the plaintiff, that the charge was false, that the plaintiff had been defamed thereby and had suffered loss and injury. The case was at first dealt with ex parte, but the defendant appeared later and was allowed to defend the suit. The Judge of the lower appellate Court says in his judgment that

"the plaintiff was too premature. He had not even waited to see what the result of the information given to the police would be."

But there is nothing on the record to show when the information was laid with the police; and though the defendant appeared and was examined before issues on 21st July 1916, the suit having been filed on 1st July 1916, and then stated that he had lodged a complaint with the police, in his cross-examination when examined as a witness, he admitted that this suit had been filed before he had made his complaint to the police. It would seem, therefore, that the suit could not have been a suit for damages for a false and malicious prosecution since, at the time it was filed, no step had been taken towards prosecuting the plaintiff; the cause of action cannot therefore have been a prosecution which had not even reached the stage of a report to the police at the time the plaint was filed. The judgments relied upon by the lower appellate Court appear to lay down that unless and until cognizance is taken of a complaint by a Court and some action is taken to require the plaintiff to appear and answer a charge, it cannot be said that there is any prosecution and there can, therefore, be no right of action for damages on the ground that there is a prosecution which is false and malicious. This view appears to have been dissented from in the Bombay case of *Ahmedbhai v. Framji Edulji* (1) and in the case of *Bishun Pergash v. Fulman Singh* (2) a Bench of the Calcutta High Court in 1914 examined the case-law on the subject and expressly dissented from the view taken in the Calcutta and Madras cases relied upon by the lower appellate Court. I am bound to say that there appears to me to be much force in the arguments by which

the learned Judges in this later case arrived at their conclusions. It is not necessary to refer to them in detail because, as has been pointed out above, this suit was not a suit for damages for malicious and false prosecution. But I have referred to these cases because there appears to be another question arising in this suit which is referred to in two at least of the cases cited which appear to be of importance, and that is whether an action for defamation would lie against a defendant in respect of a charge which has formed the subject of a complaint to the police or to Court. In the case of *Bishun Pergash v. Fulman Singh* (2) cited above the plaintiff also claimed damages for defamation, but the Judges refused to consider this claim on the ground that it was not put in issue and for other reasons.

In the case of *Golap Jan v. Bhula Nath* (3) however it was held that even if the complaint to the Magistrate was defamatory, still the complainant was entitled to protection from suit and this protection was the absolute privilege awarded in the public interest to those who make statements to the Courts in the course of and in relation to judicial proceedings. This view of the law appears to be correct. Defamation of character is not a ground for claiming damages for false and malicious prosecution which may be granted upon proof of actual loss or damage. The law provides sufficient protection for an accused person in the prosecution of a complainant who has deliberately brought a false charge. But if this is the case, it appears to me to be more than doubtful whether a plaintiff is entitled to sue for damages for defamation on the ground that the allegations which formed the subject of the complaint to the police or Magistrate had been previously made outside the Court, and whether if he were so entitled the effect would not be to deprive the complainant of his privilege and would not be opposed to public policy. A person who had reason to believe that an offence had been committed, would be very seriously and unfairly handicapped if he were bound to keep his reasons to himself and to go to Court without making any enquiry into the truth of his suspicions, under penalty of having to meet an action for damages if he did not follow this course. I am of

1. (1904) 28 Bom 226.

2. A I R 1915 Cal 79=27 I C 449.

3. (1911) 38 Cal 880=11 I C 311.

opinion therefore that the defendant-respondent having taken his complaint to the police and to Court, so far as the record shows, without unreasonable delay was protected from an action for defamation of character in respect of allegations contained in his subsequent complaint. This being so, the plaintiff-appellant's suit was bound to fail. He had, when the complaint was filed and was dismissed, two remedies, one by obtaining sanction for the prosecution of the defendant for bringing a false charge, and the other, if he suffered loss or injury, upon the authority of the Calcutta case of 1914 cited above, by a suit for damages for false and malicious prosecution. In this view of the case the appeal is dismissed with costs throughout.

K.N./R.K.

*Appeal dismissed.***A. I. R. 1918 Upper Burma 14 (1)**

SAUNDERS, J. C.

Ma Tu and another—Defendants—Appellants.

v.

Kumar Gangadhar Bagla and others—Plaintiffs—Respondents.

Civil Appeal No. 180 of 1917, Decided on 16th November 1917.

(a) Civil P. C. (1908), S. 35—Decree not appealable—No appeal, lies on question of costs—Appeal, maintainability.

An appeal does not lie on the question of costs where there has been no appealable decree.

[P 14 C 2]

(b) Civil P. C. (1908), S. 24—Order under S. 24 read with S. 15 of Upper Burma Civil Courts Regulation is not appealable.

An order passed under the provisions of S. 24, Civil P. C., read with S. 15, Upper Burma Civil Courts Regulation, is not a decree and is not appealable. No appeal, therefore, lies from an order as to costs forming part of such order.

[P 14 C 2]

*S. Vasudevan—for Appellants.**D. Dutt—for Respondents.*

Judgment.—The respondent in the course of a suit against the appellants for an injunction, applied for a temporary injunction, and being dissatisfied with the progress made by the Court which was trying the suit, applied to the Divisional Court praying that the suit should be transferred to the file of the District Judge, and that the Divisional Judge should take upon his own file the application for a temporary injunction. The Divisional Judge, without referring to, or noticing the latter application, transferred the suit to the file of the District Judge and directed that the present ap-

pellants who had opposed the application should pay the costs, fixed at Rs. 50. Against this order requiring them to pay costs, the defendants appeal.

A preliminary objection is taken by the respondents that an appeal does not lie against the order of the Divisional Judge directing the appellants to pay costs. I think there is no doubt that this view is correct. The appellants relied on various Indian cases, among others *Ranchordas Vitthaladas v. Bai Kasi* (1) where it was held that, where the Original Court has made an erroneous order for costs under a misapprehension of fact and law, an appeal lies from such order although the appellant complains of nothing else but the order for costs so erroneously made. And in other cases, e. g., *Kuppuswami Chetty v. Zamindar of Katsahasti* (2) and *Dildar Ali Khan v. Bhawani Sahai Singh* (3), it was held that an appeal may be entertained on a question of costs only, when a matter of principle is involved, since costs are awarded in the exercise of the discretion of the Judge with reference to general principles. But it does not appear to me that any of these cases are authority for holding that where there is no appealable decree, the Court may entertain an appeal on a question of costs. In each of the Indian cases which I have referred to there was an appealable decree and the appeal was entertained as against that part of the decree which dealt with costs. Here the order of the Divisional Judge was an order passed under the provisions of S. 24, Civil P. C., read with S. 15, Upper Burma Civil Courts Regulation, and the order was not a decree and was not appealable. No appeal, therefore, lies.

K.N./R.K.

Order accordingly.

1. (11-22) 16 Bom. 676.

2. (1904) 25 Mad 341.

3. (1907) 24 Cal 878.

A. I. R. 1918 Upper Burma 14 (2)

SAUNDERS, J. C.

Maung Kala and another—Defendants—Appellants.

v.

Maung Meik and another—Plaintiffs—Respondents.

Second Appeal No. 74 of 1917, Decided on 15th October 1917.

(a) Civil P. C. (1908), Sch. 2, Para 1—General principle is that award is final—Princi-

ple should not be departed from where Court itself acts as arbitrator.

The general principle is that an award is final and cannot be questioned except upon such grounds, as corruption or an illegality apparent upon the face of the award, as are set out in Sch. 2, Civil P. C., and there is no reason for departing from the principle where the Court itself has been appointed and has accepted the office of arbitrator. [P 15 C 2; P 16 C 1]

(b) Civil P. C. (1908), Sch. 2, Para 1—Court acting as arbitrator—Its award is in itself decree.

Where the Court itself is appointed to act as an arbitrator, no separate award need be passed inviting the parties to put in objections before passing a decree; such an award in itself is a decree. [P 15 C 2]

(c) Civil P. C. (1908), Sch. 2, Para 1—Examination of documentary evidence and inspection of ground by Court—Parties agreeing to abide by decision without calling witnesses—Decision is in nature of award—Appeal does not lie.

Where the parties to a suit agreed that after the Judge had examined the documentary evidence and inspected the ground he should give his decision without any witnesses being called, and that they would abide by his decision.

Held: that the decision was in the nature of an award and that no appeal lay against it. [P 15 C 2]

S. Mukerjee—for Appellants.

C. G. S. Pillay—for Respondents.

Judgment.—This was a suit to recover possession of a certain piece of land, together with mesne profits. The defendant filed a written statement in which he traversed the statements in the plaint, and an issue was framed. The parties then filed a number of maps and an application, in which they stated that they agreed that after the Judge had examined the documentary evidence and inspected the ground, he should give his decision without any witnesses being called, and they agreed to abide by this decision as final. The Judge accordingly visited the site and gave the plaintiff a decree as prayed for. The defendant, Maung Kala, then appealed. The District Judge held that the Judge had been appointed sole arbitrator in the dispute, and that the District Court could not question his decision. The defendant now comes to this Court in second appeal under S. 100, Civil P. C. It is urged that the submission by the parties did not amount to a submission to arbitration, that if it was, the award was subject to the procedure laid down in Sch. 2, Civil P. C., that the Judge of the first Court exercised a double function as arbitrator and Judge and that the award did not operate by itself and ripen

into a decree, that the plaintiff should have been dismissed upon the plaintiff-respondent's producing no evidence, that the alleged wrongful dispossession and damage claimed has not been established, and that the Judge of the lower appellate Court should have decided the appeal upon its merits.

There appears to be good authority for the view taken by the District Court. It was held in *Barkanta Nath Goswami v. Sita Nath Goswami* (Sita Nath v. Barkanta Nath) (1) that when, after the hearing of the suit had commenced before a Munsif, both parties agreed to leave the questions in dispute between them to the determination of the Court after the Court had made a local inspection, and also agreed not to raise an objection to the same or to prefer an appeal, the decision of the Munsif is in the nature of an award and that no appeal lay to the District Judge. Further that no appeal lay from the decision of the District Judge to the High Court, though the High Court might interfere under S. 115, Civil P. C. Much the same view was taken in the Madras case of *Nidamarthi Mukkanti v. Thammanna Ramayya* (2). At p. 117 of Sarpi's Law of Arbitration, 1916, it is stated that where the Court itself is appointed to act as an arbitrator, no separate award need be passed inviting the parties to put in objections before passing a decree, such an award in itself is a decree and an objection to the award can be raised only by way of appeal against the decree to the appellate Court. The authority for this is said to be *Nimmagadda Peda Naganna, In re* (3), which is not available in this Court. If the law as laid down therein is correctly summarized, this appears to dispose of the objection that the parties should be given an opportunity of putting in objections before passing a decree, and it would seem probable that any appeal could only attack the award upon the grounds set out in Sch. 2, Civil P. C., as grounds for invalidating an award.

It does not appear that in the District Court any such grounds were set out. The general principle is that an award is final and cannot be questioned except upon such grounds, as corruption or an illegality apparent upon the face of the

1. (1911) 28 Cal 421=9 I C 296.

2. (1908) 26 Mad 76.

3. (1915) 26 I C 355.

award, as are set out in Sch. 2. Civil P. C., and I see no reason for departing from the principle where the Court itself has been appointed and has accepted the office of arbitrator. It would seem from a perusal of the maps filed by the parties that they did sufficiently substantiate the plaintiff's case, and I think the District Court was justified in refusing to interfere. The appeal must therefore be dismissed with costs.

K.N./R.K.

Appeal dismissed.

*** A. I. R. 1918 Upper Burma 16**

SAUNDERS, J. C.

Nga Ba Than and others—Complainants
—Appellants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 52 of 1918, Decided on 26th March 1918.

*** (a) Criminal P. C. (5 of 1898), S. 162—Statements of witnesses recorded by police is only admissible when witness is called for prosecution on request of accused except under Evidence Act (1 of 1872), S. 32 (1).**

The statements of witnesses recorded by the police in the course of an investigation cannot be used in any way whatever in the course of the trial which results from that investigation, except in the one way laid down in S. 162 with the single exception referred to in Cl. (2). Where, therefore, the statement taken down in writing by the police does not refer to the cause of the death of the person making it, as set out in S. 32, Cl. (1), Evidence Act, such statement can only be used when a witness is called for the prosecution on the request of the accused, if the Court thinks it expedient in the interests of justice, after the accused has been furnished with a copy thereof. [P 16 C 2]

(b) Criminal P. C. (5 of 1898), S. 162—Provisions should be strictly complied with.

It is very desirable that the provisions of S. 162 should be clearly understood and strictly complied with. [P 16 C 2]

M. Johannes—for Appellants.

H. M. Lutter—for the Crown.

Judgment.—The three accused have been convicted and sentenced, the first to six months' rigorous imprisonment under S. 366, I. P. C. and the second and third to three months' rigorous imprisonment each under Ss. 366 and 114, I. P. C. The case was tried by the District Magistrate and no appeal lies, but this application for revision proceeds upon the ground that the Magistrate committed irregularities in the trial of the case which resulted in the admission of inadmissible evidence and the exclusion of admissible evidence, that the accused were prejudiced by these irregularities and that the Magistrate took a perverse view of the evi-

dence. There is undoubtedly a tendency on the part of Courts in Upper Burma to ignore the strict provisions of S. 162, Criminal P. C. or to attempt to give them a meaning which they do not possess. The statements of witnesses recorded by the police in the course of an investigation cannot be used in any way whatever in the course of the trial which results from that investigation, except in the one way laid down in S. 162, Criminal P. C., with the single exception referred to in Cl. 2. Where therefore the statement taken down in writing by the police does not refer to the cause of the death of the person making it, as set out in S. 32, Cl. 1, Evidence Act, such statement can only be used when a witness is called for the prosecution on the request of the accused, if the Court thinks it expedient in the interests of justice after the accused has been furnished with a copy thereof. It is very desirable that the provisions of S. 162, Criminal P. C. should be clearly understood and strictly complied with. Here the witness Ma Nyun was called for the prosecution and she made a statement which was evidently thought to be more favourable to the accused than the statement which she had made to the police.

Her statement to the police was then read to her by the Court and she was asked whether it was correct, and she was cross-examined by the Court after she had admitted the correctness of the statement. This procedure was entirely unwarranted and the whole of this witness's evidence from the time her statement to the police was put to her must be excluded. The investigating Sub-Inspector was also called at the conclusion of the trial and was examined as to the investigation made by him. He was asked whether one of the witnesses for the defence, who had deposed in Court to the carrying of letters between the complainant and the accused and who had been examined by the police, had made any such statement to him. He was apparently referred to her statement as recorded by the police and stated that she had made no such statement. He was also examined as to admissions and statements made to him by the accused. It is true that under S. 172, Criminal P. C., the Court may send for the police diaries of a case under enquiry or trial and may use such diaries, not as evidence in the

case, but to aid it in such enquiry or trial. It is clear, however, here that it was not the diaries referred to in S. 172, Criminal P. C. which were referred to and there was no provision of law which allows a police officer to give evidence of admissions made to him by an accused person of the kind here recorded. As to the admissible evidence upon the record it does not appear to me that there would be good grounds for interference in revision. The prosecution evidence was certainly open to serious criticism but so also was that for the defence. It was open to the Magistrate to believe the one and refuse to believe the other, and the mere fact that he did not give detailed reasons in every case for believing the prosecution witnesses in the face of improbabilities and discrepancies in their evidence, or that he did not give reasons for refusing to believe the defence witnesses in every case would not be sufficient reason for interference in revision.

I think there is no doubt that the complainant exaggerated the resistance offered by her and that she was probably not carried kicking and screaming through the town of Myingyan and into the house of one of the accused. She has probably also not told the truth in denying any previous acquaintance with the accused. The evidence of the witnesses who say that they saw the Gharry being driven through the town and deposed to what they say they saw is also open to serious criticism. On the other hand the evidence of a school fellow of the accused as to his relations with the girl was probably evidence of a person anxious to get his school fellow out of trouble, and the witness Ma Saw Myaing who deposed to the carrying of letters had been selling in the bazaar for about two years at the stall of the accused I's mother and therefore also undoubtedly had cause for trying to help him. There seems to be no doubt that the complainant received a bruise upon her cheek and an abrasion upon her knee and that she was suffering from fever for a day or two after the occurrence. The defence story that she was to all intents and purposes engaged to the accused I and that a marriage was to take place before long does not explain why she should have been taken away by the accused I with a show of force but really with her own consent, as the defence suggest. D.W. 10 Maung

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Kywe, who was called apparently to prove that the girl's father did not believe the story of the abduction or thought that the accused was justified in behaving as he did, seems to me to have gone too far. I find it difficult to believe that the father would have said in order to show his friendship for the accused I "even if he kills my daughter I do not mind."

Surely the best person to have proved the wishes of the father would have been the father himself. I think, however, that the record does show that the father had been at one time, if he was not at the time of the abduction, on friendly terms with the accused I's family. It is possible that the boy hoped to marry the complainant, that either on account of the winning of a large prize in a lottery or for some other reason he saw little hope of getting his wishes gratified in a legitimate manner and, therefore, had recourse to force. It appears to me that the evidence, apart from that which was not admissible, was sufficient to prove the charges, but the Magistrate undoubtedly committed serious irregularities and from the reference in the judgment to another abduction case which had come to the Magistrate's notice and from the failure to refer the facts which undoubtedly told in favour of the accused, it does appear to me that he was influenced by what he thought to be the general lawlessness of Burmese youths and failed to give due weight to the circumstances which in this case told in favour of the accused and that the latter were prejudiced thereby. In my opinion that in the circumstances of the case justice will be done if the convictions are maintained, but the sentences are reduced to the period already undergone and there will be an order accordingly.

K.N./R.K.

Sentences reduced.

A. I. R. 1918 Upper Burma 17

SAUNDERS, J. C.

Meghraj Ramniranjandas—Applt.

v.

Thakurdas—Respondent.

Civil Appeal No. 256 of 1917, Decided on 3rd December 1917.

Civil P. C. (1908), S. 20 (c)—Suit on contract—Place of contract not within jurisdiction—Court can try suit if place where contract was to be performed or money was payable is within jurisdiction.

Where in a suit on a contract it appears that the place where the contract was made, is not

within the jurisdiction of the Court, the Court still has jurisdiction if the place where the contract was to be performed, or where in its performance the money to which the suit relates was expressly or impliedly payable, is within the jurisdiction of the Court. [P 18 C 1]

J. C. Chatterjee—for Appellant.

D. Dutt—for Respondent.

Judgment.—This was a suit upon a promissory note. The suit was filed in the District Court, Mandalay, and the plaintiff alleged that the note had been executed in Mandalay. The defendant denied that he had been present in Mandalay at the time, or had executed the note. In the course of the hearing the Judge had reason to believe that the note was not executed in Mandalay, and framed an issue accordingly. The plaintiff produced one witness who gave evidence that the note was executed in Taunggyi, and upon this the District Judge returned the plaint under O. 7, R. 10. The plaintiff now comes to his Court in appeal. The point does not appear to be free from difficulty, and the rejection of the plaint did not necessarily follow as a matter of course, as the District Judge appeared to think, upon proof that the note had been executed outside the jurisdiction of the Court. S. 20, Civil P. C., provides that a suit may be brought in a Court within the local limits of whose jurisdiction the cause of action wholly or in part arises. What was meant by this was explained in the third explanation to the corresponding S. 17 of the old Code, and although that explanation has been omitted in the present Code, it has been omitted because the present Code expressly gives jurisdiction where the cause of action wholly or in part arises. Expln. 3 to S. 17 of the old Code settled the signification of the term "cause of action" in the case of suits arising out of contract: see *Salig Ram v. Chuba Mal* (1). It is true that the place where the contracts in the present suit was made was not within the jurisdiction of the Court; but the Court still had jurisdiction if the place where the contract was to be performed, or where in its performance the money to which the suit relates was expressly or impliedly payable, was within the jurisdiction of the Court.

It is apparently urged by the plaintiff-appellant that the cause of action did arise in Mandalay because it was not merely the promissory note but previous

transactions. But it appears to be clear that the plaint as it stands was based on a promissory note only; as it was filed within three days of the expiry of the period of limitation, the previous promissory note in substitution of which the note sued upon is said to have been executed would not have afforded a cause of action, nor would the previous transactions in the course of which the money became due. The main contention of the plaintiff-appellant, however, is that the contract was to be performed in Mandalay or that in its performance the money to which the suit related was impliedly payable in Mandalay. It is clear that the money was not expressly made payable in Mandalay and the Court certainly did not have jurisdiction from any express agreement that the contract was to be performed there. The only question, therefore, which remains was whether the money was impliedly payable in Mandalay. The only Indian case which I have been able to find is that of *Raman Chettiyar v. Gopalachari* (2), but this case appears to be exactly in point. There a note payable on demand and not payable at any specified place—a description to which the note in the present suit answers—had been executed within the local limits of the jurisdiction of the Tanjore Court by the defendant, who resided at Tanjore; the plaintiff, residing at Kumbakonam, brought his suit in the Kumbakonam Court, and the question was, had that Court jurisdiction. Both the Judges held that it had not. Sir Arnold White, C. J., said:

"I do not think it necessary to decide whether the question of the implication of payment in a particular place is to be considered only with reference to the terms of the contract, or whether the circumstances in which the contract was made may also be taken into account. I assume that for the purpose of applying Expl. 3 (S. 17 of the old Civil P. C.) you must look at the contract and at the fact, which existed at the time the contract was made and then determine whether, having regard to the terms, the contract was one which ought to be performed within the jurisdiction."

And the Judge went on to say that in deciding that the Court had jurisdiction, the District Judge appeared to have had only in mind the ordinary rule that a debtor should follow his creditor. He said:

"I do not think this general rule can be relied on as controlling the express words of a Statute prescribing the conditions which give a Court

1. (1912) 34 All 49=11 I C 712.

2. (1908) 34 Mad 223.

local jurisdiction. Such a view would involve the proposition that unless the contract or the circumstances in which the contract was made, gives rise to a contrary implication, a creditor may sue in any Court within the local jurisdiction of which he happens to be when his right to sue arises."

a conclusion which, I think there can be no doubt, would be quite inconsistent with the express provisions of S. 17. Miller, J., was also of the same opinion and said:

"But it seems to me clear that by the phrase 'expressly or impliedly payable, we are to understand payable according to the terms of the contract, which are expressed or can be inferred from a construction of the language, or from the circumstances.'"

Both Judges held that illus. (b) to S. 17, which is repeated as illustration to S. 20 of the present Code, was a useful guide to interpreting the meaning of the section, since if the plaintiff's place of residence gave rise to an implication as to the place where the money to which the suit relates was payable, it would have been entitled to sue B and C at Suola (Sir Arnold White, C. J.); or, as Miller, J., remarked, the framers of the Code had an excellent opportunity of making it clear in drafting illus. (b) that a plaintiff should be allowed to sue at his place of residence to recover debts due to him in pursuance of contracts made elsewhere in the absence of a contrary to the contrary, and the fact that they did not avail themselves of the opportunity supported, in his opinion, the view taken. I think there is no doubt that this view is correct. The fact that the defendant had previously bought goods from the plaintiff in Mandalay and had paid for them in Mandalay, if it is a fact, though the evidence of the witnesses called by the defendant to prove transactions which had taken place outside the jurisdiction of the Court seems to throw some doubt on it, was not sufficient in my opinion to show that there was an implied contract to pay the money in Mandalay. The plaintiff's only witness says that as the plaintiff asked him to write to the defendant to pay a debt on an old on-demand note, he took a form from the plaintiff and sent it to the defendant to Taunggyi who returned it from Taunggyi duly filled in, and he then sent the defendant the old on-demand note. This is the contract sued on, and the circumstances are not sufficient, in my opinion, to prove an implied contract to pay in Mandalay. I may add that, although it

is true that under S. 61, Negotiable Instruments Act, where a promissory note is payable on demand and is not payable at a specified place, no presentment is necessary in order to charge the maker thereof, the ordinary rule that a debtor must seek his creditor is not given effect to in S. 70 of the same Act, which provides that a promissory note not payable at a specified place must be presented for payment at the place of business, if any, or at the usual residence, not at the residence of the maker. I see no reason to interfere and dismiss the appeal with costs. W.S. B.N. *Appellants' counsel.*

A. I. R. 1918 Upper Burma 19

SAUNDERS, J. C.

Maung Nyan Mo—Appellant.

".

Ma Po and another—Respondents.

Second Appeal No. 120 of 1917, Decided on 2nd November 1917.

(a) Contract Act (1872), S. 38—Co-mortgagees are joint promisees—Mortgage.

Contract Act (1872), S. 38—Co-mortgagees are joint promisees and the payment of the mortgage debt to one of them discharges the whole debt. *See the decision.*

[P 21 C 2]

(b) Contract Act (1872), S. 38—Claim on money bond to two or more obligees—Presumption that obligees who tenants in common and not joint tenants of debt how far to be given effect to in India stated.

In view of the difference in the conditions of social life in India and in England, it is doubtful whether and to what extent the presumption that when a bond is on a money bond to two or more obligees, they are tenants in common and not joint tenants of the debt with the consequence that the discharge by one obligee cannot be set up as a defence against the other obligee since for his share of the debt, which in England prevails only in cases in which equitable relief is claimed, should have effect given to it in India.

[P 20 C 2]

M. Johannes—for Appellant.

Pillay and Pershad—for Respondents.

Judgment.—The plaintiffs' case was that he had mortgaged certain land to the two defendants and the deceased husband of defendant 1, that he had redeemed the mortgage by payment of the mortgage money to defendant 1, but defendant 2 refused to deliver possession. Defendant 1 admitted the claim, while defendant 2 stated that as he had not received the mortgage money, he was entitled to retain possession of the land. The Court of first instance held that the defendants mortgagees were partners and that defendant 2 was bound by the payment to defendant 1, and decreed the plaintiff's suit. Upon

appeal the District Court apparently held that there was fraud and dismissed the suit, and the plaintiff now comes to this Court in second appeal under S. 13, Upper Burma Civil Courts Regulation. It is clear that neither in his written statement nor in his examination before issues did defendant 2 plead fraud, and there does not seem to be any suggestion throughout the evidence that the plaintiff was acting in collusion with defendant 1. There were in fact no grounds whatever for the conclusion arrived at by the lower appellate Court, which was clearly wrong. The facts are not in dispute. The mortgage document was produced and admitted, and in it, after the description of the land, it is set out that U Pa Si, Ma Po and Maung Po Mya deliver Rs. 325 to Maung Nyan Mo and receive the said lands in mortgage with possession.

"If it is required to redeem the lands, the redemption shall be made only after three years from the date of execution of this document."

There is the usual clause as to interference by third parties, and the document is signed by the three persons named as mortgagees. The evidence does little more than prove the mortgage and the redemption thought it appears from it that defendant 2 was the son-in-law of defendant 1 and her deceased husband, that at one time they lived together and that up to the time of Maung Pa Si's death, defendant 2 worked with defendant 1. Defendant 1 said in her evidence that defendant 2 was merely an agent of her husband; she did not attempt to prove it, and he is clearly described in the document as mortgagee. Defendant 2 gave evidence that the mortgage money belonged jointly to him and to his father-in-law and mother-in-law, who had a joint income and did joint business and no partition had been made up till the time of suit. There appears to be no authority for the view taken by the Court of first instance that the defendants were partners, though they may have occupied a position analogous to that of partners. They were co mortgagees or co-promisees and in the absence of fraud or collusion the only question which arises is whether the mortgagor is entitled to redeem by making payment to one of them, and whether payment to a co-mortgagee has the effect of discharging the joint debt. Upon this question there appears

to be a difference of opinion in the Indian Courts. The latest reported case is that of *Umes Chandra Banerjee v. Dinabandhu Mahanti* (1). It was there held that payment to one of several joint mortgagees was not a good payment as against the plaintiff and another co-mortgagee. Reliance was placed on *Husainara Begum v. Rahmannessa Begum* (2), in which it was stated that the principle of law applicable to cases of this description was fully explained. The explanation referred to shows that the principle is based upon the English presumption of equity, that when a claim is on a money-bond to two or more obligees, the presumption is that the obligees are tenants-in-common and not joint tenants of the debt, with the consequence that the discharge by one obligee cannot be set up as a defence against the other obligee suing for his share of the debt, and the doctrine stated by Wills, J., in *Steeds v. Steeds* (3) is quoted with approval, that "although the mortgagees take a joint security each means to lend his own money and to take back his own."

It was added:

"There is nothing to indicate that the intention of the parties was that each of the persons in whose favour the mortgage obligation was created was a creditor for the whole."

Whether co-promisees are joint or several is a question of fact. In view of the difference in the conditions of social life in India and in England, it appears to me to be doubtful (as stated in *Cunningham and Shephard's Contract Act*, Edn. 11, at p. 182) whether and to what extent, this presumption, which in England prevails only in cases in which equitable relief is claimed, should have effect given to it in this country. Although in *Umesh Chandra Banerjee v. Dinabandhu Mahanti* (1) referred to above, the mortgagees are referred to as joint mortgagees, it was held that in view of the terms of the mortgage instrument which stated explicitly that the mortgagors would pay the loan to the two mortgagees, they were thus under an obligation to tender to both the mortgagees. In the present case there is no such stipulation and the presumption (assuming, but not admitting that it is applicable in India) that the mortgagees were tenants-in-common, which is a rebuttable pre-

1. (1915) 29 I C 956.

2. (1911) 38 Cal 342=8 I C 837.

3. (1889) 22 Q B D 537.

sumption, appears to me in the present suit to be rebutted by the evidence. Both the mortgagees agree that at the time of the mortgage they were working together, and defendant 2's statement, that they held their property jointly and that there was no division, has not been contradicted and may be accepted as correct.

But there appears to be a still further conflict of opinion as to whether in the case of joint promisees, payment of one discharges the debt. In *Mannava Anna-purnamma v. Uppala Akkayya* (4) the Full Bench, by a majority of two Judges to one, held that one of several payees of a negotiable instrument can give a valid discharge of the debt without the concurrence of the other payees. From this view the Chief Justice dissented, and his opinion has been referred to in the case of *Umesh Chandra Banerjee v. Dinabandhu Mahanti* (1), quoted above as a weighty dissent which appeared to the Judges of the Calcutta Bench to enunciate the correct rule on the subject. The learned Chief Justice of Madras held that S. 38, Contract Act, dealt with the case of an offer which was not accepted, and although the last paragraph of the section is general and is not restricted to an offer which has not been accepted, apparently the legislature were not contemplating the legal consequences of an offer which had been accepted, but the legal consequences of an offer which had been refused; and the Chief Justice thought that it was impossible to infer from this enactment that the legislature intended to lay down by implication that the acceptance of payment by one of several promisees operated as a discharge of the claims of the others. But I am bound to say that the opinion of the majority of the Bench appears to be more in conformity with reason. If it is admitted that an offer to one of several joint promisees, whether accepted or not has the same legal consequences as an offer to all of them, the only possible conclusion appears to be that the acceptance of the offer discharges the obligation. It seems to me that the answer to the question can be found within the four corners of the Contract Act, and that it is not necessary therefore to look to the general law. Even if this view is not correct, it appears to me that, apart from

the presumption referred to above, which is of doubtful application in India, there can be no real question as to what the law is; the only question is as to what the facts in each particular case are. I hold therefore that the plaintiff was entitled to succeed. If the presumption is admitted to arise that the creditors were tenants-in-common, and not joint tenants it was rebutted in this case; and if the presumption does not arise, a fortiori the mortgagees were joint promisees and the payment to one of them discharged the whole debt. The appeal must therefore be allowed and the decree of the Court of first instance is restored with costs throughout.

R.N./R.K.

Appeal allowed.

A. I. R. 1918 Upper Burma 21

SAUNDERS, J. C.

Pauksi How & Co.—Plaintiffs—Appellants.

Sinwa Naung—Defendant—Respondent.

Civil Appeal No. 225 of 1917, Decided on 14th October 1917, against the order of Dist. Judge, Myitkyina.

(a) *Kachin Hill Tribes Regulation* (1 of 1895) Ss. 1 (3) and 4—Regulation does not apply outside defined hill-tracts.

The *Kachin Hill Tribes Regulation* applies to Kachins in the defined hill-tracts and does not apply outside those hill-tracts. [P 22 C 2]

(b) *Kachin Hill Tribes Regulation* (1 of 1895) S. 11—Suit triable outside hill tract—Jurisdiction of ordinary civil Courts is not superseded.

Section 11 of the *Kachin Hill Tribes Regulation* applies to suits triable within a hill tract by an officer exercising jurisdiction therein. It is permissive and gives the Special Court power to try any suit of the nature described, but it does not lay down, and it cannot be inferred, that where a suit is triable outside a hill-tract, the jurisdiction of the ordinary civil Courts is superseded. [P 22 C 2]

Lentaigne and Pillay—for Appellants.

Judgment.—This was a suit upon a mortgage which was filed in the District Court, Myitkyina, by the plaintiffs, a Chinese firm carrying on business in Bhamo and Mogaung. The defendant is a Kachin described in the plaint as residing in Kansai, Kamaing Subdivision, Myitkyina District. It is apparently admitted that Kansai is a hill tract as defined in *Kachin Hill Tribes Regn. 1 of 1895*, that is to say, a hill-tract to which that regulation has been extended. The plaint was returned by the District Judge to the plaintiff on the ground that he had no jurisdic-

tion, and the order directs that the plaint be returned for representation to the proper Court, which under the Kachin Hills Regulation is the Court of the Assistant Superintendent, Kamaing. This appeal is under O. 43, R. 1 (a), Civil P. C. The District Judge held that the suit was one between a Kachin as defined in the Kachin Hills Regulation and a non-Kachin, that the subject-matter of the suit lay in the Kachin Hills and that the defendant was a permanent resident there. The suit was, therefore, in the opinion of the District Judge, controlled by S. 11 of the Kachin Hills Regulation and should be tried by the Special Court established under the Kachin Hills Regulation and under the special law and procedure laid down therein. The grounds of appeal are that the District Judge was in error in holding that the District Court, of Myitkyina, had no jurisdiction to entertain the suit, that the cause of action arose at Mogaung which is not a hill-tract and as such the District Judge had jurisdiction, that the Judge erred in holding that the suit was barred under S. 11 of the Kachin Hills Regulation, and that he should not have returned the plaint for presentation to the Assistant Superintendent, Kachin Hills Tracts Kamaing.

The extent of the Kachin Hill Tribes Regulation is laid down in S. 1 (3) of the Regulation, which declares that it shall extend to such hill-tracts and shall apply to such hill tribes as the Local Government may by notification direct, and sub-S. 3 goes on to declare that S. 11 shall apply to all persons who may be parties to a suit or other proceeding of a civil nature in which any of the parties is a member of a hill tribe to which Regulation applies. The wording of this clause is not perhaps very clear, but there seems to be no reason for supposing that it extends, or was intended to extend, the operation of the Regulation beyond the local area to which by CL (3), S. 1, it is specifically extended. The District Judge, Myitkyina, would appear to interpret this clause as extending the operation of the Act to members of a hill tribe outside the hill tracts. If that is so, apparently a Kachin ordinarily resident in a hill-tract might come to Mandalay, contract debts in the bazaar and plead the Regulation as a bar to the jurisdiction of the Local Courts in the Mandalay District. Apart from the actual wording of the Regulation, it ap-

pears to me very improbable that it was the intention of Government that this should be possible. It is true that the regulation is extended to such hill tribes as the Local Government may, by notification in the Burma Gazette, direct, and by a notification, Political Department No. 17, dated 29th July 1914, the Lieutenant-Governor directs that the regulation shall apply to the undermentioned hill tribes in certain defined tracts, namely, Kachins and others. I think that this notification must be taken to mean what it says, that is to say, that it applies to Kachins in the hill-tracts defined and does not apply outside those hill-tracts. S. 3 defines what enactments are in force and apply to members of a hill tribe in a hill tract, and declares that no other enactment shall be deemed to apply to members of a hill tribe in a hill-tract.

It seems to me that it would be impossible to interpret this section as meaning that the enactments as set out in the schedule apply to members of a hill tribe outside a hill-tract without straining the plain meaning of the words. S. 11, which is referred to in S. 1 of the Regulation and on which the learned District Judge relies, lays down that the Deputy Commissioner and every Assistant Commissioner exercising jurisdiction within a hill tract may try any suit or other proceeding of a civil nature between parties any one of whom is a member of a hill-tribe. Nothing is said about the subject-matter of suit or about one of the parties being a permanent resident in a hill tract. This section, therefore, clearly applies to suits triable within a hill-tract by an officer exercising jurisdiction therein. It is permissive and gives the Deputy Commissioner or Assistant Commissioner power to try any suit of the nature described but it does not lay down, and it cannot be inferred, where a suit is triable outside a hill-tract, the jurisdiction of the ordinary civil Courts is superseded. S. 9, Civil P. C., declares that the Courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred, and S. 20 lays down that subject to certain limitations, every suit shall be instituted in the Court within the local limits of whose jurisdiction, among other things, the cause of action wholly or in part arises, and there can be no doubt that the plaintiff may select the forum in which to bring

his suit, provided that he complies with the provisions of S. 20. Here it is his case that the mortgage upon which he sued was executed in Mogaung, that is to say, within the jurisdiction of the District Judge of Myitkyina. There is no doubt therefore that even if the Kachin Hill Tribes Regulation extends beyond the limit of a hill tract, the fact that it lays down that the Deputy Commissioner or Assistant Commissioner may try a suit, cannot be a bar to the jurisdiction of the ordinary civil Courts. There will, therefore, be an order setting aside the order of the District Judge and directing him to admit the plaint and proceed to deal with it according to law. Costs will follow the final result.

K.N./R.E.

*Order set aside.***A. I. R 1918 Upper Burma 23**

SAUNDERS, J. C.

Emperor

v.

Nga Po Kyan—Convict.

Criminal Revn. No. 76 of 1918, Decided on 23rd April 1918.

Burma Excise Act (1917), S. 37—Manufacture of tari not prohibited or restricted in a district—S. 37 does not apply to possession of tari manufactured in such district.

In a district in which the tree-tax system is not in force and in which consequently the law does not prohibit or place any restriction upon the manufacture of tari it cannot be unlawfully manufactured and S. 37 does not, therefore, apply to the possession of tari manufactured in such a District. [P 25 C 2]

H. M. Lutter—for the Crown.

Judgment.—This is one of seven cases in which the accused have been convicted and sentenced to pay fines under S. 37, Burma Excise Act (Burma Act 5 of 1917). The charge in each case was that the accused had been in possession of less than four quarts of tari which had been illegally manufactured and that such possession was within five miles of a licensed tari shop. The District Magistrate is doubtful whether the convictions can stand. Burma Act 5 of 1917 only came into force on 1st October 1917, and though the law in respect of the possession of tari does not appear to have been materially altered, this result has been arrived at by a somewhat different method to that followed in the Act which has been superseded. For the purpose of the present case it is sufficient to point out that unfermented tari has been declared to be alcoholic liquor and that

alcoholic liquor is included in the meaning of the term "excisable article," while "manufacture" includes the tapping of tari producing trees and the drawing of tari from trees, S. 2, sub Ss. (a), (f) and (m). The manufacture of excisable articles is forbidden except under the authority and subject to the conditions of a license granted under the Act by S. 12 (a) of the Act, and by a notification of the Financial Department No. 71 dated 18th September 1917, the Local Government has been pleased to exempt from the provisions of S. 12 of the Act tari where the tree tax system is not in force.

The District Magistrate reports that the tree tax system is not in force in his District. The provisions of S. 12 (a) do not therefore apply to tari and there is no other provision in the Act making its manufacture illegal. S. 37 of the Act provides a penalty for the possession of an excisable article which the person possessing it knows or has reason to believe has been unlawfully manufactured. It is clear, therefore, that in a District in which the law does not prohibit or place any restriction upon the manufacture of tari it cannot be unlawfully manufactured and S. 37 does not therefore apply to the possession of tari manufactured in such a District. The District Magistrate has expressed doubt as to whether the possession was lawful in view of the fact that it has not been shown that the tari had been collected in unsmoked or unlimed pots. This doubt however has reference to another set of facts. S. 16 (1) of the Act provides that the Local Government may by notification prescribe a limit of quantity for possession of any excisable article and in exercise of the authority so granted the Local Government has by Financial Department notification No. 77 dated 18th September 1917, prescribed a limit of four reputed quart bottles in the case of tari; where the quantity of tari exceeds four quart bottles its possession is an offence punishable under S. 30 (a) of the Act subject to further exceptions made by Notification No. 72 referred to above, of which the Cl. 1 permits possession of tari intended for the manufacture of gur, jag-gery molasses or sugar, in a District where the tree-tax system is not in force if the tari is drawn either in smoked pots or in pots treated with lime. But inasmuch as in each of the cases here re-

ferred to the quantity of tari found was less than four quart bottles, it is clear that no offence was committed, however the tari may have been drawn. The convictions and sentences are set aside and fines must be refunded.

K.N./R.K. *Convictions set aside.*

A. I. R. 1918 Upper Burma 24

SAUNDERS, J. C.

Nga Po Tha and others—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeals Nos. 227, 228 and 229 of 1917, Decided on 27th November 1917.

(a) Penal Code (1860), S. 304, Part 2—Beating woman to death believing her to be possessed by evil spirit—Accused are guilty under S. 304, Part 2.

Accused, believing the deceased to be possessed by an evil spirit, beat her to death in the hope of curing her. The deceased protested that she was not possessed and did not consent to be beaten;

Held: that the accused were guilty of an offence under the part 2, S. 304, I. P. C.

[P 270 1]

(b) Penal Code (1860), S. 304—Intention is question of fact, to be decided on circumstances of each case.

Intention is a question of fact which must be decided upon the circumstances of each particular case. It may be a legal fiction, as for instance, where knowledge is presumed in the case of a person who is intoxicated and intention is the inference drawn from such knowledge, or it may be proved by evidence of the particular circumstances in each case. [P 26 C 1]

Maung Su—for Appellants.

H. M. Lutter—for the Crown.

Judgment.—This is a case of a kind which, though fortunately not common, is not unique. The deceased was believed to be possessed by an evil spirit and was beaten to death by four persons acting, it is alleged, under the mistaken belief that by beating her, she would be cured of her unnatural illness. Appellant 1 who is a Burmese sayu has been sentenced to death, and the other two appellants have been sentenced to transportation for life under S. 302, I. P. C. Accused 4 was sentenced to pay a fine of Rs. 50 or to suffer three month's rigorous imprisonment under S. 323, I. P. C., and this accused has not appealed. The facts of the case are briefly as follows:

Ma Chon, mother of Ma Me Te, called in appellant 1, who happened to be visiting the village, to attend her daughter, Ma Me Te, who had a sore upon her leg. The appellant, who apparently professes

to be a specialist in the cure of witchcraft, took with him the two other appellants, fellow villagers of the deceased, and one of them, Nga Shwe Pyan, a lover of Ma Me Te. He was also accompanied by Ma Me Tin, accused 4 who was said to be a notkadaw, described as a person who acts as a spirit medium, capable of becoming possessed by a not. Appellant 1 Po Tha, appears immediately to have assumed that the girl was possessed by an evil spirit and gave her a betel leaf to chew, and when she said that the leaf tasted hot, he declared that she was possessed by a spirit which must be exorcised by beating her. He and his companions thereupon beat and kicked her for a short time. She received several contusions described by the medical witness, and the treatment was evidently brutal enough to cause the mother, Ma Chon, to weep. Appellant, Po Tha, thereupon said the spirit had gone into Ma Chon. She was tested in the same way with a betel leaf and was then beaten from about 10 o'clock that night until just before dawn, when she succumbed to her injuries.

Although there is nothing on the record to show that appellant 1 was called in to drive out an evil spirit, the evidence in fact being that he was not called to do so but to treat an ulcer, it appears to me possible that there may have been some suspicion on the part of the mother or the girl's relations that she was possessed. The man, who called in appellant 1 says he was called for that purpose, and there seems to be no doubt that he professed to be able to cure such cases. It is also difficult to understand the conduct of the appellant, Shwe Pyan, in beating the girl to whom he was paying his addresses and subsequently her mother and of the villagers who, though they say they remonstrated, did not, as they certainly could have done, interfere more effectively and put a stop to the beating, if they had nothing more than appellant 1's word to induce them to think that the girl and her mother were "possessed." But whether this is so or not there is no evidence upon the record that either the girl, Ma Me Te, or her mother, Ma Chon, gave any consent to the treatment to which they were subjected. On the contrary it seems clear that Ma Chon at least protested that she was not possessed by an evil spirit and that she

should not be beaten. The learned Sessions Judge in convicting the accused has referred to the case of *Nga Po Kyaw v. King-Emperor* (1), in which the persons who inflicted a fatal beating upon a woman alleged to be possessed by an evil spirit were found to have committed an offence under S. 304-A, I. P. C., and the Sessions Judge has questioned the correctness of that decision. But it was expressly stated in the judgment of my learned predecessor in that case that the evidence left no doubt that the girl's mother and her relatives contemplated that she should be beaten, and that the girl herself voluntarily submitted to that treatment. The girl would seem to have been suffering from hysteria or some similar complaint for years, and among her own people she was universally believed to be under the domination of an evil spirit that had located itself in her body.

The case therefore differs from the present case in important particulars. Here there is no evidence upon the record that the girl was suffering from anything but an ulcer on her leg, or that there was any reason which would lead her relations to suppose that she was possessed of an evil spirit. As I have said above, it is possible that they did so, but there is not a particle of evidence to that effect. The woman whose death was caused, it is not suggested and there seems to be no reason whatever to suppose, was afflicted in any way. The only reason given for leading appellant 1 and his assistants to suspect that she was possessed and to turn their attention to her was that she performed the perfectly natural act of weeping, probably loudly, when she saw her daughter being severely beaten. Neither she nor her daughter consented, and the evidence indeed goes to show that Ma Chon, so far from consenting, protested vigorously against being suspected of being possessed and beaten in consequence. I have read the judgment of the Sessions Judge in Criminal Appeal No. 61 of 1893 which is referred to in *Po Kyaw's* case (1). It appears there that the girl had been afflicted for five years or so with hysteria or some form of hysterical mania; she was subjected to severe beating with sticks while in this condition by her relations. It does not appear that she

submitted or consented to the treatment. The learned Sessions Judge held that it was clear that the accused had no intention of causing bodily injury likely to cause death, nor had they any knowledge that they were likely to cause death. No reason whatever was given for this conclusion, but it was not questioned by the learned Judicial Commissioner who remarked:

"The fact that the deceased died from the shock of the beating need not necessarily enter into the consideration of the question of punishment and that death may have been accelerated by disease of the heart, but anyhow the appellants have not been convicted of the offence of causing death."

From the extracts of the medical evidence given in the judgment of the Sessions Judge in that case, it was apparent that there were very severe contusions on the body of the woman extending from the nape of the neck down to the thighs, and also on both shoulder joints extending to the elbows, that there must have been a repeated and protracted beating which was dangerous to life and which might have caused death.

The medical witness thought that the woman's death was caused by severe shock produced by the injuries sustained. Her heart was a little fatty and that might have accelerated death. The accused were sentenced by the Sessions Judge to two years' rigorous imprisonment, which was reduced by the Judicial Commissioner for the reasons quoted in *Po Kyaw's* case (1) to six months' rigorous imprisonment.

Mr. Burgess found that the beating was administered in perfect good faith, but as he went on to say it was carried out to excess and no precautions were taken to guard against misadventure, it is clear that he used the words "good faith" in some other sense than that with which they are used in the Penal Code. As S. 52 lays down that nothing is said to be done or believed in good faith which is done or believed without due care and attention, it seems obvious that the beating carried out to excess, without precautions to guard against misadventure, cannot have been administered in good faith. Nor do I think that the finding of the Sessions Judge was necessarily endorsed by the Judicial Commissioner or can be accepted, in the absence of any reasons, as authority for holding that where a number of persons

1. (1902-03) U B R.

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inflict a beating upon a woman which in the ordinary course of nature is sufficient to cause death or which is likely to cause death, it can be assumed that there was no intention to cause death or to cause such injuries. Intention is a question of fact which must be decided upon the circumstances of each particular case. It may be a legal fiction as for instance where knowledge is presumed in the case of a person who is intoxicated and intention is the inference drawn from such knowledge, or it may be proved by evidence of the particular circumstances in each case.

It appears to me further that in considering the question of sentences in the case referred to, Burgess, for whose opinion I in common with other Judges of this Court have a great respect, did not deal with the whole aspect of the matter. It is no doubt incontrovertible that there is no reason for punishing ignorance as ignorance, but where a person is convicted of a brutal crime of a kind repugnant to the natural instincts of mankind, it is necessary to pass a sentence which will punish such brutality even where it proceeds from ignorance, and I am not aware that any protest has ever been raised against the provisions of the law under which persons who have taken part in proceedings sanctioned possibly by ignorance but also by a belief in certain religious teachings, are subject to very severe penalties, e.g., in the case of suttee. It appears clear, moreover, that the occurrence of a case in 1917, even more brutal than that dealt with in Criminal Appeal No. 64 of 1893, goes to show that the punishment there considered appropriate has not had the effect of putting a stop to the practice complained of. The fact in the present case that the deceased woman did not consent to be beaten makes S. 304-A, I. P. C. inapplicable. If there was no intention to cause death or knowledge that death would ensue, the appropriate section would appear to be S. 325, I. P. C. If there was, the question is whether S. 302 or S. 304 applies.

As to appellant I, he described himself as a saya or doctor, and it must, therefore, be presumed that he had some knowledge, however slight and empirical, of the effects of violence upon human beings. The evidence goes to show that the deceased woman actually died while being

beaten; the witnesses who went into the house as soon as the appellants had left it, found her dead. The evidence is that the woman was kicked with the bare heel, beaten and slapped with the fist or open hand, and also that her feet and hands were joined by a rope by which she was lifted from the ground and dropped. Although the witnesses did not depose to this last treatment in the Committing Magistrate's Court, it seems unlikely that they can have invented it, but whether it took place or not it is obvious from the medical evidence that the woman received injuries from which she could not possibly have recovered. She was a woman of 45 years of age or more, of weekly physique. The ordinary lay person looking at her would consider that she was somewhat weak. Her whole body and head were covered with a mass of bruises. Death was due to internal haemorrhage and shock, and the Medical Officer said that these were sufficient in the ordinary course of nature to cause the death of a normally healthy person.

I think it is impossible to believe that appellant I did not know that the treatment to which this woman was subjected was likely to cause her death. The question whether he intended to cause such injuries is not so easy to answer. Assuming that he did believe that she was possessed by an evil spirit, his primary intention no doubt was not to cause the patient's death but to drive the spirit out. There is no doubt that a belief in witchcraft is extremely common among Burmans, and it is difficult to imagine that if they did not think that the treatment of Ma Chon was justified and that it would have the desired effect, the villagers would not have interfered early in the proceedings. That they did not interfere is however no evidence that the conduct of the appellant was not unnecessarily brutal. Great stress has been laid by the learned advocate who has argued this appeal on the reply made by appellant I to remonstrances, that he was not beating the woman but was beating the spirit and that the woman would not be marked by so much as a scratch. But it appears to me that very much stronger evidence would be necessary to prove that the appellant acted in the bona fide belief that the laws of nature would be suspended in this particular instance for his convenience. It is necessary to assume

a certain standard of common sense among all persons accused of committing crime, in the absence of a plea or evidence of insanity or mental deficiency.

But I do not think that it is necessary to convict the appellant under S. 302 of murder. He certainly had no intention, as far as can be judged, to kill the deceased and the intention, which may be inferred from knowledge, is not an intention which must necessarily be inferred in every case. Up to a certain point the appellant's acts, though in the circumstances probably criminal, did not endanger life and I do not think that it is necessary to infer that because he went beyond that point, he intended to cause injuries which he knew to be likely to cause death. Each of the blows struck by himself was probably comparatively light, and the prevailing intention throughout would seem to have been to drive out the spirit. In any case the reasons given by the learned Sessions Judge for passing the capital sentence appear to me to be too remote to be sound, and it was pointed out in *Nga Tet Kyu v. Emperor* (2) that when the discretion as to punishment is vested in the Judge, it is his duty to exercise it and not to compel the executive Government to interfere by way of remission. The sentence of death is very appropriately imposed in cases where from motives of revenge, anger or the like a person causes death by such means as make it clear that it was his intention that his victim should not escape. In the case of appellants 2 and 3 the same remarks apply, with this qualification that they were probably acting under the instructions and influence of appellant 1 and that they had not the same means as he had of judging of the effect of their acts. I think however that in treating the deceased woman as the evidence shows they did treat her, the woman herself being elderly and weakly, they must have known that they were likely to cause death. The convictions and sentences are set aside, and in lieu thereof, appellant 1, Po Tye, is convicted of an offence punishable under S. 301, I. P. C., part 2, and Nga Po Tye sentenced to undergo transportation for seven years. Nga Shwe Pyan and Nga Pyaing are convicted of an offence punishable under S. 304, I. P. C., part 2, and sentenced to

undergo two years' rigorous imprisonment each.

K.N./R.K.

Sentences reduced.

A. I. R. 1918 Upper Burma 27

SAUNDERS, J. C.

Nga Tet Pyo and others—Appellants.

v.

Ma Ngwa Ka and others—Respondents.

Second Appeal No. 41 of 1916, Decided on 15th September 1916.

Civil P. C. (1908), O. 47, R. 4 (2) (b)—Provisions of O. 47, should be strictly construed.

The provisions of O. 47, Civil P. C., should be strictly construed, and no application for review of judgment on the ground of discovery of new matter or evidence which was not within the knowledge of the applicant or could not be adduced by him at the first trial should not be granted without strict proof of such discovery. (P. 24 C. 1)

In Favour of Appellants.

C. G. N. P. C.—for Respondents.

Judgment.—The plaintiffs sued to obtain a share in certain land which they claimed formed an undivided estate. Their claim was resisted on the ground that the land was joint family property. The plaintiffs' suit was dismissed in regard to two out of three pieces of land. The plaintiffs then applied for a review on the ground that they had discovered new evidence to prove that the lands were joint family property. This evidence consisted of copies of settlement registers and maps. Notice was issued to the defendants who objected to the application which was, however, granted, and the Court, admitting this evidence, proceeded to give the plaintiffs decrees as prayed for. On appeal to the District Court the defendants objected to the admission of the application for review. The District Court, however, dismissed the appeal and the defendants, or three of them, now come to this Court in second appeal under S. 100, Civil P. C.

It was a ground of appeal in the District Court, as it is a ground here, and as it was a ground of the defendant's objection to the review, that there was no reason why the evidence which the plaintiffs sought to produce after judgment had been delivered should not have been produced in the first instance. To this there appears to be no answer. Settlement maps and registers are public documents the existence of which is known to every one, and a careful litigant would certainly examine these registers and maps before embarking on litigation. O. 47, R. 4 (2) (b), expressly lays down that no

application for review shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made, without strict proof of such allegation. There was here, not merely no strict proof of such allegations; there was no proof whatever; there was not even an affidavit. No witnesses were examined and the Judge was clearly committing a very serious illegality in admitting the application for review in defiance of the provisions of O. 47, R. 4. It is necessary that the provisions of O. 47, should be strictly construed, and that parties should not be at liberty to make up, at any time, for indolence or carelessness before coming to Court, by putting in evidence after judgment which they might have put in, if they had exercised due diligence, at the trial. The order allowing the review was clearly an improper order and must be set aside. There was, in the absence of the evidence adduced, no evidence to justify a decree in respect to two pieces of the land and the original decree of the Township Court must be restored with costs throughout.

K.N./R.K.

*Order set aside.***A. I. R. 1918 Upper Burma 28 (1)**

MCCOLL, J.

H. E. Mandari—Appellant.

v.

R. Misser—Respondent.

Civil Appeal No. 273 of 1916, Decided on 14th December 1916.

Civil P. C. (1908), O. 21, R. 90 and O. 43, R. 1—Order dismissing application to set aside sale is not decree—Appeal against order of District Judge lies to Divisional Court—Upper Burma Civil Courts Regulation (1896), S. 12 (3).

An order dismissing an application to set aside a sale under O. 21, R. 90, Civil P. C., is not a "decree" and therefore an appeal against such an order of the District Court lies to the Divisional Court, even in cases in which the value of the subject-matter is above Rs. 10,000. [P 28 C 2]

*H. M. Lutter—for Appellant.**C. G. S. Pillay—for Respondent.*

Judgment.—The respondent in execution of a decree for over Rs. 56,000 against the appellant had two oil wells sold. The appellant applied under O. 21, R. 90, to have the sale set aside on the ground of material irregularity. The District Court set aside the sale of one well but confirmed the sale of the other. Against that

order the appellant has appealed to this Court. I think it is clear that the appeal lies to the Divisional Court. S. 12 (13), Upper Burma Civil Courts Regulation, runs:

"An appeal from a decree of a District Court shall, when the value of the suit in such Court is Rs. 10,000 or upwards, lie to the Court of the Judicial Commissioner and in any other case to the Divisional Court. . . ."

Thus it is only appeals against decrees that lie to this Court. The order appealed against, though it relates to the execution of a decree in a matter arising between the parties, is not a decree because an appeal lies against it, is an appeal against an order S. 2 (2), Civil P. C. under O. 43, R. (1) (j). The appeal therefore lies to the Divisional Court. Reliance is placed on Civil Appeal No. 74 of 1916 between the same parties which related to the execution of the same decree, which was entertained by the learned Judicial Commissioner, but in that case the order appealed against was passed under O. 21, R. 83, and an appeal did not lie as an appeal against an order and therefore, the order was a decree. The memorandum of appeal is returned for presentation to the Divisional Court. The appellant will pay the respondent's costs in this Court.

K.N./R.K.

*Memorandum returned.***A. I. R. 1918 Upper Burma 28 (2)**

RIGG, J. C.

Nga Meik and another — Plaintiffs—Appellants.

v.

Nga Gyi—Defendant—Respondent.

Second Appeal No. 220 of 1916, Decided on 19th March 1917.

(a) Civil P. C. (1908), S. 80—Suit against clerk for recovery of money lost through his carelessness—Suit cannot be instituted without notice under S. 80.

Plaintiffs sued defendant, the Bench Clerk of a Subdivisional Judge, for the recovery of a sum of money which they alleged had been lost through his carelessness in losing or concealing an application for the execution of a decree, which became time-barred through the loss:

Held: that the suit could not be instituted without giving the defendant a notice under S. 80 Civil P. C. [P 30 C 1]

(b) Civil P. C. (1908), S. 2 (2)—"Adjudication"—Meaning of.

The adjudication referred to in the definition of a decree in S. 2 (2), Civil P. C., is an adjudication granting or refusing any of the reliefs claimed in the plaint and embodied in a formal declaration. [P 29 C 2]

(c) Civil P. C. (1908), Ss. 80 and 97—Decision that notice under S. 80 is necessary be-

fore institution of suit does not necessarily amount to preliminary decree.

The decision in a suit that a notice under S. 80 Civil P. C., was necessary before the institution of the suit does not amount to a preliminary decree, where the plaintiff alleges that he has given notice, and the decision is not therefore appealable. [P. 30 C. 1]

C. G. S. Pillay—for Appellants.

S. Mukerjee—for Respondent.

Judgment.—The respondent, Maung Gyi, was the Bench Clerk of the Subdivisional Judge, Yamethin. The appellants sued him for the recovery of a sum of money they alleged they had lost through his carelessness in losing or concealing an application for an execution of a decree, which became time barred through the loss. They asserted in the plaint that about 10th February 1915 they sent the defendant, Maung Gyi, a notice under S. 80, Civil P. C., but denied that any notice was necessary. The receipt of the notice was not admitted, and a preliminary issue was fixed as to whether such notice was necessary or not. The Subdivisional Judge decided that it was and on appeal the decision was upheld. The date of the decision of the Subdivisional Judge was the 19th January, and the 7th February was fixed for the hearing of evidence. On the 5th February, the appeal was filed and was decided the same day. On the 7th, the appellant failed to produce any evidence and their suit was dismissed under O. 17, R. 3. The final order was one rejecting the plaint under O. 7, R. 11 (d). The rule did not apply to the case, as there was no statement in the plaint from which it appeared that the suit was barred by law. The District Court dismissed the appeal. In his judgment the District Judge pointed out that O. 17, R. 3, had no application to the case as the hearing had not been adjourned at the instance of the appellants, but at the same time he said that the appellants had no valid excuse for not producing their evidence on the date fixed for hearing.

The appellants appeal to this Court on the ground that there has been a substantial error in the procedure of the Subdivisional Court in not granting an adjournment on payment of costs for the issue of subpoenas to their witnesses after the dismissal of the appeal on the 5th February. Two other points have been argued at the hearing: (1) whether notice was necessary to Maung Gyi under S. 80,

Civil P. C., and (2) whether the lower appellate Court had power to decide the point, as the decision of the preliminary issue was not, it is contended, a decree. As regards the latter points, I am of opinion that the lower appellate Court erred in entertaining the first appeal. Decree is defined in S. 2 (2), Civil P. C., as the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit, and the decree may be either preliminary or final. In the present case there was no formal expression of adjudication, and none was ever asked for and refused. Undoubtedly if the expression "matters in controversy" be interpreted in its widest sense, it would include every question in dispute between the parties. The result of such an interpretation would be that the parties would be bound to appeal under S. 97 of the Code against every issue that was decided against them in the course of the trial, and litigation would be prolonged indefinitely. O. 15, R. 3, provides that where the parties are at issue on some question of law or fact and issues have been framed, if the Court is satisfied that no further argument or evidence than the parties can at once adduce is required upon such of the issues as may be sufficient for the decision of the suit, the Court may proceed to determine such issues, and if the finding thereon is sufficient for the decision, may pronounce judgment accordingly whether the summons has been issued for the settlement of issues only, or the final disposal of the case, provided that where the summons has been issued for the settlement of issues only, the parties or their pleaders are present and none of them objects.

Under S. 33, a decree must follow on the judgment. A decree of this kind may be either a final or preliminary decree: it is based on some preliminary point or points that are held to govern the whole case. Besides this O. 21, Rr. 12-18, specify cases where a preliminary decree can be passed. If these provisions are borne in mind, it will be seen that the adjudication referred to in the definition of a decree is an adjudication granting or refusing any of the reliefs claimed in the plaint, and embodied in a formal declaration. All that the decision

of the Subdivisional Judge amounted to was to declare that the notice was necessary. The appellants said that notice had been given, and an appeal against the Subdivisional Judge's decision was clearly premature.

With reference to the necessity of notice, I have no doubt that the Courts below were right in affirming it. Maung Gyi is a public officer and he received the application for execution in that capacity. In the absence of the Judge, para. 554, Upper Burma Courts Manual, provides that application shall be received by a clerk, whose duty it is to note on the application the date of receipt. There is certainly no proof on the record that notice was ever sent to Maung Gyi of the suit. The question is whether the lower Courts were right in dismissing the suit without giving the appellants a further opportunity for calling evidence. The only excuse given for failing to apply for summonses for witnesses is that the plaintiffs-appellants were appealing to the District Court. They did not ask the Subdivisional Judge to stay the case pending the result of the appeal, which was only filed two days before the case came on for hearing and was summarily rejected. I am of opinion that the excuse was a very weak one and that the appellants ought to have had their witnesses in attendance. They had ample time for applying for the issue of summonses. The appeal is dismissed with costs.

K.N./R.K. *Appeal dismissed.*

A. I. R. 1918 Upper Burma 30

McCOLL, J.

Maung Shwe Myat—Appellant.

v.

Maung Shwe Ban and others—Respondents.

Second Appeal No. 260 of 1916, Decided on 12th December 1916.

(a) Civil P. C. (1908), Sec. 2 and 47—“Decree”—Scope of—Determination of question under S. 47.

A decree includes the determination of any question within S. 47, Civil P. C., except a determination against which an appeal lies as an appeal from an order. [P 31 C 1]

(b) Civil P. C. (1908), Sec. 2, 47 and 100—O. 21, R. 90—Order dismissing application to set aside sale is not decree—Second appeal does not lie.

An order dismissing an application to set aside a sale under O. 21, R. 90, Civil P. C., falls under S. 47 of the Code, but is appealable as an order, and is, therefore, not a decree, and conse-

quently no second appeal lies in respect of it: 19 Cal 683 (P C) and 26 Cal 539, *Expt.*

[P 31 C 1]

C. G. S. Pillay—for Appellant.

J. C. Chatterjee—for Respondents.

Judgment.—At a sale in execution of a decree the appellant purchased certain land. The decree-holders applied to have the sale set aside on the ground of material irregularity in conducting it. Their application having been dismissed, they appealed unsuccessfully to the District Court and then appealed to this Court. The appeal was admitted and heard and the case was remanded under O. 41, R. 23, read with O. 42 as the allegations of material irregularity had not been enquired into. The Township Judge then enquired into these allegations and again dismissed the application. The decree-holders appealed and the District Court directed the sale to be set aside. The auction-purchaser has now come to this Court in second appeal and a preliminary objection has been taken that a second appeal does not lie, as the appeal to the lower appellate Court lay under O. 43, R. 1 (j), Civil P. C. For the appellant it is urged that the matter in dispute related to the execution of a decree and arose between the decree-holders and the representative of the judgment-debtor and, therefore, came under S. 47, Civil P. C., and that consequently a second appeal lies. Reliance is placed on *Prosunno Kumar Sanyal v. Kali Das Sanyal* (1) and on *Hira Lal Ghose v. Chundra Kanto Ghose* (2). At first sight it looks as if there were some inconsistency in the Civil Procedure Code, but if the matter be gone into the apparent inconsistency disappears. In the first case cited above a suit was brought to set aside a sale on the ground of fraud, and it was held that the matter fell under S. 244 of the Code of 1882 and that a separate suit did not lie. In the second case an application was made to have a sale set aside on the ground of fraud and material irregularity in conducting the sale, and it was held that as the matter came under S. 244 of the Code of 1882, a second appeal did lie.

The judgment of Banerjee, J., in the latter case is illuminating. He held that a second appeal lay because the grounds on which it was desired to have the sale set-

1. (1892) 19 Cal 683=19 I A 166 (P C).

2. (1899) 26 Cal 539.

aside were not entirely comprised in S. 311 of the Code of 1882, inasmuch as fraud was alleged—it is to be noted that the words "or fraud" in O. 21, R. 90, are new—and that, therefore, as part of the order did not fall under S. 588 but did come under S. 244 it was a decree and a second appeal lay. In the present case the application was to have the suit set aside on the ground of material irregularity in conducting it and fell under O. 21, R. 90, and an appeal lay to the lower appellate Court under O. 43, R. 1 (j). It undoubtedly was a matter relating to the execution and satisfaction of a decree and it arose between the decree-holders and the representative of the judgment-debtor. The order passed, therefore, came under S. 47, Civil P. C., but nevertheless it was not a decree. In S. 2, a decree is said to include the determination of any question within S. 47 but not to include any adjudication from which an appeal lies as an appeal from an order. It is necessary to read this definition so as to exclude inconsistency and, therefore, it must be read as declaring that a decree includes the determination of any question within S. 47, Civil P. C., except a determination against which an appeal lies as an appeal from an order. The definition in the Code of 1882 runs as follows:

"Decree means the formal expression of an adjudication upon any right claimed or defence set up, in a civil Court, when such an adjudication, so far as regards the Court expressing it, decides the suit or appeal. An order rejecting a plaint, or directing accounts to be taken, or determining any question as referred to in S. 211, but not specified in S. 588, is within this definition; an order specified in S. 588 is not within this definition."

It was thus clearly laid down that all orders that came within the wording of S. 244 were not decrees and though the language used in the present Code is not the same, I do not think there has been any change in the law in this respect. In the present case the order of the Township Judge, though it fell under S. 47, Civil P. C., was appealable as an order and was, therefore, not a decree, and consequently a second appeal does not lie. It has been suggested that the memorandum of appeal should be taken as an application for revision, but none of the grounds are good grounds for revision. The appeal is accordingly dismissed with costs.

R.N./R.K.

Appeal dismissed.

A. I. R. 1918 Upper Burma 31

McCOLL, J.

Ma Shwe Pu—Plaintiff—Appellant.

v.

Maung Po Dan and another—Defendants—Respondents.

Civil Appeal No. 117 of 1916, Decided on 5th December 1916.

Stamp Act (1879), S. 35—Sut to set aside award—Award not duly stamped—Plaintiff is not liable to pay deficiency and penalty.

In a suit to have an award set aside on the ground of the misconduct of the arbitrators, the plaintiff cannot be called upon (1) to prove that the award is not duly stamped, to make up the deficiency, in the stamp and to pay the penalty under S. 35, Stamp Act, nor (2) as in such a case the plaintiff is entitled not to accept the award, but to prevent its being acted upon, and if the allegations of misconduct can be proved without leading into the award, the award is not sought to be put in evidence; *Cheppel v. Bowser* (1889) 4 M. & W. 361, 362 (Ct. Q. B.).

J. C. Chatterjee—for Appellant.

J. C. Mukerjee—for Respondents.

Judgment.—The plaintiff-appellant brought a suit to have an award set aside on the ground of misconduct of the arbitrators. The award was stamped with Rs. 5 and the learned District Judge directed the plaintiff-appellant to pay deficient stamp duty and penalty amounting in all to Rs. 2,532-5-0, as the award directed partition of property. As she failed to pay this sum her suit was dismissed. I think the learned District Judge was clearly wrong. The award could of course not be acted upon unless stamp duty and penalty were paid, but the plaintiff-appellant did not want it acted upon; it was to prevent its being acted upon that she went into Court. Again it could not be admitted in evidence without stamp duty and penalty being paid, but of what could it be evidence? It could only be evidence of the decision of the arbitrators. The plaintiff-appellant did not necessarily want to prove that. She alleged that the arbitrators had taken Rs. 1,000 from the defendants-respondents as arbitration fees. That amounted to an allegation of corruption. Again she alleged that they had not examined her witnesses. If she proved these two things, that might be a sufficient reason for setting aside the award, whatever the contents of the award might be, and it would not be necessary for the District Judge even to see what those contents were. Thus she might succeed without the

award being put in evidence at all. On the other hand the putting of the award in evidence might be vital for the defendants respondents' case and then it would be for them to pay the stamp duty and penalty.

"The object of both the Statute and Common law would be defeated, if a contract, void in itself, could not be impeached, because the written evidence of it is unstamped, and, therefore, inadmissible. If that were so a party entering into such agreement might avoid the consequences of its illegality, by taking care that no stamp should be affixed to it. I think, therefore, that in all cases where the question is whether the agreement is void at Common law or by Statute, and the party introduces it, not to set it up and establish it, but to destroy it altogether, there is no objection to its admissibility": *Coppock v. Bower* (1).

The decree of the District Court is reversed and the suit is remanded under O. 41, R. 23, for a decision on the merits. Costs of this appeal will abide the final result. The plaintiff-appellant will be given a certificate under S. 13, Court-fees Act.

K.N./N.K.

Decree reversed.

1. (1838) 4 M & W 361.

A. I. R. 1918 Upper Burma 32 (1)

McCOLL, J.

Nga San Balu—Applicant.

v.

Mi Thaik and another — Opposite Parties.

Civil Revn. No. 162 of 1915, Decided on 2nd October 1916.

Civil P. C. (1908), O. 21, Rr. 58, 60 and 61—Application under O. 21, R. 58 (1)—Court making investigation—It is bound to pass orders under O. 21, Rr. 60 and 61—Dismissal of application after investigation on ground of delay is illegal.

If a Judge is of opinion that an application under O. 21, R. 58 (1), has been designedly or unnecessarily delayed he may refuse an investigation, but if he makes an investigation he is bound to pass orders under O. 21, R. 60, or under O. 21, R. 61, Civil P. C., and the dismissal of the application on the ground of delay after investigation has been made is illegal.

S. Mukerjee—for Applicant.

C. G. S. Pillay—for Opposite Parties.

Judgment.—The Township Judge, after holding an investigation under O. 21, R. 58, and reviewing the evidence, dismissed the application without coming to any finding, on the ground that it had been made too late. Considering the circumstances of the case it certainly could not be said that the application had been designedly delayed and I should feel inclined to construe the word "unneces-

sarily" in the proviso to O. 21, R. 58 (1), in a generous way. Be that as it may, if the Township Judge had only read this proviso, he would have seen that it did not apply because the investigation had already been made. If a Judge is of opinion that an application under O. 21, R. 58 (1), has been designedly or unnecessarily delayed he may refuse an investigation, but if he makes an investigation he is bound to pass orders under O. 21, R. 60, or under 21, R. 61, Civil P. C., and the dismissal of the application on the ground of delay after the investigation had been made was illegal.

On behalf of the respondent it has been suggested that the investigation should have been made by the Subdivisional Court, but it is clear from O. 21, R. 52, that it is the Court which has custody of the property and not the attaching Court that has to make the investigation. The order of the Township Court is set aside and the application is remanded to that Court in order that it may be disposed of according to law. There will be no order as to costs, as the respondent was not responsible for the mistake made.

K.N./R.K. *Application remanded.***A. I. R. 1918 Upper Burma 32 (2)**

McCOLL, J.

Nga Po Nyun—Defendant—Appellant.

v.

Mi Yin—Plaintiff—Respondent.

Civil Appeal No. 308 of 1915, Decided on 27th October 1916.

(a) Transfer of Property Act (1882), Ss. 60 and 68—S. 98 must be read subject to S. 60.

Section 98, T. P. Act, must be read subject to S. 60 of the Act, which applies to all kinds of mortgages, anomalous as well as those described specifically in the Act. [P 33 C 2]

(b) Mortgage—Redemption—Right cannot be extinguished except by order of the Court or act of parties.

However a mortgage bond be worded, the right to redeem cannot be extinguished except by an order of the Court or an act of the parties, i. e., an act subsequent to the mortgage. [P 34 C 1]

(c) Mortgage—Construction—"Once a mortgage always a mortgage"—Meaning of.

"Once a mortgage always a mortgage" means that an estate cannot at one time be a mortgage and at another time cease to be so by one and the same deed: 2 *Bom* 231, 1 *Rel on*; 21 *Mad* 10 and *Bom* 297, *Ref.* [P 34 C 1]

(d) Mortgage—Construction—Mere insertion of forfeiture clause does not make simple mortgage anomalous—Mortgage is still subject to provisions of S. 60, T. P. Act (1882).

The mere insertion of a forfeiture clause in a simple mortgage-bond does not make the mort-

gage anomalous, but even if it were so, the mortgage would still be subject to the provisions of S. 60, T. P. Act. [P 34 C 2]

(e) Mortgage—Construction—Mortgage—Bond construed.

A mortgage bond contained the following clause: "When five months have elapsed if the principal and interest be not paid and the property redeemed, let the creditor go with this mortgage-bond to the Town Lots Office and effect a mutation of names and take the property as his absolutely;

Held: that the failure of the mortgagor to pay the principal and interest within five months did not of itself convert the mortgage into a sale, and that the right to redeem continued in spite of such failure: (1907-09) U B R 2 Mortgage 1, Fall. [P 34 C 1]

(f) Mortgage—Debt—Tender of—Tender before it is payable is of no effect.

A tender of the mortgage-debt before the latter becomes payable under the terms of the mortgage-deed is of no effect. [P 34 C 2]

J. C. Chatterjee—for Appellant.

R. K. Banerjee—for Respondent.

Judgment.—The plaintiff-respondent sued to redeem a house and ground which she had mortgaged to the defendant-appellant for Rs. 50. The latter pleaded that a clause in the mortgage-deed gave him the right to obtain a mutation of names in the Town Lots office if the mortgage-money and interest were not paid within five months, that he had done so and the property had become his. The plaintiff-respondent alleged that she had made one tender to the defendant-appellant's wife and one to his advocate and that the money had not been accepted. The defendant-appellant denied both tenders.

The learned District Judge held that the contract could not execute itself and that plaintiff-respondent was entitled to redeem. He found that the plaintiff-respondent had tendered the money due to the defendant-appellant's wife four months after the execution of the mortgage-deed and held that defendant-appellant was not entitled to interest after that date. He gave plaintiff-respondent a decree, permitting her to redeem the property for Rs. 51 erroneously calculating the interest at the rate of 6 per cent. per annum. It is now contended that the mortgage was an anomalous one, that the parties are therefore bound by its terms and that in accordance with one of them the property had become the defendant-appellant's. This condition runs as follows:

"When five months have elapsed if the principal and interest be not paid and the property redeemed, let the creditor go with this mortgage-bond to the Town Lots Office and effect a muta-

tion of names and take the property as his absolutely."

Nga Kyaw v. Nga Yu Nut (1) was a very similar case. It was there held that such a contract was not intended to execute itself and that a further transaction was necessary before the land could become the property of the mortgagees. But it is contended that the language used in the document in that case differs from that used in the present case and that it was because of the words "if . . . we fail to redeem, we will make over outright" that it was held that a further transaction was necessary, whereas in the present case nothing remained to be done by the mortgagor. I am unable to accept this view.

I think it is clear that S. 98, T. P. Act, must be read subject to S. 60. It is one of the last sections in Ch. 4, in which the rights and liabilities of the parties to the different kinds of mortgages described in S. 58 are laid down, and enacts that when a mortgage does not come within the definitions of those mortgages and is not a combination of the 1st and 3rd kinds or of 2nd and 3rd, then the rights and liabilities of the parties must be determined by the contract itself. This does not, in my opinion, take anomalous mortgages out of the operation of S. 60, which occur at the beginning of the chapter and is clearly meant to apply to all mortgages. The following passage from Gour's Law of Transfer in British India, Ed. 3, p. 729, is illuminating:

"In the Civil Law the debtor was allowed to redeem the estate on payment of his debt at any time before the sentence passed, and this right he exercised in spite of a covenant to the contrary expressly made in the deed. The Civil Law always looked at the substance of the transaction, and argued that since by mortgage the property is conveyed by way of security for the loan, the creditor was not entitled to the property, if the debtor could otherwise pay off his debt. But this view was foreign to the English Common Law, which rigidly enforced the covenant for forfeiture on breach of the condition. Following, however, the principles of the Civil Law, the Courts of Equity readily recognized the severity of literally enforcing mortgage contracts. But while the debtors had the power to strike at the rigour of the law, the Courts of Equity in England possessed no such powers. On the other hand, they professed to follow the law whilst mitigating its evils, and so in England, while holding that on breach of the condition the mortgagee had the legal estate, still as it was unreasonable that he should retain for his own benefit what was intended as a mere security, they allowed the mortgagor to redeem on pay-

1. (1907-09) U B R 2, Mortgage 1.

ment of the mortgage money and costs, notwithstanding the forfeiture at law. And this right, which was the creature of equity and the object of its solicitude, came to be designated the equity of redemption. Indeed, to the Judges of Common Law, it was an innovation which they struggled hard to oppose, but the Courts of Equity justified its intervention on the ground that the clause as to forfeiture was in the nature of a penalty which should be relieved against."

I think there can be no doubt that the legislature deliberately embodied this equitable principle in S. 60, T. P. Act, and as it is an equitable principle, Courts of equity are bound to follow it even where the Transfer of Property Act is not in force. The principle is that, however the mortgage-bond be worded, the right to redeem cannot be extinguished except by an order of the Court or an act of the parties; i. e., an act subsequent to the mortgage. In *Bapuji Apaji v. Senawaraji Harvadi* (2) it was explained that the rule "once a mortgage always a mortgage" meant that an estate could not at one time be a mortgage and at another time cease to be so by one and the same deed. In *Kanaran v. Kutooly* (3) it was held that a stipulation in a mortgage that if the mortgage money were not paid on the due date the mortgagor would sell the property to the mortgagee at a price to be fixed by an umpire, was unenforceable as constituting a fetter on the equity of redemption. In *Kanhayalal v. Narhar* (4) Chandavarkar, J., said :

"The law is well established that, though once a mortgage always a mortgage and no clog can be placed by the mortgagee on the mortgagor's equity of redemption, it is open to both of them to enter into a contract subsequent to the mortgage for the sale of the mortgaged property to the mortgagee."

but though the District Judge had held that there had been a subsequent transaction, which the parties had for years treated as a sale, it was held that the right to redeem had not been extinguished because the parties had acted under the mistaken belief that the forfeiture clause was enforceable and their conduct had not been the consequence of a transaction independent of the mortgage. Several other rulings could be cited to the same effect. It is obvious, therefore, that if a forfeiture clause turned a simple mortgage into an anomalous one, it would still be subject to the equitable rule contained in S. 60, T. P. Act; but I am of opinion

that the mere insertion of a forfeiture clause in a mortgage-bond does not make the mortgage anomalous, the forfeiture clause is merely of no effect. The plaintiff-respondent is, therefore, entitled to redeem. The learned District Judge held that the defendant-appellant was entitled to interest for four months only because the plaintiff respondent at the end of that time had tendered payment to defendant-appellant's wife. Apart from the question whether she could be considered her husband's agent—they are ponnas—the tender, if made, could have no effect because the bond provided for a mortgage to last five months and so the money had not yet become payable. The plaintiff-respondent also alleged a tender to defendant-appellant's Advocate two months before the institution of the suit. There is one witness on her side who deposes to this tender, but the Advocate, called as a witness by defendant-appellant, denied it and stated that the plaintiff-respondent had asked for time. There is nothing to show which of the two spoke the truth, and I must decide that the tender is not proved. The interest due up to the institution of the suit is Rs 39-6-4. The plaintiff-respondent could have saved further interest by depositing the redemption money in Court. As she did not do so she will pay interest at the rate of 12 per cent. per annum from the institution of the suit to the date of payment. The decree of the District Court is modified accordingly. There will be no order as to the costs of this appeal.

K.N./R.K.

Decree modified.

A. I. R. 1918 Upper Burma 34

RIGG, J. C.

Nga San Nyein and others—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeals Nos. 24 to 33 of 1917. Decided on 27th March 1917.

(a) Evidence Act (1872), S. 30—Confession of co-accused is not proper basis for conviction in absence of other evidence.

The confession of a co-accused is not the same thing as the testimony of an accomplice and stands on a different footing. It may be taken into consideration as lending support to other evidence in the case. But if there is no other evidence, it is not a proper basis for a conviction. It is not strengthened by the fact that it is supported by the other confessions, whether these have been made in such circumstances as to preclude the theory that there has been con-

2. (1877-78) 2 Bom 231.

3. (1898) 21 Mad 110.

4. (1903) 27 Bom 297.

nivance between the persons making the confession or not. *Case-law discussed.* [P 36 C 1]

(b) Criminal Trial—Confession—Retracted confession—Value of.

The weight to be given to a retracted confession depends on the circumstances under which it is made, and on the intrinsic credibility of the confession: 1 L B R 238, *Rel. on.*

[P 37 C 1]

(c) Criminal Trial—Procedure—Examination of accused—Object is to afford him opportunity of explaining away evidence against him.

The object of examining an accused person is to afford him an opportunity of explaining away evidence against him. Each point appearing in evidence should be put to the accused and he should be invited to offer his explanation or comment on it. Anything in the nature of cross-examination should be avoided. [P 39 C 1,2]

C. G. S. and L. Pillay—for Appellants.

H. M. Lutter—for the Crown.

Judgment.—Nga San Nyein, Nga Ngwe Zin, Nga Kyi Byu, Nga Hime, Nga San Byaw, Nga Shin, Nga Yan Nyein, Nga Po Min, Nga Thu Daw and Nga Tet Si have all been convicted by the Sessions Judge, Magwe, of committing dacoity with murder at Kyaungyagan on the 19th September last and with the exception of Nga Tet Si had been sentenced to death. There is no doubt whatever that a dacoity was committed in the course of which Maung Nyi Maung was killed by some of the dacoits. The evidence shows that late at night, six or seven men came armed with daks, sticks and a tube gun to the house of Maung Shwe Daik. They demanded money and some of them called out that they had caught one of the inmates of the house. Thereupon San Kwin and Nyi Maung attacked the dacoits with daks. Both of them were wounded and Nyi Maung died three days later in the Yenangyaung hospital. The fight took place whilst the dacoits were still near the house of Shwe Daik and not whilst they were retreating after abandoning their attempt to commit the robbery. S. 396 clearly applies to the case. San Kwin and Nyi Maung were justified by the right of private defence in attacking the dacoits, who were not justified by the provocation thus given in killing Nyi Maung. Nyi Maung was cut several times with a dah, one of the wounds being a severe one on the back, and there can be no doubt that in causing his death, his assailants committed murder. San Kwin wounded one of the dacoits on the head. The dacoits left behind them Exs. 1—7,

of which the most important are a pawa with a dah-cut and some human hair, and three sticks of dahat wood. The wounded dacoit managed to escape. Nga San Nyein was found wounded after the dacoity, and his wounds correspond in respect of position and age with those of the man attacked by San Kwin.

The rest of the evidence in the case is found in five confessions, all of which have been retracted in Court. The evidence of corroborations is of very little or no value, and except in the case of San Nyein, the convictions rest upon the credit to be given to the confessions. The Sessions Judge believed that the confessions were voluntary and were true. He failed to consider whether confessions of co-accused persons are proper material upon which to base a conviction unless they are corroborated in material particulars and as regards the identity of the persons alleged to be concerned in the crime. In *Emperor v. Kehri* (1) it was held that a retracted confession may be taken into consideration against co-accused persons, and although corroborative evidence may be necessary, it is not necessary that such evidence should be by itself sufficient to support a conviction. Richards, J., said that he could see no reason why a Court could not legally convict an accused person on the unsupported confession of a co-accused. He remarked that at the same time it is very seldom that a Court ought to convict on such unsupported evidence. In *Gangapa Kardepa v. Emperor* (2) Heaton, J., thought that the confessions of seven co-accused, who had independently implicated four others, was a sufficient basis for supporting the convictions of these four men, and he referred to Illus (b), S. 114, Evidence Act, as affording precisely the kind of corroboration which in certain circumstances is a sound foundation for belief. This view was not, however, accepted by two other learned Judges of the same Court, who held that it was a rule followed in all the High Courts in India that a conviction founded solely on the confession of a co-accused could not be sustained. They also held that Illus. (b), S. 114, Evidence Act, only applies to the testimony of an accomplice. An exami-

1 (1907) 29 All 434.

2. A I R 1914 Bom 305=38 Bom 156=21 I C 673.

nation of the authorities leaves no doubt in my mind that the decision of the majority of the learned Judges in *Gangapa Kardepa's* case (2) is correct: *Queen v. Jaffir Ali* (3), *Queen v. Naga* (4), *Queen-Empress v. Dosa Jiva* (5), *Queen-Empress v. Khandia* (6), *Queen-Empress v. Ram Saran* (7), *Queen-Empress v. Nirmal Dai* (8), *Giddigadu, In re* (9), *Empress v. Ashootosh Chuckerbutty* (10), *Yasin v. King-Emperor* (11). In *Queen v. Sadhu Mundul* (12). Phear, J., said:

"It is true that the instance of corroboration which is appended to Illu. (b), of S. 114, Evidence Act, . . . is corroboration to be found in accounts of an occurrence given by the accomplices; but it is noticeable that the legislature . . . makes it a condition . . . that these accomplices should have been 'captured on the spot and kept apart from each other' and . . . there is not the slightest indication that the legislature intended in this passage by the terms 'accounts given by the accomplices' anything other than accounts given in due course of examination as witnesses."

Section 133, Evidence Act, modifies the general rule laid down in S. 114, but it clearly refers only to accomplices who have been examined as witnesses. The result of the decisions cited above appears to be that the confession of a co-accused person is not the same thing as the testimony of an accomplice and stands on a different footing. It may be taken into consideration as lending support to other evidence in the case. But if there is no other evidence, it is not a proper basis for a conviction. It is not strengthened by the fact that it is supported by the other confessions, whether these have been made in such circumstances as to preclude the theory that there has been connivance between the persons making the confessions or not. Mr. Lutter, who has appeared in this Court for many years, informs me that it has been the rule not to uphold convictions based merely on the confessions of co-accused persons. He is not prepared to support the convictions of Yan Nyein, Po Min, San Byaw or Nga Shin. These convictions rest entirely on the retracted confessions

of other appellants, and are set aside. Nga San Nyein, Nga Po Min, Nga San Byaw and Nga Shin are acquitted and will be set at liberty. San Nyein, Yan Nyein and Po Min belong to Kyunbosan village, whilst San Byaw, Nga Shin and Nga Hma come from Kyetthaukkwin. Maung Shwe Ge is headman of Kyunbosan. Yan Nyein and Po Min are his sons, San Byaw and Nga Shin are brothers and his nephews; whilst San Nyein is another nephew.

San Nyein disappeared after the dacoity, and was induced to surrender by Shwe Ge, who seems to have been chiefly instrumental in detecting this case. Maung Chet, a cousin of San Nyein, said in the committing Magistrate's Court that Shwe Ge mentioned the names of all the appellants to him before San Nyein was arrested, but this piece of evidence was not elicited in the Sessions Court, and Shwe Ge was not questioned about it in either Court. Maung Chet also told the committing Magistrate that Shwe Ge was very anxious and asked him to help him with reference to his sons and nephews, but this important statement was also overlooked in the Sessions Court. San Nyein was arrested on the 7th October, and confessed to his uncle, to Maung Chet, Maung Hmo and the Kama headman Tun Tin. He implicated Ngwe Zin, Thu Daw, Tet Si, Kyi Byu and Nga Hle.

He described Nga Hle as a villager of Magyi-yo. The other four men all come from Yeson village. Thu Daw probably is the father of Tet Si, but this relationship has not been clearly ascertained and the conjecture of its existence rests upon the headings of the examination forms. On the 8th, San Nyein confessed to a Magistrate and stated that he did so as he had no chance of escape. In that confession he suppresses all mention of the visit to Kyetthaukkwin village by the members of the gang and he puts the gun in the hands of Ngwe Zin. He also says there were six men concerned. As the other four were all relatives, his reason for silence is obvious. There can be no doubt that this confession is a voluntary one. San Nyein was wounded, and the explanation now put forward by him of the way he received those wounds is incredible. They are the kind of wounds that one man would receive when fighting with another. The evidence of his identification of his own pawa at the Police Station is

3. (1873) 19 W R Cr 57.
4. (1875) 23 W R Cr 24.
5. (1886) 10 Bom 231.
6. (1891) 15 Bom 66.
7. (1886) 8 All 306.
8. (1900) 22 All 445.
9. (1910) 33 Mad 46=1 I C 867.
10. (1879) 4 Cal 483.
11. (1901) 28 Cal 689.
12. (1874) 21 W R Cr 69.

inadmissible and should not have been recorded, as it is excluded by S. 25, Evidence Act. The evidence as to his pointing out the place where sticks were cut is of no value. The sticks found at the scene of crime did not correspond with the stumps. There can be no doubt about San Nyein being one of the dacoits, and he has been rightly convicted.

Thu Daw and Ngwe Zin were arrested on the 8th October but did not admit their guilt. On the 13th Kyi Byu was arrested and he confessed the next day. He said that his motive for confessing was that he knew that he could not escape from the police and San Nyein had already confessed. Prior to this he had confessed to Tun Tin, who says that he named the Yeson men, San Nyein, Yan Nyein, Po Min, San Byaw, Nga Hmo and Nga Shin. Maung Hmo was also present at the confession. In the committing Magistrate's Court he said that Kyi Byu named all the accused, but in the Sessions Court he said that he implicated the Yeson men and Nga Shin. He was not asked to explain the differences between his two statements. He is related to Shwe Go on his wife's side and he may have intentionally suppressed some names in the Sessions Court. In his confession before the the Magistrate Kyi Byu mentions Nga Shin, San Nyein, Tot Si, Thu Daw, Ngwe Zin and three unknown men from Kyotthaukkwin, and says that ten men were concerned in the dacoity. He has retracted his confession which he declares was made under ill-treatment by the police. There is not the slightest reason to suppose that he was in any way ill-treated. He denied that he ever confessed to the village headman. The evidence against Kyi Byu consists solely of these retracted confessions, with such support as they derive from other confessions. The law relating to retracted confessions was fully discussed in *Chit Tun v. Crown* (12), and I adopt the conclusions of the learned Judges of the Chief Court in that case. The weight to be given to such confessions depends on the circumstances under which they were made and on the intrinsic credibility of the confessions. In my experience confessions in Burma are seldom the result of physical ill-treatment by the police.

Sometimes the person confessing is under police surveillance and is induced to confess under threat of prosecution

coupled with a promise that if he confesses, he will be given a pardon. Sometimes the police have a certain amount of evidence against the man and induce him to confess under a similar promise. Relatives are not infrequently called in to persuade him that it will be better for him to confess. Others confess in the hope that they will derive some benefit from doing so and will be less severely punished. Some confessions are made out of resentment against those who have already confessed and with a view of securing their punishment, whatever may happen to the person confessing. Not infrequently confessions are due to a belief that everything is lost, and that the result of deeds in a former state of existence has brought the prisoner into peril. He succumbs to his ill-luck and does not attempt to fight against it. It is not possible to enumerate exhaustively all the motives that may lead to a confession but the present case seems to afford illustrations of the motives just suggested. I have no doubt that Kyi Byu's confession was due to a feeling that he could not escape from punishment, and that he might as well yield to his fate. He gave himself up to the headman, and has entirely failed to explain why he did so, if he was not concerned in the crime. I am of opinion that the confession is substantially true, so far as the part played by him in the crime is concerned, although for some reason he has concealed the names of some of his companions. He has been rightly convicted.

The day after Kyi Byu confessed, both Thu Daw and Ngwe Zin, who had been in the same lock-up, confessed. They had been in police custody for a week. Thu Daw was closely examined by the Magistrate about his reasons for confessing. He said that his mind was in a state of confusion or bewilderment, that he knew he would not escape punishment, and although he was afraid, he could not avoid what he could not keep to himself, and he felt himself, unsafe. Nga Zin said that he knew he would be punished, but he wanted all who had taken part in the dacoity to be punished. He was asked why he had delayed and said that he had been considering the matter and wondering whether, if he spoke out, the wives and children of the others concerned would be oppressed or put to trouble. He probably meant to say that he felt a certain amount of sympathy with them. Both

men now say that they were ill-treated by the police. There is not the slightest reason for believing this assertion. They both come from the same village as Kyi Byu and are neighbours. The fact that both confessions were made the day after Kyi Byu confessed is very significant.

The men were all confined in the same police station, and Kyi Byu had mentioned the names of Ngwe Zin and Thu Daw. It was pointed out in *Queen-Empress v. Basvanta* (14) that the law in India is not identical with that in England on the relevancy and admissibility of confessions. In England if there is any doubt about the admissibility of a confession it has to be proved to be free and voluntary. In India the question to be decided is whether the confession appears to have been induced by any of the means mentioned in S. 24, Evidence Act. There are no grounds for supposing that the confessions of Thu Daw and Ngwe Zin were induced by any of those means. They are, therefore, admissible and the only question is whether they are credible. There is very little corroboration. Chit Po says that he saw Ngwe Zin and Tet Si leave the village of Yeson about sunset on the day the dacoity was committed. Maung Kaung says he saw Ngwe Zin leave the gate alone. Ma Kaw states that So Pe told her that he saw blood on Thu Daw's jacket on the night of the dacoity. So Pe and Maung Hla depose to having seen the blood, which Thu Daw told them was fowl's blood. There is nothing to show what the nature of the blood was. This evidence does not corroborate any of the incidents mentioned in the confessions.

The prosecution must, therefore, fall back on the inherent credibility of the confessions as sufficient ground for the conviction. The motive for the confessions of Ngwe Zin and Thu Daw seems to me clearly to lie in the fear and annoyance caused by the fact that Kyi Byu had confessed and implicated them. The Sessions Judge remarks that the five confessions in the case differ considerably in the details of the going and coming of the dacoits and the course of the dacoity. But he thought that in spite of these differences, they were correct and true. The greatest differences are between San Nyein's confession and those of the other four men. There are strong reasons for thinking that San Nyein has suppressed

much of what he knew to shield his friends, if they were concerned. If the confessions of the other four men are compared carefully, there are no serious discrepancies in the accounts given. Nga Hme says that San Byaw had one of the guns when he went into the village, and others say that Nga Shin had it.

The gun may have passed from one hand to another. I have carefully considered whether the confessions were the result of police tuition and I think it impossible to believe that they were. The Kyetthaukkwin men were arrested on the confession of Ngwe Zin. It is very unlikely that the names of these men were inserted at the suggestion of any police officer. Four of them were close relatives of Shwe Ge, who had assisted the Police to detect the case. There is no reason why the Police should wish for the gang to be enlarged. If the Kyetthaukkwin and Kyunbosan men were included in the members of the gang as an afterthought, it must have been due to the wish of Kyi Byu, Thu Daw and Ngwe Zin to revenge themselves on Shwe Ge. Kyi Byu only mentions one of the men by name, and Thu Daw only knew two men. If Thu Daw and Ngwe Zin had conspired to confess out of revenge, Thu Daw would probably have mentioned the same names of the Kyetthaukkwin-Kyunbosan party as Ngwe Zin did. But the theory becomes still more difficult to believe when Nga Hme's confession is taken into consideration. He comes from Kyetthaukkwin (Wetchok is the same village) and was only in police custody for half a day at Yenangyaung before he confessed. He admits that he was kept away from the other men in the lock-up. His confession therefore was not the result of conference with Thu Daw or Ngwe Zin, and he had no reason whatever for implicating his fellow villagers. He is also known as Hnget Kyi, by which name he was mentioned in Ngwe Zin's confession. He states that he was taught what to say by Min Gyaw, a Sergeant of Police. He was in the charge of the headman after arrest, and if there was tuition, the headman must have been aware of it. It seems to me impossible that any policeman could have taught Nga Hme so well in the short time before he confessed, that he, an ordinary Burman yokel, would have been able to give a detailed account of the crime and of the part played in it by ten

men so as to make that account tally with Nga Zin's confession. His reason for confessing is that he thought he could not escape punishment. As was remarked in Chit Thun's case:

"It is not improbable that a person under arrest may think his fate is certain, and that the only hope for him lies in either obtaining a pardon or a less severe punishment by confession and implicating his fellow-criminals."

This motive is a common one amongst Burmans, who are much influenced by their belief in "kan" or the result of deeds in a former existence. After careful consideration, I have come to the conclusion that the Sessions Judge is right in believing that the confessions were substantially true as far as they affected those making them. Against Tet Si the only evidence is that of the confessing co-accused and that is an insufficient basis for a conviction. The conviction of Tet Si is set aside and he is acquitted. The Sessions Judge has sentenced the others to death. It was pointed out in *Queen-Empress v. Nga Pyon Cho* (15) that sentences of death should be passed in cases under S. 396, I. P. C., unless there are extenuating circumstances. The gang in this case went out armed with the two tube guns and dahs and the probability of some villager being killed must have been present to their minds. The persianity with which these offences are committed in Burma calls for the severest punishment. According to the confessions Nga Hme and Kyu Byu waited outside the village. They were keeping watch there and according to the map, were 125 yards from the house attacked. They are equally liable under S. 37, I. P. C., for the dacoity, and their mere presence at the actual scene of the crime is immaterial: *Queen-Empress v. Teja* (16). The alibis set up are so weak as not to require serious discussion. I dismiss the appeals of San Nyein, Ngwe Zin, Kyi Byu, Thu Daw and Nga Hme.

The manner in which the committing Magistrate has examined some of the accused is open to most serious objection. He has cross-examined them and asked such question as "If you did not commit the dacoity, who did?" It ought not to be necessary to point out that it was for the prosecution to prove who committed the crime. The object of examining an accused person is to afford him an op-

portunity of explaining away evidence against him. Each point appearing in evidence should be put to the accused and he should be invited to offer his explanation or comment on it. Anything in the nature of cross-examination should be avoided.

K.N./R.K.

Appeals dismissed.

A. I. R. 1918 Upper Burma 39

RIGG, J. C.

Santa—Decree-holder.

v.

Battersby—Judgment-debtor.

Civil Revn. No. 219 of 1916, Decided on 18th June 1917.

Army Act (44 and 45 Vict. C. 58), Ss. 136 and 144—Non commissioned officer is not "officer"—His pay is exempt from attachment—Civil P. C. (1908), O. 60 (1).

A non-commissioned officer is merely a soldier and is not an "officer" within the meaning of S. 136, Army Act, and therefore the pay of such officer is under S. 114 of the Act exempt from attachment in execution of a decree of a civil Court. [P 40 C 2]

M. H. Lutter—Amicus curiae.

Judgment.—This is a reference by the Township Judge, Bhamo, as to whether the pay of a non-commissioned officer in charge of the supply and transport, Bhamo, is liable to attachment in execution of a decree passed by the Court under its small cause Court jurisdiction. It is contended on behalf of the judgment-debtor that his pay is exempt from attachment under S. 144, Army Act (44 and 45 Vict., c. 58). Neither party has been represented by counsel at the hearing, but Mr. Lutter has kindly argued the case as amicus curiae. The proviso to S. 144, Army Act, runs as follows:

Provided that

(1) "Any person having cause of action or suit against a soldier of the regular forces may, notwithstanding anything in this section, after due notice in writing given to the soldier, or left at his last quarters, proceed in such action or suit to judgment and have execution other than against the person, pay, arms, ammunition, equipments, regimental necessities or clothing of such soldier . . ."

The section commences by exempting any soldier of His Majesty's forces from being taken out of the service by process execution or order of a Court of law, except in respect of a charge of or conviction for crimes or (b) debts, damages or money exceeding £30 over and above the costs of suit. The section then explains what is meant by a crime, a Court of law, and the method of proof of the

15. S J L B 636.

16. (1895) 17 All 86.

debt, damages or money and declares that all proceedings in contravention of the section are void. The proviso contains an exception to the privileges conferred by the first four sub-clauses of the section, and although as pointed out in *Murray & Co. v. Prins* (1), the drafting of the section is open to criticism, I think there is no doubt that the pay of a soldier is exempt from attachment unless there is any other provision of law that is inconsistent with it and prevails. S. 136, Army Act, lays down that the pay of an officer or soldier should be paid without deduction other than the deductions authorized by the Act, etc., or by any law passed by the Governor-General in Council.

The last clause was added at the same time as S. 151 was repealed, which dealt with the way in which a civil Court could award execution against persons subject to military law other than soldiers. In *Prins v. Murray & Co.* (2) it was held that sub-S. 2, Cl. (b), S. 60, Civil P. C., does not amount to a declaration that the provisions of sub-S. 1, S. 60 do not constitute a law passed by the Governor-General in Council authorizing deductions to be made from the pay of an officer of His Majesty's Regular forces. The doubt that existed about the correctness of this view in consequence of the differences in opinion in the High Courts of India has been set at rest by the repeal of sub-S. 2 (b), S. 60 by Act 10 of 1914. The question for decision, therefore, resolves itself into one of whether sub-Cl. 1, S. 60, Civil P. C., authorizes the attachment of soldiers' pay and if so, how it is to be reconciled with S. 144, Army Act. Cl. 1 exempts to a certain extent the pay of the public officers or servants referred to in Cl. (h) from attachment, when they are on duty. "Public officer" is defined in S. 2 (17), Civil P. C., and includes commissioned or gazetted officers in the military forces of His Majesty and every officer in the service or pay of the Government. It is argued that non-commissioned officers fall within the latter description, and that, therefore, their pay is subject to attachment to the extent allowed in S. 60 (1), unless S. 144, Army Act, is to override this section.

The reply to this argument is that in S. 136, Army Act, the term "officer" does not include a non-commissioned or warrant officer, who is merely a soldier within the meaning of that section, and the provisions of S. 144, Army Act, prevent the operation of S. 60 (1), Civil P. C. This is clear from the definition of "officer" in Cl. (4), S. 190, Army Act. Had the legislature intended to include non-commissioned officers within the meaning of S. 60 (1), Civil P. C., I think this intention would have been clearly shown by including them in Cl. (c), S. 2 (17), Civil P. C. I am of opinion that sergeant Battersby's pay is not liable to attachment in execution of the decree in the township Court, Bhamo.

K.N./R.K. *Reference answered in the negative.*

A. I. R. 1918 Upper Burma 40

RIGG, J. C.

Ma Tok and others—Appellants.

v.

Ma Chit—Respondent.

Second Appeal No. 356 of 1916, Decided on 30th May 1917.

(a) *Buddhist law (Burmese)*—*Succession*—*Children of divorced wife living with mother and not keeping filial relations with father cannot inherit father's property.*

Under the Burmese Buddhist Law the children of a divorced wife, who live with their mother and do not maintain filial relations with the father, are not entitled to share in his estate where there has been a division of property at the time of divorce. By maintaining filial relations is meant something more than paying visits to the parent or receiving presents from him, which only indicates a continuance of those relations that are natural between a parent and child. Filial relations implies living and working and planning with the parent: *S J L B* 296; *2 U B R* 116; *4 L B R* 272 and *6 L B R* 167, *Fall*. [P 43 C 1]

(b) *Buddhist law (Burmese)*—*Gift—Actual parting with possession is true test.*

The essence of a transfer by delivery of the property is that possession is changed. In the case of a gift the donor must put the donee in such relation to the land as he himself occupies. The actual parting with possession is the only true test of a gift: *34 Cal* 267 and *2 U B R* 59, *Rel. on*. [P 42 C 1]

(c) *Civil P. C. (1908), S. 100*—*Finding of fact—No evidence to support—Finding can be interfered.*

A High Court can in second appeal interfere with the finding of fact of a lower appellant Court where there is no evidence on the record to justify or support the finding. [P 42 C 1]

(d) *Probate and Administration Act (1881), S. 98*—*Claim denied—Claimant trying to enforce claim by legal measures—S. 98 is no bar.*

Section 98, Probate and Administration Act is not a bar to a person claiming an interest in

1. (1911) 14 O C 82=10 I C 719.

2. A I R 1914 Oudh 199=17 O C 99=23 I C 935.

the estate taking legal measures to enforce his claim where that claim is denied: *U B R* (1902-3) 2, *Probate and Administration* 1, *Expi.*

[P 41 C 2]

C. G. S. Pillay—for Appellants.

Mung Su—for Respondent.

Judgment.—The plaintiff, Ma Chit, is the daughter of Maung Kyaw Din by his first wife Ma On Bo. Maung Din and Ma On Bo were divorced when the plaintiff was about ten years of age. Maung Kyaw Din then married Ma Tok, and defendants 2, 3 and 4 are the children of that marriage. The plaintiff sued for the possession of a house and its site, which she alleged had been given her by her father and in the alternative she claimed this property by right of inheritance on the ground that Ma Tok was not a wife entitled to any share in her husband's property. A preliminary objection to the frame of the suit, on the grounds that the claims were inconsistent and that the plaintiff could not sue for a part only of the estate, was overruled, and the decision was confirmed on appeal by my learned predecessor. Objection was also taken to the suit on the ground that Ma Tok had obtained Letters of Administration and that the filing of the suit was in contravention of the ruling in *Ma Hmyin v. Ma On Gaing* (1). This objection has not been dealt with in the judgments of either of the Courts below, but it has been urged in second appeal. In the case cited, Adamson, J., held that when Letters of Administration had been obtained to the estate of an intestate, a co-heir cannot sue the administrator for partition so long as he is performing his duties properly, but must merely present his claim to the administrator. In the present case Letters of Administration had not been issued to Ma Tok at the time the suit was filed, although an order for their issue had been made.

The value of the properties of the estate had not been verified and security had not been furnished. Ma Tok's objection at the time the suit was filed was, therefore, premature. It was not until May 1916 that letters were actually issued. But apart from this, Ma Chit claims that the house and site are not part of the deceased's estate at all, but are her own property of which she has

been dispossessed by Ma Tok. There is no reason why she should not file a suit for its recovery on the basis of such a claim. If her claim as heir was denied by the administratrix, she could have filed a suit for a declaration of her right to inherit in Maung Kyaw Din's estate, or if she was dissatisfied with the administration of the estate, she could have filed a suit for its administration by the Court. The ruling in *Ma Hmyin v. Ma On Gaing* (1) only lays down that where an administrator is engaged in the administration of an estate, a suit by a co-heir for partition is premature as interfering with the due administration of the estate. It does not lay down that the fact that S. 38, Probate and Administration Act, gives an administrator six months within which to file an inventory and one year within which to file an account, is a bar to a person claiming an interest in the estate taking legal measures to enforce his claim when that claim is denied. The objection that the suit did not lie is, therefore, overruled. In her written statement Ma Tok further took exception to the suit on the ground that the parties had referred their dispute to arbitration.

Neither of the Courts below has dealt with this point, and as it has not been urged in appeal in this Court, it must be considered waived. The two main points argued at the Bar on behalf of the appellants in this Court are that there is no evidence to support the finding that there had been delivery of possession of the subject-matter of the gift, and that Ma Chit is not entitled under the Buddhist law to any share in her father's estate as there had been a partition of the property at the time of the divorce between her father and mother and she had not resumed filial relations. The advocate for the respondent contends that as this is a second appeal under S. 100, Civil P. C., this Court is bound by the finding of fact by the lower Courts that there had been delivery of possession and a valid gift. It is not, however, every finding of fact by the lower Court which precludes this Court in second appeal from a consideration of the evidence. Their Lordships of the Privy Council have pointed out within what limits interference in second appeal with finding of facts is permitted. In

1. *U B R* (1902-3) 2, *Probate and Administration* 1.

Durga Chowdhurani v. Jewahir Singh Chowdhri (2) Lord Macnaghten said:

"It is enough . . . to say that an erroneous finding of facts is a different thing from an error or defect in procedure, and that there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be. Where there is no error or defect in the procedure, the finding of the first appellate Court . . . is final, if that Court had before it evidence proper for its consideration in support of the finding."

And in *Shivabasa v. Sangappa* (3) their Lordships cited with approval the rule laid down in *Anangamanjari Chowdhurani v. Tripura Sundari Chowdhurani* (4), that it is within the jurisdiction of the Judge of second appeal to dismiss the case if they are satisfied that there was, as an English lawyer would express it, no evidence to go to the jury because that would not raise a question of fact such as arises upon the issue itself but a question of law for the consideration of the Judge. It is, therefore, clearly permissible for this Court to examine the evidence in order to see whether there is any evidence on which the findings of the lower appellate Court could properly be based. The gift in the present case was a verbal one and it is admitted that delivery of possession is essential to its validity. In *Sibendrapada Banerjee v. Secy. of State* (5), the learned Judges remarked: "The essence of a transfer by delivery of the property is that possession is changed." In the case of a gift the donor must put the donee in such relation to the land as he himself occupies. Now what are the facts found proved by the lower appellate Court? They are as follows: (1) That Maung Kyaw Din, on marrying again, made a verbal gift of the property in dispute to Ma Chit, which he re-affirmed in the presence of three witnesses when Ma Chit was 18 years of age; (2) the house was rented to Sit Hon was referred by Maung Kyaw Din to U Kyaw Wa, maternal grandfather of Ma Chit, for the leasing of the house; (3) that in the quarter of the town where the house is situate, it was a matter of notoriety that the house was Ma Chit's; and (4) that Maung Kyaw Din and his second wife, Ma Tok, kept their properties separate, and that Ma Chit

also made a gift of part of her property to her son.

On these findings the Divisional Judge thought that it was proved that Ma Chit was in possession of the house and he cited the decision in *Guru v. San Tun Baw* (6), as authority for the proposition that because the house was rented in Ma Chit's name it was her property. No such proposition, however, was laid down in *Gura's* case (6). The Judicial Commissioner remarked that if land was rented on behalf of a person and rent was received by that person for the land, it would be reasonable to hold that he was in possession of it. The evidence in the present case, however, proves that the house was not rented in Ma Chit's name but in Maung Kyaw Din's. She herself says that as she was so young her grandfather allowed her father to enter into a written agreement with Sit Hon about renting the house. The gossip in the town about the house being Ma Chit's was not admissible in evidence and should not have been taken into account by the lower appellate Court. So far as the evidence of transfer of possession goes, the whole case for the plaintiff practically rests upon the reference by Maung Kyaw Din to Maung Kyaw Wa when Sit Hon wished to rent the house. There is no doubt that Maung Kyaw Din frequently stated that he had given the house to Ma Chit, but as Burgess, J., said in *Maung Thwe v. Ma Saing* (7):

"actual parting with possession is the only true test of the completion of a gift, and Burmans avoid that final and crucial test if they possibly can."

These remarks are particularly apposite to the present case. There is no evidence whatever that Maung Kyaw Din put Ma Chit in possession of the house and land; on the contrary he occupied the house with Ma Tok at times, or when he was not in occupation, took the whole of the rents. As Sit Hon says, it was understood that Maung Kyaw Din was to enjoy the rents during his lifetime. Maung Tha Han, witness 3 for the plaintiff, says he paid rent for beans stored in the premises to Maung Kyaw Din, who charged him an exorbitant rate. Further Maung Kyaw Din paid the Municipal taxes. The title deeds of the property were with Ma Tok, and Ma Chit's explanation that she handed them back to

2. (1891) 18 Cal 23=17 I A 122 (P O).

3. (1905) 29 Bom 1=31 I A 154 (P O).

4. (1887) 14 Cal 740=14 I A 101 (P C).

5. (1907) 34 Cal 207.

6. P J L B 504.

7. (1897-01) 2 U B R 59.

her father a month before his death is neither plausible nor credible. I accordingly find that there was no evidence on the record to justify or support the finding of the lower appellate Court that there was delivery of possession to Ma Chit of the house and land in suit. I now come to the second branch of Ma Chit's claim. It is admitted that at the time of her father's divorce with her mother there was a partition of property, and it was quite clear that after that she lived with her mother and not with her father. The general rule governing such a case is laid down in *Ma Pon v. Maung Po Chan* (8), where it was held that the children of a divorced wife, who live with their mother and do not maintain filial relation with the father, are not entitled to share in his estate where there has been a division of property at the time of divorce. This case was followed in the Lower Burma case of *Ma Paw v. Ma Mon* (9), where all the authorities were again considered, and was approved of in *Ma Yi v. Ma Gale* (10), and may be regarded as settled law.

The question, therefore, is whether Ma Chit, after her parents' divorce, continued to maintain filial relations with her father. By filial relations is meant something more than paying visits to the parent or receiving presents from him, which would only indicate a continuance of those relations that are natural between the parent and child. In *Ma Shwe v. Maung Lan* (11) filial relations was held to imply living and working and planning with the parent. The evidence in the present case falls far short of those requirements. Ma Chit continued to live with her mother; there is no evidence that she worked and planned with her father. The Court of first instance has not considered her position at all. It rejected the claim of Ma Tok to inherit her husband's property on the ground that she belonged to the class of wife which is not entitled to inherit from her husband. In particular the Judge mentioned three disqualifications: (1) that she did not eat with her husband, (2) that she did not attend on her husband during his illness, and (3) that Ma Chit performed the funeral ceremonies. Ma Tok

herself says that her husband drank heavily so that she often had to leave him and live at her own house. The Myo-thugyi and his clerk speak of Maung Kyaw Din and Ma Tok living together. Ma On Bwin, who was their cook, says that they had their meals together. Ma Kan Me, witness 12 for the plaintiff, says that Maung Kyaw Din had meals with Ma Tok.

The evidence adduced by the plaintiff to show that Maung Kyaw Din and Ma Tok kept their estates entirely separate and never work together, is rebutted by that of the two Chetties one of whom, Adegappa, swears that they jointly borrowed money from him for about 10 years, and these loans were repaid sometimes by one, and sometimes by both. It is quite clear that they were ordinarily regarded as man and wife, and a good deal of the evidence about their separate eating and separate incomes comes from the side of Maung Kyaw Din's relations. Ma Tok admitted that she was unable to look after her husband during his last illness, but attributed it to the fact that she herself was ill as she was pregnant. She says that of the Rs. 500 spent on the funeral, Rs. 200 were her money and Rs. 300 were borrowed from Ma Chit. Ma Chit denies making the loan to Ma Tok's sister, but in cross-examination said that she did not know whether a notice had been issued through a lawyer to recover this sum, and also that she had not yet got it back. If she had made no loan, it is strange that she should not be able definitely to deny that any message of demand for its recovery had been issued. In my opinion it has not been shown that Ma Tok should be excluded from inheriting her husband's property on the grounds stated by the District Judge. I accordingly reverse the judgments and decrees of the lower Courts, and direct that the suit be dismissed with costs in both Courts.

K.N./R.K.

Suit dismissed.

A. I. R. 1918 Upper Burma 43

RIGG, A. J. C.

Emperor

v.

Nga Po Mya and another—Accused.

Criminal Revn. No. 350 of 1917, Decided on 1st June 1917.

8. (1897-01) 2 U B R 116.

9. (1907-03) 4 L B R 272.

10. (1911-12) 6 L B R 167=19 I C 85.

11. S J L B 296.

(a) Criminal P. C. (1898), Ss. 342 and 364—Magistrate must examine accused under Ss. 342 and 364.

A Magistrate is bound to examine the accused under the provisions of Ss. 342 and 364, Criminal P. C., and the omission to do so is fatal to the validity of the trial. [P 44 C 1]

(b) Criminal P. C. (1898), Ss. 342 and 364—Provisions of S. 342 are imperative.

The provisions of S. 342 are imperative and failure to comply with them is not a mere irregularity curable under S. 537, Criminal P. C.

[P 44 C 1]

Judgment.—The conviction in this case must be quashed. The accused did not admit that they had committed criminal trespass by entering upon the land in dispute. They claimed that they had leased it from the owner. After the evidence for the prosecution had been recorded, the Magistrate was bound to examine them under the provisions of Ss. 342 and 364, Criminal P. C. His omission to do so is fatal to the validity of the trial. The provisions of S. 342 are imperative and failure to comply with them is not a mere irregularity curable under S. 537 Criminal P. C. Moreover, so far as can be ascertained from the diary of the record, the accused were never given an opportunity to produce witnesses on their behalf. The District Magistrate has commented on the irregularity of the method of trial in this case. The Magistrate fixed the case for the 2nd of December at Pakokku, but proceeded to the village where the land was situated on the 30th of November without giving any notice to the advocates, and pronounced judgment on the 2nd of December. The convictions and sentences are set aside, and a re-trial is directed. The fines that have been paid will be refunded.

K.N./R.K. *Conviction set aside.*

A. I. R. 1918 Upper Burma 44

SAUNDERS, J. C.

Maung Hme and another—Applicants.

v.

Maung Tun Hla—Opposite Party.

Civil Revn. No. 129 of 1916, Decided on 23rd October 1916.

Upper Burma Land and Revenue Regulation (3 of 1889), S. 53 (2) (x)—Claim to right to fish or connected with or arising from demarcation or disposal of fishery—Jurisdiction of civil Courts is not barred.

Clause (x), sub-S. (2), S. 53 of the Upper Burma Land and Revenue Regulation, must be read subject to the provisions of sub-S. 1 to that section. It does not bar the jurisdiction of civil Courts to all claims to right to fish, or connected with or arising out of the demarcation or disposal of any

fishery, but only claims which the Local Government or a revenue Officer is empowered by or under the Regulation to dispose of. [P 44 C 2]

Chatterjee and Vakil—for Applicants.

H. M. Lutter—for Opposite Party.

Judgment.—This is a reference by the District Judge to this Court under S. 113, Civil P. C. The District Judge has not stated precisely the question on which orders are required, but it appears that he is in doubt whether S. 53 (2) (x) of the Upper Burma Land and Revenue Regulation was validly enacted. Apparently the District Judge has assumed that this provision of the Regulation bars the jurisdiction of the civil Courts, but for the reasons stated in the judgment in *Sonilal Sheoshankar v. Delawar* (1) of this Court, I am of opinion that this is not the case. It is clear that Cl. (x), sub-S. (2), S. 53 must be read subject to the provisions of, sub-S. (1) of that section. It does not purport to bar the jurisdiction of civil Courts to all claims to a right to fish, or connected with or arising out of the demarcation or disposal of any fishery, but only claims which the Local Government or a Revenue Officer is empowered by or under the Regulation to dispose of. The provisions relating to fisheries which are contained in S. 32 of the Regulation have been repealed, and the Local Government or a Revenue Officer is not therefore empowered by or under the Regulation to dispose of any such claim; that this is also the view adopted by the Local Government would appear to be the case from the foot-note to S. 53, p. 27 of the Upper Burma Land and Revenue Manual published by the authority of Government, in which it is stated that Cl. (x), S. 53, sub-S. (2), ceased to apply since the extension of the Burma Fisheries Act 1905, to Upper Burma. Since the jurisdiction of the civil Courts is not barred under S. 9, Civil P. C., the Court is entitled to take cognizance of the matter. It may be added that this is a suit for damages for trespass on the plaintiff's fishery, and there appear to be no provisions of the Revenue law by which such a suit can be entertained or the order or decree of the Revenue Court enforced.

K.N./R.K.

Answer accordingly.

A. I. R. 1918 Upper Burma 45

RIGG, J. C.

Maung San Ba—Applicant.

v.

Maung Lun Bye—Opposite Party.

Civil Revn. No. 47 of 1917, Decided on 18th May 1917.

(a) Civil P. C. (1908), S. 115—Decree or order of subordinate Court declared by law to be final and conclusive though by its nature provisional—Extrinsic conditions of its legal activity plainly infringed in lower Court—High Court will rectify proceedings.

Where a decree or order of a Subordinate Court is declared by the law to be for its own purposes final or conclusive, though by its nature provisional, as subject to displacement by another decree in a more formal suit, the Court will have regard to the intention of the legislature that promptness and certainty should in such cases be in some measure accepted instead of juridical perfection. It will rectify the proceedings of the inferior Court where the extrinsic conditions of its legal activity have been plainly infringed, but where the alleged or apparent error consists in a misappreciation of evidence or misconstruction of the law intrinsic to the enquiry and decision, it will respect the intended finality and will intervene summarily only when it is manifest that by the ordinary and prescribed method an adequate remedy or the intended remedy cannot be had: 7 Dom 341, *Exil; Case-law* reviewed.

[P 46 C 1]

(b) Civil P. C. (1908), O. 21, Rr. 58, 63 and S. 115—Land attached in execution of decree—Objection preferred—Court directing removal of attachment—Decree holder contending evidence produced—Held there could be no interference in revision.

Certain lands were attached in execution of a decree. The respondent preferred an objection to the attachment, and the executing Court, holding that at the time of the attachment the lands were in the possession of the objector and not of the judgment-debtor or some person in trust for him, directed the removal of the attachment. The decree-holder moved the Judicial Commissioner in revision on the ground that the executing Court had acted with material irregularity in not applying its mind to the provisions of S. 110, Evidence Act, and in not considering the evidence produced:

Held: that the Judicial Commissioner could not interfere in revision, inasmuch as there had been no infringement of the extrinsic conditions of the lower Court's legal activity. [P 46 C 2]

R. K. Banerjee—for Applicant.

Judgment.—This is an application in revision against an order passed by the Township Judge, Thazi, directing the removal of attachment on certain lands. The Judge held that the lands were in the possession of the objector at the time of the attachment and not of the judgment-debtor or some persons in trust for him. San Ba's grounds for moving this Court in revision are that the Judge has acted with material irregularity in not applying

his mind to the provisions of S. 110, Evidence Act, and in not considering the evidence produced. An objection is also taken to the amount of costs awarded. R. 63, O. 21, provides that where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but that subject to the result of such suit, if any, the order shall be conclusive. The first point that has been argued at the Bar is whether any revision lies against an order such as the one passed by the Township Judge and if it does lie, within what limits this Court will interfere in revision. In *Ittiachan v. Velappan* (1) the Court appeared to think that it had no power to revise orders in cases investigated under O. 21, R. 58, but the point was not argued and the opinion is merely an obiter dictum. In *J. J. Guise v. Jaisraj* (2) Burdett, J., said that the rule of the Court was that if a party applied to the Court to exercise its powers in revision, he must satisfy the Court that he has no other remedy open to him under the law to set right what has been done illegally, irregularly or without jurisdiction. In *Ghulam Shabbir v. Dwarka Prasad* (3) a Bench of the same Court interfered in revision on the ground that it was doubtful whether a separate suit would lie. In the matter of *Sheoraj Nandan Singh v. Gopal Suran Narain Singh* (4) and *Monmohney Dass v. Radha Krishna Dass* (5) the Calcutta High Court interfered in two cases where the Court had gone beyond the determination of the question of possession only. The decisions proceeded apparently on the ground that the Court below had acted illegally in the exercise of its jurisdiction in directing execution to issue. In *San Tun Pru v. Mi Ani Me* (6) interference with the lower Court's order was made for similar reasons to these given in the Calcutta cases. The latest reported decision in Lower Burma is that of *Mg. Tun U v. Palaniappa Chetty* (7), where the learned Chief Judge said:

"The course which the plaintiff should have pursued is very clearly indicated in R. 63 O. 21,

1. (1885) 8 Mad 484.
2. (1893) 15 All 405.
3. (1896) 18 All 163.
4. (1891) 18 Cal 290.
5. (1902) 29 Cal 543.
6. (1900-02) 1 L B R 160.
7. (1915) 8 L B R 146=27 I C 829.

Civil P. C., which says that where a claim or an objection is preferred to an attachment, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject on the result of suit . . . the order shall be conclusive . . . With such plain provisions staring him in the face, it was sheer culpable negligence on the part of the advocate . . . to incur the risk of the plaintiff losing all remedy by filing the appeal and the application for revision."

The case does not decide that under no circumstances will revision lie. The only reported decision in Upper Burma is *Maung Thaing v. Maung Thale Ni* (8), where Thirkell White, J., said:

"In a case in which the Court of first instance has acted on insufficient materials, has dealt with the case in a perfunctory manner or has given a decision which is plainly perverse, this Court would be justified in interfering in revision."

None of the authorities seems to have been brought to the notice of the learned Judge, and I venture to doubt whether the law laid down correctly states the grounds on which revision is justified under S. 115, Civil P. C. The most fully considered decision that I have been able to find is that of a Full Bench of the Bombay High Court in *Siva Nathaji v. Joma Kashinath* (9), where the question referred for the decision of the Full Bench was:

"Whether the High Court should exercise its extraordinary jurisdiction under S. 622, Civil P. C., or otherwise on behalf of persons who feel themselves aggrieved by orders passed by Courts . . . in cases in which it appears the law has specifically prescribed another remedy, by suit or otherwise."

After a very elaborate discussion of the authorities, seven propositions were laid down of which the most important was the fifth, which is as follows:

"Where a decree or order of a subordinate Court is declared by the law to be, for its own purposes, final or conclusive, though by its nature provisional, as subject to displacement by another decree in a more formal suit, the Court will have regard to the intention of the legislature that promptness and certainty should, in such cases, be in some measure accepted instead of juridical perfection. It will rectify the proceedings of the inferior Court where the extrinsic conditions of its legal activity have plainly been infringed, but where the alleged, or apparent, error consists in a misappreciation of evidence, or misconstruction of the law intrinsic to the inquiry and decision, it will respect the intended finality, and will intervene peremptorily only when it is manifest that, by the ordinary and prescribed method an adequate remedy, or the intended remedy, cannot be had."

8. (1897-01) 2 U B R 311.

9. (1883) 7 Bom 341.

The principles laid down in this decision were approved in *Sheo Prasad Singh v. Kastura Kuar* (10) by Mahmood, J., who described the judgment as one deserving of the highest respect from the Indian Courts, and I think that it should be followed in this Court. In the present case I see no reason why the petitioner should not resort to the ordinary remedy by suit. It is not shown that there has been any infringement of the extrinsic conditions of the lower Court's legal activity. The Judge found after taking evidence that the lands in dispute were in the objector's possession on his own account and not on account of the judgment-debtor, and he had power to decide the point. The application for revision is dismissed.

K.N.J.R.K. *Application dismissed.*
10. (1888) 10 All 119.

A. I. R. 1918 Upper Burma 46

SAUNDERS, J. C.

Sonilal Sheoshanka—Plaintiff—Appellant.

v.

Delawar—Defendant—Respondent.

Second Appeal No. 307 of 1915, Decided on 23rd October 1916.

Upper Burma Land and Revenue Regulation (3 of 1889), S. 53 (2) (ii)—Jurisdiction of Civil Courts in respect of state lands is not barred.

Clause (ii) to sub-S. (2), S. 53, Upper Burma Land and Revenue Regulation neither bars nor purports to bar the jurisdiction of Civil Courts over claims to the ownership or possession of any State land, except in respect of such matters as the Local Government or a Revenue Officer is empowered by or under the Regulation to dispose of; and inasmuch as the Regulation does not empower Revenue Officers to dispose of claims, between private persons, to the ownership or possession of any State land more than one year after the date of the declaration by the Collector that the land is State land, and does not give any authority to the Financial Commissioner to make rules for deciding such claims, the jurisdiction of the Civil Courts is not barred and they are entitled and bound to take cognizance of such claims: 2 U B R 207; 2 U B R 209 and 2 U B R 211, *Diss. from*. [P 48 C 1, 2]

J. C. Chatterjee and Vakil—for Appellant.

H. M. Lutter—for Respondent.

Judgment.—The plaintiff-appellant sued the defendant-respondent in the Township Court and prayed for a mortgage-decree. The Judge gave him a money-decree and he then appealed to the District Court, which gave him a mortgage-

decree as prayed for. The plaintiff then applied to execute this decree by sale of the mortgaged properties, which included 4.83 acres of land. The Judge's order is by no means clear, but it appears that the judgment debtor had ceased to occupy the 4.83 acres which had been mortgaged; he would seem to have been in occupation of 1.79 acres of the area under a license from the Deputy Commissioner, and another area of 1.79 acres had been assigned to one Maung Po So by the Deputy Commissioner, and in each case the land was held under a license issued in accordance with the rules under the Upper Burma Land and Revenue Regulation. It would appear that the order cancelling the original license of the judgment-debtor and ordering the issue of two licenses for 1.79 acres each was passed on 5th May 1914, more than a month before the date of the decree which the decree-holder was seeking to execute. The Township Judge apparently refused to execute the decree against the land, and the decree-holder thereupon appealed to the District Judge who directed that as to the area of 1.79 acres only, standing in the name of the judgment-debtor, the Township Court should allow the judgment-debtor's interest in the land to be sold for the benefit of the decree-holder. Against this order the decree-holder now comes to this Court in appeal, on the ground that the District Court erred in holding that 1.79 acres of land should be excluded from the execution of the appellant's decree.

In the course of the argument it appeared that the land in question was State land. It has been held in Upper Burma that the jurisdiction of the Civil Courts is barred in respect of claims to the ownership or possession of State land by the provisions of S. 53, Upper Burma Land and Revenue Regulation. The validity of that section was called in question recently in two cases of this Court, Civil Second Appeal No. 195 of 1913, and Civil Second Appeal No. 372 of 1913, in which the Additional Judge held that S. 53 (2) (ii), Upper Burma Land and Revenue Regulation, is not validly enacted, and the Civil Courts have power to try suits between private individuals for the possession of State land. The learned Advocate for the appellant has maintained this view in the present appeal, and as the question of

jurisdiction went to the root of the matter, notice was given to the Local Government as representing the Secy. of State and Mr. Lutter has been heard on behalf of the Secy. of State in support of the validity of this section of the Act. The view that S. 53 (2) (ii), Land and Revenue Regulation, bars the jurisdiction of the Civil Courts appears to have been first put forward in the case *Maung Tha Aung v. Maung San Ke* (1). This decision was followed in *Maung Nat v. Ma Mi* (2) and in *Maung Ke v. Maung Po Ni* (3).

Before considering whether the section in question was validly enacted or not, it appears necessary to consider whether the rule laid down in those judgments was correct, since if the jurisdiction of the Civil Courts is not expressly or impliedly barred, there can be no doubt that under S. 9, Civil P. C., the Court may take cognizance of and try all suits of a civil nature relating to State land. The material portion of the judgment in *Maung Tha Aung v. Maung San Ke* (1) was as follows:

"Now in S. 53 (2) of the Land and Revenue Regulation it is laid down that 'a Civil Court shall not exercise jurisdiction over any of the following matters, which shall be cognizable exclusively by Revenue Officers, namely . . . (ii) any claim to the ownership or possession of any State land' . . . Consequently this suit is barred in the Civil Courts."

Now it appears to me that a reference to the regulation in question does not justify this view, and it could only be arrived at by taking a portion of the section in question out of its context and applying it as a general and absolute rule. S. 53 runs as follows:

"Except as otherwise provided by this Regn. (1) a Civil Court shall not have jurisdiction in any matter which the Local Government or any Revenue Officer is empowered by or under this Regulation to dispose of, or take cognizance of the manner in which the Local Government or any Revenue Officer exercises any powers vested in it or him by or under this Regulation; and in particular . . . (2). A Civil Court shall not exercise jurisdiction over any of the following matters which shall be cognizable exclusively by Revenue Officers, namely,"

and then follow fourteen clauses of which one was cancelled by Regn. 4 of 1896. The second of these clauses is that quoted above. The clause in full runs as follows:

"Any claim to the ownership or possession of State land, or to hold such land free of land re-

1. (1897-01) 2 U B R 207.
2. (1897-01) 2 U B R 269.
3. (1897-01) 2 U B R 211.

venue or at a favourable rate of land revenue, or to establish any lien upon or other interest in such land or the rents, profits, or produce thereof."

It is clearly, therefore, necessary to interpret this clause in relation to the general rule laid down in sub-S. (1) S. 53, of which it forms a particular instance. It is not a rule which bars the jurisdiction of a Civil Court over claims to the ownership or possession of any State land except in such matters as the Local Government or a Revenue Officer is empowered by or under the Regulation to dispose of. And the question, therefore, arises whether the Local Government or a Revenue Officer is empowered by or under the Regulation to dispose of any claims to the ownership or possession of any State land. The second rule laid down in S. 53, sub-S. (1), barring the cognizance by Civil Courts of the manner in which the Local Government or any Revenue Officer exercises any powers vested in it or him by or under the Regulation does not apparently apply in the present case, but it is clear that it does not bar or purport to bar the cognizance by Civil Courts of the manner in which the Local Government or a Revenue Officer exercises its or his powers, except so far as those powers are vested in it or him by or under the Regulation. For the purpose of the present appeal the only part of the Regulation with which we are concerned is that part contained in Ch. 3 which relates to State land. S. 23 contains a definition of State land. S. 24 (1) lays down that

"any land.....declared by the Collector to be State land shall be deemed to be such land until the contrary is proved."

The only reference to claims to the ownership or possession of State land is contained in sub-Ss. (2), (3) and (4) of S. 24. Sub-S. 2 lays down that

"a claim to the ownership or possession of any land with respect to which such a declaration" (as has been referred to in sub-S. (1))

"has been or may be so made, or to hold such land free of land revenue or at a favourable rate of land revenue, or to establish any lien upon or other interest in such land or the rents, profits or produce thereof shall be cognizable by the Collector only."

.....From the words of this sub-section, it would appear probable that the claims referred to are claims against the State, but, whether this is so or not, the following sub-section, which lays down that the period of limitation for a claim under the last preceding sub-section shall

be one year from the date of the declaration made by the Collector, makes it quite clear that the provisions of this section do not apply to claims made more than one year after the date of the declaration. There is no suggestion that in the present case the claim of the appellant falls within this period of limitation and there must in fact be very little land in Upper Burma in respect of which a declaration under the provisions of S. 24 (1) of the Regulation was not made very much more than a year ago. Sub-S. (4) merely empowers the Collector to withdraw a declaration made under sub-S. (1) before the passing of an order or any claim preferred under sub-S. (2). S. 25 of the Regulation lays down some of the incidents of the tenure of State land. There is nothing in this section from which it can be held or inferred that the jurisdiction of the civil Courts is barred in the case of a claim to ownership or possession of State lands. S. 26 gives power to the Financial Commissioner to make rules in respect of State land which is waste, and sub-S. (4), S. 26 lays down that no person shall acquire by length of possession or otherwise any interest in land disposed of, occupied or allotted in pursuance of the rules made by the Financial Commissioner under Cl. (1) beyond such interest as is conferred by the rules.

The rules framed by the Financial Commissioner do not appear anywhere to lay down that the jurisdiction of a civil Court is barred in case of claims to State land. Financial Commissioner's Notification No. 8, dated 5th July 1889, directs that claims as against the State to the ownership or possession of any land with respect to which a declaration that it is state land has been made or may be made, shall be tried by Collectors only and that claims between private individuals to the occupation or possession of State land shall be tried by a Collector or by an Assistant Collector of the first or second class. But this notification does not purport to do more than define the class of Revenue Officers by which claims of different descriptions shall be tried, and neither from the notification nor from the rules or directions framed under the Act is it possible to infer that any such monopoly of the trial of claims to State land as is apparently recognized in the published rulings of this Court quoted

above, is either claimed or suggested. If there were any doubt as to whether Cls. 13 or 14 included in sub-S. (2), S. 53, Land and Revenue Regulation, were intended to lay down an absolute rule without reference to sub-S. (1), I think it would be laid at rest by a reference to some of the other clauses. For instance Cl. (ix) purports to bar the jurisdiction of a civil Court over any claim connected with or arising out of any right in an irrigation work or any charge in respect of any land irrigated from such a work or any matter which the Collector is bound to ascertain and record under S. 36.

Section 36 of the Regulation has been repealed and the Regulation now contains no provisions relating to irrigation works, which are dealt with in the Burma Canals Act 2 of 1905. Similarly Cl. (x) bars the jurisdiction of a civil Court in respect of any claim to a right to fish, or connected with or arising out of the demarcation or disposal of any fishery. The Regulation now contains no provisions relating to fisheries, S. 32 having been repealed by the extension of the Burma Fisheries Act (1905) to Upper Burma. The view that these two clauses depended on, and were restricted to, the other provisions of the Regulation and did not lay down a general rule of law irrespective of those provisions, appears to be the view which has also been taken by the Local Government, since in the foot-notes appended to those clauses at p. 27 of the Upper Burma Land and Revenue Manual, which is published under the authority of Government, it is pointed out that Cl. (ix) should apparently have been repealed by Burma Act 2 of 1905, and that Cl. (x) ceased to apply since the extension of the Burma Fisheries Act, 1905, to Upper Burma.

I think, therefore, there can be no doubt that Cl. (ii) to sub-S. (2) of S. 53 of the Upper Burma Land and Revenue Regulation neither bars nor purports to bar the jurisdiction of civil Courts, except in respect of such matters as the Local Government or a Revenue Officer is empowered by or under the Regulation to dispose of, and inasmuch as the Regulation does not empower Revenue Officers to dispose of claims to the ownership or possession of any State land more than one year after the date of the declaration by the Collector that the land is State

land, and does not give any authority to the Financial Commissioner to make rules for deciding such claims, I am of opinion that the jurisdiction of the civil Courts is not barred and that they are entitled and bound to take cognizance of such claims. I have already stated that the terms of the Financial Commissioner's Notification No. 8 of 1889 do not appear to be intended to empower Revenue Officers to dispose of claims between private individuals and there does not seem to be any rule giving them such powers. If, however, there is any such rule or if it was the intention of the notification to confer the power upon Revenue Officers of deciding claims between private individuals to the occupation or possession of State land, I think it is clear that, except in so far as such notification or rule is issued or framed under the authority of, and in conformity with, S. 24, sub-S. (3), or S. 26 or otherwise to effect the purposes of the Regulation, it cannot have the effect of barring the jurisdiction of a civil Court since it is not made or issued by or under the Regulation. I am unable to find that the Regulation anywhere empowers Revenue Officers to decide claims to occupy or possess State land between private persons except within one year of a declaration that the land is State, or gives any power to make rules by which Revenue Officers may be so empowered.

In this view of the case it is not necessary to consider whether S. 53 of the Regulation was validly enacted or not. But I do not think it is possible to pass over in silence two of the arguments used by the additional Judge of this Court in arriving at the conclusion that the section was not validly enacted. It is apparently urged that the word "allegiance", which occurs in S. 22, Indian Councils Act of 1861, is used in the sense of devotion or loyalty, and it is apparently argued that as the allegiance, in the sense of devotion or loyalty, of the person may depend upon the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland, any law which may be held to affect those unwritten laws or that constitution must be illegal, since the allegiance, in the sense of devotion or loyalty, of any person to the Crown may depend upon such a law. I am of opinion that the word "allegiance" used in S. 22, Indian Councils Act, used in the ordinary legal

sense of a duty or obligation of loyalty owed by a subject to his Sovereign.

This is the sense in which the word is used in Ch. 10 of the first book of Blackstone's Commentaries, and I have no doubt that the object of the section was to lay down in the words of a learned writer that

"the Council may not pass a law affecting the authority of Parliament or any part of the unwritten law or constitution of the United Kingdom dealing with the allegiance or the sovereignty or the dominion of the Crown over any part of British India" (Professor A. Berredale Keith, *The Journal of the Society of Comparative Legislation* Vol. 36, p. 211).

Nor can I agree with the argument that whereas the section might be validly enacted in respect of the natives of the country, it is invalid in respect of Englishmen and is, therefore, entirely invalid. The suggestion that whereas the allegiance of an Englishman might depend upon his right to have recourse in all cases to the ordinary tribunals, whereas in the case of a Burman it would not so depend, appears to me to be merely an instance of the difficulties into which the Courts would be landed if they attempted to give the meaning to allegiance attributed to it by the additional Judge and is entirely opposed to the general spirit of legislation in this country. Since the jurisdiction of the civil Courts is not barred, the appeal will now be heard upon the merits.

K.N./R.K.

A. I. R. 1918 Upper Burma 50

SAUNDERS, J. C.

Maung Chit Pu and another — Plaintiffs—Appellants.

v.

Maung Pyaung and others — Defendants—Respondents.

Second Appeal No. 191 of 1916, Decided on 6th October 1916.

Civil P. C. (1908), O. 41, Rr. 22 and 33—Portion of decree appealed against—Appellate Court cannot in absence of cross objection set aside portion of decree in favour of appellant.

Where a party appeals against that portion of a decree in respect of which he has been unsuccessful, the appellate Court is not ordinarily entitled, without any formal cross-objection by the other side, to set aside so much of the decree as has been in favour of the appellant: 34 All 32 Ref. [P 51 C 1]

A. C. Mukerjee—for Appellants.

D. Dutt—for Respondents.

Judgment.—The plaintiffs sued to eject the defendants from certain land. The plaintiffs' case was that they had

bought the land in suit in the year 1262 B. E., corresponding with the year 1900 A. D., that they had been in possession ever since, that the defendants had entered on the land and in spite of their protest taken possession and built a house on it. The defence was that the plaintiffs had not purchased the land that the land had been mortgaged to the mother of the plaintiff Ma San Hmi, who was also mother of defendant 1 Maung Pyaung, and that Maung Pyaung had been permitted to occupy the land with the consent of his mother the mortgages. The Court of first instance held that the sale had not been proved but that the plaintiffs had contributed Rs. 10 towards the mortgage money of Rs. 15 which had been paid to the mortgagor, that the plaintiffs were, therefore, entitled to two-thirds of the land in suit and the Court accordingly gave the plaintiff a decree for two-thirds of the land. The plaintiffs appealed and the District Court held that the suit was wrongly framed, that it should have been a suit for possession and that the plaintiffs having failed to make out their case were not entitled to succeed at all and the Court not merely dismissed the appeal but dismissed the plaintiffs' suit. The plaintiffs now come to this Court in second appeal.

The first ground of the appeal is that the defendants-respondents not having raised any objection to the decree of the Court of first instance, it was not open to the lower appellate Court to set so much of the decree aside as was in favour of the plaintiffs-appellants. For the respondents the provisions of O. 41, R. 33, Civil P. C. are relied upon. This is a new provision of law incorporated in the present Code of Civil Procedure for the first time and whereas there appears to have been no doubt that under the old Code a Court would not have been entitled to pass such an order as has here been passed by the lower appellate Court it is urged that the new rule gives the Court ample power to pass any decree which the case may require. It was, however, pointed out in *Rangamal v. Jhandu* (1) that in interpreting this rule the Court should not lose sight of the provisions of the Code of Civil Procedure itself, nor of the court-fees Act nor of the Law of Limitation. R. 22 of the same order provides:

1. (1912) 34 All 32=11 I C 640.

"Any respondent though he may not have appealed from any part of the decree may not only support the decree on any of the grounds decided against him in the Courts below but take any cross-objection to the decree which he could have taken by way of appeal provided he has filed such objection in the appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal or within such further time as the appellate Court may see fit to allow."

This rule clearly shows that it was intended that prima facie at least, a respondent should not be allowed to take exception to so much of a decree as was against him without complying with the provisions of the rule. The learned Judges went on to say:

"In a case in which there is no sufficient reason for respondent neglecting either to appeal or to file objection we think the Court should hesitate before allowing him to object at the hearing of the appeal filed by the appellant."

I think that this view of the law may be accepted and that where a party appeals against that portion of the decree in respect of which he has been unsuccessful, the Court is not ordinarily entitled without any formal cross objection by the other side to set aside so much of the decree as has been in favour of the appellant. I think therefore that to this extent the appeal in the present case must succeed. On the merits the appellants urge that they are entitled to a decree as prayed for. It is however, clear that their suit was not one for ejectment. They alleged wrongful dispossession by the defendants and the suit was one for possession. This is a mistake, however which is very commonly made and might have been and should probably have been corrected by an amendment in the Court of first instance. But the evidence certainly does not show that the plaintiffs have made out their case and both the Courts below have apparently agreed in holding that the sale set up was not proved while the mortgage relied upon by the defendants was proved. In view of this finding and of the fact that the mortgage was the mother of one plaintiff and mother-in-law of the other living upon the same land with the plaintiffs, I think it was a natural inference that the plaintiffs were not in possession on their own account. There is, moreover, evidence that the plaintiffs gave the defendants permission to build a house upon the land. It was at least as good evidence as that of the plaintiffs' witnesses.

There are no grounds for allowing the appeal except in so far as the lower appellate Court has disturbed the finding of the Court of first instance. To that extent the appeal is allowed and the decree of the Court of first instance will be restored with costs.

K.N. H.K. *Appeal partly allowed.*

A. I. R. 1918 Upper Burma 51

McCOLL, A. J. C.

Ma Pyu—Plaintiff—Appellant.

v.

Maung Po Chet and others—Defendants—Respondents.

Second Appeal No. 96 of 1916, Decided on 23rd October 1918.

(a) Evidence Act (1872), S. 115—"Thing"—Meaning of—Proposition of law or promise to make gift is not "thing."

The word "thing" in S 115, Evidence Act, means a fact, and a fact in existence or past. A proposition of law or a promise to make a gift is not a "thing" within the meaning of that section, and cannot create estoppel: *Langdon v. Dond*, 10 Allen 432, *Ref.* [P 53 C 1]

(b) *Maxims*—*Quicquid plantatur solo solo cedit*—*Maxim* is not applicable to India.

The maxim *quicquid plantatur solo solo cedit*, i.e., that anything affixed to land with the object of improving the inheritance becomes part of the realty and the property of the owner, whether it be affixed by him or some one else, is not applicable to India. [P 52 C 2]

(c) Possession—Suit for—Plaintiff alleging ground and house built on it to be hers—Defendant alleging that ground had been gifted to him, by plaintiff and house was built by him—Gift not established—Amount advanced by plaintiff towards costs of house not proved—Held plaintiff was entitled to decree for possession subject to payment estimated value of house.

Plaintiff sued for possession of a house and ground, alleging that the ground was hers, that she had built the house on it, the defendant being entrusted with the superintendence of its construction and having contributed a portion of the costs of its building. The defendant alleged that the ground had been gifted to him by the plaintiff, and that the house was built by him. It was found that no gift from the plaintiff to the defendant was established, and that there was no proof of the amount of money advanced by the plaintiff towards the costs of the house:

Held: that the plaintiff was entitled to a decree for possession subject to the payment by her to the defendant of the estimated value of the house. [P 53 C 2]

C. G. S. Pillai—for Appellant.

H. M. Lutter—for Respondents.

Judgment.—Defendant-respondent 1 is the grandson of the plaintiff-appellant. Defendant-respondent 2 is defendant-respondent 1's wife, and defendant-respondent 3 is his mother-in-law. The plaintiff-appellant sued for possession of

a house and ground alleging that the ground was hers, that she had built the house on it, defendant-respondent being entrusted with the superintendence of its construction, that the house had cost Rs. 1,500 of which she had furnished Rs. 1,050 and defendant-respondent, Rs. 450, that after the house had been built she had permitted defendants-respondents to live in it with her, and that now disagreements had arisen and they had refused to quit. The defence was that the ground had been given to defendant-respondent 1 by the plaintiff-appellant out of natural love and affection, that he had built the house with his own money and that he had permitted the plaintiff-appellant to live with him. The Sub Divisional Judge found that the house belonged to plaintiff-appellant, but that defendant-respondent had furnished more than Rs. 450 for its construction, and gave the plaintiff-appellant a decree for possession on payment of Rs. 1,100. On appeal the lower appellate Court held that it was for the plaintiff-appellant to prove that she had furnished Rs. 1,050 for the construction of the house, that she had failed to prove this and that there was accordingly no difficulty in believing the story of the gift of the land, but that the question of the gift was not essential to a determination of the suit. It reversed the decree of the first Court and dismissed the suit. One of the grounds of this appeal is that the lower appellate Court erred in holding that the question whether the land on which the building was erected was given or not by the plaintiff-appellant to defendant-respondent 1 was not essential, and that the only issue to be determined was whether the plaintiff-appellant had contributed Rs. 1,050 towards the building.

The land admittedly had belonged to the plaintiff-appellant and she was in joint possession of the house and paid the taxes. If she had stated nothing further the burden of proof would have been on the defendants-respondents, but she stated that defendant-respondent 1 had built the house for her as her agent and had expended money of his own on its construction. He was therefore entitled to remain in joint possession until reimbursed what he had expended under S. 221, Contract Act. She thus admitted that she had not an unconditional right

to turn defendant-respondent 1 out of the house, and she, therefore had to prove on what terms she was entitled to sole possession. No doubt she was not in a position to prove the exact amount expended by defendant-respondent 1, but she was bound to make out a *prima facie* case, and this she could have done by proving the approximate value of the building and that she had contributed Rs. 1,050. The payment of this sum therefore was part of her case, but it does not follow that her suit was bound to fail entirely if she failed to prove it. Unless there was a gift she remains owner of the land. For the defendants-respondents it is urged that the maxim *quicquid plantatur solo, solo cedit*, which means that anything affixed to land with the object of improving the inheritance becomes part of the realty and the property of the owner, whether it be affixed by him or by some one else, is not applicable.

This rule is not part of the law of India, Ss. 51, 63 and 108 (h), T. P. Act, have taken its place. The two latter sections do not apply because defendant-respondent 1 is neither a mortgagee nor a tenant. S. 51 does not apply either. If defendant-respondent 1 be a transferee, i. e., if there were gift of the land, then the land is his, he is not a transferee with an imperfect title. But assuming that plaintiff-appellant failed to prove that defendant-respondent 1 was her agent and that she contributed Rs. 1,050 she certainly could not lose her land unless she be estopped, and I think the equitable rule contained in S. 51, T. P. Act, should be followed. Now it is plain that there was no gift. No registered deed was executed and the plaintiff-appellant remained in possession of the land. If the evidence adduced by the defendants-respondents be true, it merely amounts to proof that plaintiff-appellant promised to give defendant-respondent 1 the land. Estoppel was not specifically pleaded, but at the hearing of this appeal it was urged that, if on the faith of plaintiff-appellant's promise defendant-respondent 1 built the house with his own money, plaintiff-appellant is now estopped from asserting her title to the land. But what "thing" did plaintiff-appellant induce defendant-respondent 1 to believe to be true? Supposing that he believed that a promise to give amounted to gift, it cannot be said that this belief was induced by the plain-

tiff-appellant, and, moreover, a proposition of law is not a "thing" within the meaning of S. 115, Evidence Act. In that section a "thing" means a fact and a fact in existence or past.

"The intent of a party is necessarily uncertain as to its fulfilment. No person has a right to rely on it. A person cannot be bound not to change his intention, nor can he be precluded from showing such a change merely because he has previously represented that his intentions were once different from those which he eventually executed. *Langdon v. Dond* (1)"

There is thus no estoppel in this case; plaintiff appellant may have truly intended to give the land at the time she made the promise, if she ever made it, and have subsequently changed her mind. I am therefore of opinion that defendant-respondent 1 cannot claim the house as his property as long as the plaintiff-appellant is willing and ready to reimburse him the money which he expended on it. It is, therefore immaterial whether defendant-respondent 1 built the house as plaintiff-appellant's agent or on the faith of her promise to give him the land; the only question is the amount which the plaintiff-appellant must pay before she can evict him. The only direct evidence of any contribution by the plaintiff-appellant is that given by a casual visitor, a cooly who has worked for plaintiff-appellant for ten years. According to one of her witnesses she is poor, and there are serious discrepancies between her own evidence and that given by her witness Maung Po Kyan. I am therefore unable to hold that the lower appellate Court was wrong in finding that it was not proved that she contributed anything towards the building, and if she did she has only herself to blame for not taking receipts and keeping accounts. The evidence adduced by the defendants-respondents as to the amount spent on the construction of the house is very deficient. The Sub-divisional Court found that the value of the house was Rs. 2,150. This finding was based on a report by the bailiff, which was apparently admitted in evidence with the consent of both sides. The opinions as to the value of the building expressed by some of the defendant-respondents' witnesses are valueless. The value, Rs. 2,150, has not been disputed in this Court and will be accepted.

The decrees of the Courts below are accordingly set aside, and the plaintiff-ap-

pellant will be given a decree directing that upon her depositing in Court within one month for payment to defendant respondent 1 the sum of Rs. 2,150, the defendants-respondents shall give her complete possession of the house and ground in suit. As the parties have been both partly successful they will bear their own costs throughout.

K.N./R.K.

Decree set aside.

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SAUNDERS, J. C.

Nga Ti—Applicant.

v.

Maung Kyaw Yan—Opposite Party.

Criminal Misc. Appeal No. 18 of 1916,
Decided on 2nd November 1916.

(a) Criminal P. C. (1898), Ss. 107 and 439
—Proceedings under S. 107—Information not justifying passing of order—High Court will interfere.

It is the duty of a High Court to prevent the abuse of the provisions of the law, and if in a case in which proceedings have been taken under S. 107, Criminal P. C., it is found that the information did not justify the Magistrate in issuing a warrant, the High Court will interfere with the order passed: 17 C W N 233, *Ref.*

[P 54 C 2]

(b) Criminal P. C. (1898), S. 107—Mere fact that doing of lawful act may lead to breach of peace does not authorise Magistrate to take action against person intending to do the act unless they themselves are likely to commit breach of peace.

Section 107, Criminal P. C., does not authorise action against a person who is expected to do an act which may cause a breach of the peace or disturb the public tranquillity unless that act is wrongful, and the mere fact that the doing of a lawful act may lead to a breach of the peace, while it may authorise the Magistrate to take action against the persons expected to commit that breach, does not authorise action against the persons intending to do the lawful act unless they are themselves likely to commit a breach of the peace or to disturb the public tranquillity: 12 C W N 703; 32 All 571 and 6 Mad 203, *Ref.*

[P 54 C 2]

(c) Criminal P. C., (1898), Ss. 107 and 144—Persons convening meeting to discuss religious matter are not doing anything unlawful—In case breach of peace is expected Magistrate should proceed under S. 144.

The right of public discussion is a right which every subject possesses, and persons convening a meeting to discuss religious matters are not doing anything unlawful. If owing to the prevalence of ill-feeling between certain persons likely to attend the meeting, or any other cause a breach of the peace is expected the Magistrate should proceed under S. 144, Criminal P. C., to secure that the peace is not broken. [P 55 C 1]

D. Dutt—for Applicant.

H. M. Lutter—for the Crown.

Tha Gywe and *Maung Su*—for Opposite Party.

Judgment.—Certain residents of Mandalay made a report to the District Superintendent of Police which was forwarded to the District Magistrate, who recorded the information given by three of their number and thereupon issued warrants for the arrest of two persons under S. 107, Criminal P. C., and then transferred the proceedings to the Eastern Sub-divisional Magistrate for disposal.

Against this order the two persons arrested have come to this Court in revision and the Government Prosecutor has been heard for the District Magistrate. The persons who gave the information to the District Magistrate were also cited, but they do not wish to be parties to the proceedings and they have not supported the order. The information given in the first instance is in writing and it was accompanied by a printed notice and a copy of a newspaper. The notice is an invitation to a meeting "to clear up doubts;" it stated that the sayadaws from the four quarters of Mandalay had been invited to give their decision on certain matters and all friends of the persons who issued the notice were invited to attend. The newspaper article stated that the sayadaws from the four quarters were to be entertained, and after that the question whether beef should or should not be eaten would be considered, the injunction by the Ledi Sayadaw and various other pongyis would be read, after which the opinion of the sayadaws would be asked for, and they would give their decision. The written information stated that there would be a serious dispute resulting in a breach of public peace, because when there is a difference among pongyis there will be a difference among laymen. It stated that the notice and the newspaper article convening a meeting would encourage a great and serious dispute between half of the residents of Mandalay who revere the Ledi Sayadaw and the rest, and if the meeting is held the information states that there will, through ill-feeling on each side, be a serious quarrel. The information stated that a public meeting was to be held at which the two applicants intend to attack the Ledi Sayadaw's propaganda for putting a stop to the eating of beef, that a very large number of priests and laymen had been called by the two persons mentioned to attend the meeting, and unless they

are placed on security their action would result in a breach of public (apparently a misprint for "peace").

It is contended that this information did not justify the arrest of the two applicants and proceedings being taken against them under S. 107, Criminal P. C. On the other hand, it is urged that the information did justify that action and this Court should not interfere at this stage of the proceedings. I think there is no doubt that if the information did not justify the issue of a warrant, this Court is entitled to interfere. It has been held constantly that it is the duty of the High Court to prevent the abuse of the provisions of the law. A recent case is that of *Rajendra Narayan Singh v. Emperor* (1). S. 107, Criminal P. C., authorizes a District Magistrate to take action upon information that any person is likely to commit a breach of the peace or disturb the public tranquillity, or to do any wrongful act that may probably occasion a breach of the peace, or disturb the public tranquillity.

It is clear that there are two distinct sets of circumstances in which a Magistrate may take action under this section, first where it appears that a person is likely himself to commit a breach of the peace or to disturb the public tranquillity, that is to say, by a direct act, e. g., by committing an assault, and secondly, where a person may be the indirect cause of a breach of the peace or the disturbance of the public tranquillity by doing a certain act, but in the latter case the Magistrate may only take action where the act anticipated is a wrongful act. It has been laid down in a number of rulings that this section does not authorize action against a person who is expected to do an act which may cause a breach of the peace or disturb the public tranquillity unless that act is wrongful, and that the mere fact that the doing of a lawful act may lead to a breach of the peace, while it may authorize the Magistrate to take action against the person expected to commit that breach, does not authorize action against the persons intending to do the lawful act, unless they are themselves likely to commit a breach of the peace or to disturb the public tranquillity. The distinction has been explained in *Firoze Ali Mullick v.*

Emperor (2), where certain persons proposed to take a procession along a public road and it was pointed out by Woodroffe, J., that if those persons "have the right claimed, it is obvious that they cannot be properly bound down because some one else proposes to interfere with that right. The proper course in such a case is to bind down the other party."

The law was similarly explained in *Mohamed Yakub v. Emperor* (3). The matter was discussed at great length in *Sundram Chetti v. Queen* (4). There can be no question that the right of public discussion is a right which every subject possesses, and that in convening a meeting to discuss religious matters the applicants in the present case were not doing a wrongful act. If owing to the prevalence of ill-feeling between certain persons likely to attend the meeting or any other cause, a breach of the peace was expected, the Magistrate had ample power under S. 144, Criminal P. C., to secure that the peace was not broken. But I am clearly of opinion that in arresting the applicants in the present case and in ordering an inquiry into their conduct, the District Magistrate was not, upon the information which was before him, justified by the provisions of the Code of Criminal Procedure. If information is or was available that the applicants themselves intended to commit a breach of the peace or to disturb the public tranquillity, the fact should be or should have been recorded. The proceedings of the District Magistrate must be quashed and the warrants for the arrest of the applicants cancelled.

K.N./B.K. *Proceedings quashed.*

2. (1908) 12 C W N 703.

3. (1910) 32 All 571=6 I C 454.

4. (1983) 6 Mad 203.

A.I. R. 1918 Upper Burma 55

RIGG, A. J. C.

Nga Min Din—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 287 of 1917, Decided on 28th June 1917.

(a) Criminal P. C. (1898), S. 437—Order for further inquiry under S. 437—Detailed examination of evidence and elaborate reasoning are not necessary—Enough should be said to indicate to lower Court in what way its order is thought to be incorrect.

It is not ordinarily desirable that in ordering further inquiry under S. 437, Criminal P. C., a detailed examination of the evidence and elaborate reasons should be given, but enough should

be said in the way of reasons to indicate to the Court below in what manner it is thought that its order was incorrect, whether on a point of law or in misappreciation of the weight of the evidence or for want of a complete inquiry. [P 56 C 1]

(b) Criminal P. C. (1898), S. 437—Order for further inquiry—Person against whom order is made should have notice of grounds on which it is directed.

It is fair to a person against whom an order for further inquiry is made that the reasons for directing such inquiry should be made explicit to him and that he should have notice of the ground on which the further inquiry has been directed: 4 L B R 231, Diss. from: 8 C W N 756 and 32 C 1090, Rel. on. (P 56 C 2)

K. Banerjee—for Applicant.

Judgment.—This is an application for revision of the order of the District Magistrate directing further inquiry in the case of *Emperor v. Nga Min Din* in Criminal Regular Case No. 61 of 1917 of the Township Magistrate, Peshawar.

The first objection taken to the order of the District Magistrate is that he has failed to give reasons for ordering further inquiry. The District Magistrate says:

"I do not wish to write a judgment in advance but prima facie it is quite clear that Nga Min Din is the prime mover in this theft and ought never to have been discharged."

Section 437, Criminal P. C., does not require a Court ordering further inquiry to state its reasons. In *Tun Win v. Emperor* (1) Irwin, J., held that it was sufficient for a Court ordering further inquiry to state as its reasons that it had considered the whole of the evidence on the record. He said that it would be improper for the Magistrate to comment on the evidence in detail, as such a proceeding would tend to prejudice the accused. This opinion has been dissented from in two cases of the Calcutta High Court, *Nagendra Nath Sen v. Mr. Korb* (2) and *Wahed Ali v. Emperor* (3), in both of which cases it was held that the Magistrate should state his reasons for ordering further inquiry, as in the absence of such reasons it is not possible for the High Court to exercise supervision over the Magistrate or Judge's proceedings. To the reasons given by the learned Judges of the Calcutta High Court, I may add that it appears to me fair to a person against whom an order for further inquiry is made, that the reasons for directing such inquiry should be made explicit to him and that he should have notice of the ground on which the further inquiry has been

1. (1907-08) 4 L B R 233.

2. (1904) 8 C W N 456.

3. (1905) 32 Cal 1090.

directed. To the objection that the accused may be prejudiced in his trial if the reasons for the superior Court's order are made explicit, it may be replied that while it is not ordinarily desirable that a detailed examination of the evidence and elaborate reasons should be given, enough should be said in the way of reasons to indicate to the Court below in what manner it is thought that its order was incorrect, whether on a point of law or in misappreciation of the weight of the evidence or for want of a complete inquiry.

(The rest of the judgment is not reportable—Ed).

A. I. R. 1918 Upper Burma 56

SAUNDERS, J. C.

W. Calogreedy, Advocate, In re.

Civil Misc. Appeal No. 37 of 1916, Decided on 4th July 1916.

Criminal P. C. (1898), S. 340—Magistrate has discretion to permit person including pleader not otherwise authorised to practise in his Court to appear for an accused—Discretion should be exercised judicially.

Every Magistrate has a discretion to permit a person, including a pleader not otherwise authorized to practise in his Court, to appear for a person accused before the Court. This discretion however should be exercised judicially, and permission should be given only in case in which the Magistrate or the presiding officer considers that it is for the interest of the accused that it should be given. *In the matter of the Petition of Mr. G. F. Travers Drapes, S. J. L. B. 260 Ref.* [P 56 C 2]

H. M. Lutter—for Applicant.

Judgment.—The applicant, who is a second grade advocate whose license does not permit him to practise in the Sagaing District, applied to the District Magistrate, Sagaing, on behalf of certain accused persons who were under trial before the District Magistrate, Sagaing, and the latter recorded an order to the effect that the Advocate could not act in the Sagaing District and the application, therefore could not be granted. The Advocate has now applied to this Court and has obtained permission to appear in the particular case mentioned. He also submits that the order of the District Magistrate was illegal in view of the provisions contained in S. 340, Criminal P. C., which is reproduced and para-

phrased in para. 295 of the Upper Burma Courts Manual. The law relating to Advocates in Upper Burma is contained in Ss. 25 to 29 of the Upper Burma Civil Courts Regulation, 1896, and under S. 25 (2) of that Regulation rules have been framed of which the first provides that Advocates of the second grade shall be entitled to appear, plead and act in any four Districts named in their license. S. 340, Criminal P. C., lays down that every person accused before any Criminal Court may of right be defended by a pleader, and "Pleader" when used with reference to any proceeding in any Court, is defined in S. 4 (r), Criminal P. C., as a pleader authorized under any law for the time being in force to practise in such Court, and includes (1) an Advocate, a vakil and an Attorney of a High Court so authorized, and (2) any Mukhtar or other person appointed with the permission of the Court to act in such proceeding.

I think it is clear that an Advocate who is licensed to appear in a certain District or in certain specified districts only, cannot be said to be authorized to practise in a Court beyond the limit of such district or districts. On the other hand, there appears to be no reason why a pleader who is not authorized to appear in any particular Court should not be appointed with the permission of the Court to act on behalf of an accused person, and so to become a pleader within the meaning of the term as defined in the Code of Criminal Procedure. Reference may be made to *In the matter of the Petition of Mr. G. F. Travers Drapes* (1), in which the question is discussed. I am of opinion that every Magistrate has a discretion to permit a person, including a pleader not otherwise authorised to practise in his Court, to appear for a person accused before the Court. This discretion should no doubt, be exercised judicially and permission should be given sparingly and in such cases as the Magistrate or presiding officer considers that it is for the interest of the accused that it should be given.

K.N./R.K. *Appeal dismissed.*

1, S. J. L. B. 260.

THE
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1918

NAGPUR SECTION

CONTAINING

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.

NAGPUR JUDICIAL COMMISSIONER'S COURT
1918

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	20	Cr L J	777		19	Cr L J	796		1	N L J	68		19	Cr L J	979
62	52	I C	495	128	44	I C	241	173 (2)44	I C	928	240	43	I C	178	
	20	Cr L J	671	129	46	I C	775	174	46	I C	1005	241 (1)47	I C	896	
63	15	N L R	36		2	N L J	40		19	Cr L J	861	241 (2)1	N L J	125	
	48	I C	934	131	53	I C	145	177	44	I C	921		1	N L J	140
64	53	I C	483		20	Cr L J	737	178	47	I C	32	242			
	20	Cr L J	760	134 (1)48	I C	901			14	N L R	125	243	1	N L J	157
65	53	I C	523	134 (2)48	I C	886	180		48	I C	723	244	1	N L J	122
	20	Cr L J	823		20	Cr L J	86	181	46	I C	424	245	1	N L J	184
66	15	N L R	39	135	48	I C	882	184	48	I C	783	247	46	I C	879
	49	I C	840		20	Cr L J	52	185	47	I C	542		4	N L J	136
67	53	I C	481	136	48	I C	987	186 (1)48	I C	964	248	1	N L J	225	
	20	Cr L J	753		20	Cr L J	107	186 (2)46	I C	970	257	1	N L J	152	
69	49	I C	843		1	N L J	159	187 (1)47	I C	540	259	1	N L J	161	
72	15	N L R	48	137 (1)48	I C	688			2	N L J	58	262	1	N L J	137
	43	I C	907		20	Cr L J	48	187 (2)45	I C	882	263	48	I C	160	
73	2	N L J	69	137 (2)48	I C	979	191	46	I C	785	264	47	I C	886	
	50	I C	951		20	Cr L J	99		1	N L J	85	268	1	N L J	76
74	15	N L R	31	138	48	I C	990	193	46	I C	922	269	1	N L J	81
	43	I C	923		20	Cr L J	110	195	48	I C	948	271 (1)1	N L J	32	
	2	N L J	19		1	N L J	65	196	48	I C	932	271 (2)42	I C	304	
76	53	I C	491	139	48	I C	482	197 (1)44	I C	972	272	1	N L J	25	

THE ALL INDIA REPORTER

NAGPUR: J. C.'s. COURT

1918

** A. I. R. 1918 Nagpur
BATES, A. J. C.

On difference between

DRAKE BROOKMAN, I. C. AND
PRIDEAUX, A. J. C.

Afterwards

PRIDEAUX AND MITTAL, A. J. C's.
Champtria—Plaintiff—Appellant.

v.

M. Laxmi Bai and others—Defendants—Respondents.

First Appeal No. 67 of 1916, Decided
on 10th April 1917, from decree of M.H.
Dist. Judge, Nagpur, D. 31st August 1915.

** (a) Court-fees Act (1870), Sch. 2,
Art. 17—Suit for declaration of adoption
and right to hold property already in possession
dismissed—Court-fees payable on memo-
randum of appeal is ad valorem fee on value of property.

Plaintiff sued for a declaration that he was the
adopted son of one B and therefore entitled to
his property of which he was already in possession.
His suit was dismissed by the Court of first
instance and he then filed an appeal paying
a Rs. 10 court-fee stamp on the memorandum
of appeal.

Held: that the court-fees payable on the
memorandum of appeal was an ad valorem fee
on the value of the property held by the appellant
as the adopted son and heir of B. [P 1 C 2]

(b) Court-fees Act (1870), Sch. 2, Art. 17 (3)
—Suit to declare adoption valid is governed
by Art. 17 (3).

A suit for a declaration without consequential
relief that an adoption is valid is a suit which
does not on the face of it admit of being satisfactorily
valued and as such it falls under the category
of the suits mentioned in Cl. (iii), Art. 17, Sch. 2, Court-fees Act. [P 3 C 2]

(c) Suits Valuation Act (1887), S. 9—High
Court and the Local Government have power
to raise court-fee—Rules framed have the
force of law.

It is not within the jurisdiction of the law
Courts to consider as to whether in case of a
particular class of suits the High Court and the
Local Government exercised their discretion
wisely in raising the fixed court-fees by framing
the rules under S. 9, Suits Valuation Act, and

whether or not, in a suit to declare adoption
valid payment of valorem of the property is a
reasonable fee. The rules as they stand have
the force of law. Cl. (i), Art. 17, Court-fees Act
dated 21st September 1911 as reproduced in
Jaffar's Commentaries Civil Circular 1911 was
promulgated with the intention of affording this
relief. [P 3 C 2, P 4 C 1]

(d) Civil P. C. (1908), S. 11—Suit by third
person as heir against adoptive mother—
Adoption pendente lite—Adopted son not
joined as party—Decree is binding on adopted
son—Adoption pending suit or pending
appeal makes no distinction.

Plaintiff's adoption took place during the
pendency of a suit brought by defendant B.
against the defendant mother of the plaintiff
claiming to be the heir of deceased B. The plaintiff
was not joined in the suit as a party.

Held: that the decree in the previous suit
operated as res judicata and was binding on the
plaintiff. 16 Cal. 40; (P. C.), 1901. [P 3 C 1]

There is no distinction in this respect between
a case in which the adoption takes place pending
a suit or one in which it is made after the decree,
but pending an appeal: 3 M. L. J. 539, Foll.;
11 Mad. 108; 5 Bom. 620; 11 Bom. 409 and 21
B. R. 103, con. and dist. [P 5 C 2]

(e) Civil P. C. (1908), O. 22, R. 10—Adop-
tive mother sued as representing estate—
Minor adopted son is sufficiently represented
—Hindu Law, Widow.

A minor adopted son is sufficiently represented
by his adoptive mother where the latter is sued
as representing the estate and the suit is fairly
and properly conducted. [P 5 C 2; P 6 C 1]

(f) Civil P. C. (1908), O. 22, R. 10—Adop-
tion is not creation of interest—"Devolu-
tion" does not include adoption.

An adoption is not the creation of an interest
within the meaning of O. 22, R. 10, Civil P. C.
It is the creation of a status to which certain
incidents are attached by the law. The word
"devolution" in the rule does not include adop-
tion as the estate after an adoption does not
devolve, i. e., pass from one person to another,
but is vested in the adopted son after it is
divested from the adoptive mother. [P 6 C 1]

(g) Civil P. C. (1908), O. 22, R. 10—Adop-
tion pendente lite is not alienation.

An adoption pendente lite is not an alienation
pendente lite: 5 Bom. 630, Foll. [P 6 C 1]

The law of procedure since 1859 has not been changed so far as the joinder of a son adopted pendente lite is concerned. [P 6 C 1]

M. Gupta, P. S. Kotwal and P. R. Naidu—for Appellant.

B. K. Bose, M. V. Joshi and D. W. Kathale—for Respondents.

Drake-Brockman, J. C. and Pri-deaux, A. J. C.—We find it necessary to refer to a third Judge under Cl. (b) (ii), S. 6-A, Central Provinces Courts Act 1904, the question whether court-fee of Rs. 10 suffices for relief (a) claimed in this appeal or whether an ad valorem fee on the value of the property now held by the appellant as adopted son and heir of Bhaskar Rao is payable under the Notification (No. 1641, dated 28th September 1911) reproduced in para. 1, Civil Circular No. II-8. The view held by one of us is that expressed in Civil Revision No. 55-B of 1916 decided by himself and Stanyon, A.J.C. on 30th September 1916. The other appears in the order passed on 23rd June last in First Appeal No. 36 of 1915. The latter view proceeds on the assumption that S. 9, Suits Valuation Act 1887, cannot reasonably be read as conferring any power of valuation in respect of suits for which the Court-fees Act, 1870, prescribes a fixed fee without any sort of reference to the possibility of estimating value. The facts of the present case are briefly these. Bhaskar Rao and Nilkanth Rao were two brothers who both died in 1899, the former dying first. Each left a widow, Bhaskar's being Lakshmi Bai (defendant 1) and Nilkanth's Bhagirathi Bai (defendant 2). The appellant claims to have been adopted by Lakshmi Bai to the deceased Bhaskar and so to be entitled as heir to the share of the joint family property which Bhaskar obtained at a partition said to have been made in 1896. Of what that share would be, had the alleged partition taken place; the appellant alleges himself to be already in possession. The real contest is with defendant 3, Shamrao, who denies the partition and adoption and sets up title as an illegitimate son of Nilkanth.

The suit has been dismissed and relief (a) claimed in the memorandum of appeal appears to fall under Cl. (iii), Art. 17, Sch. 2, Court fees Act i. e., what the appellant desires is a declaratory decree where no consequential relief is prayed.

If S. 9, Suits Valuation Act, is held to give power to raise the court-fee above Rs. 10, the question will still remain whether Notification 1641, dated 28th September 1911, was necessarily intended to effect that result where the appeal as framed is for a relief such as we have described. We have assumed that the court-fee payable in appeal must be calculated in the same way as if that payable in a suit were in question. Our difference of opinion is referred for the decision of Mr. Batten, Additional Judicial Commissioner.

Batten, A. J. C.—This is a reference under Cl. (b) (ii), S. 6-A, Central Provinces Courts Act, 1904, two of the Judges of this Court having disagreed. The facts, as stated in the reference, are as follows: Bhaskar Rao and Nilkanth Rao were two brothers who both died in 1899, the former dying first. Each left a widow, Bhaskar's being Lakshmi Bai (defendant 1) and Nilkanth's being Bhagirathi Bai (defendant 2). The appellant Ganpatrao claims to have been adopted by Lakshmi Bai to the deceased Bhaskar, and so to be entitled as heir to the share of the joint family property which Bhaskar obtained at a partition said to have been made in 1896. Of what that share would be, had the alleged partition taken place, the appellant alleges himself to be already in possession. The real contest is with defendant 3, Shamrao, who denied the partition and adoption and sets up title as an illegitimate son of Nilkanth. Shamrao sued both the widows for possession in Suit No. 474 of 1910, on the ground that Nilkanth Rao took the entire property by survivorship, and succeeded.

In the present suit and in appeal the plaintiff Ganpatrao claims three reliefs in the form of declarations, of which the most important described as relief (a) is a declaration that he is the adopted son of Bhaskar, and therefore entitled to his property, of which he is already in possession. The court-fee paid on the plaint was ad valorem on the value of the property, stated to be Rs. 12,000, but that paid on the memorandum of appeal is Rs. 10 for each declaration. In the reference, and in the arguments before me, it has been assumed that the Court-fee payable in appeal must be calculated in the same way as if that payable in a suit were in question. The

point for decision before me is whether a court-fee of Rs. 10 offices for relief (a), or whether an *ad valorem* fee on the value of the property now held by the appellant as an adopted son and heir is payable under the Notification (No. 1641 dated 28th September 1911) reproduced in para. 1 of Civil Circular II-8. The view held by Pridemore, Additional Judicial Commissioner, has been expressed in Civil Revision No. 55 B of 1915, in which the plaintiff asked for a declaration that an adoption was void. The learned Judges held that the suit was one to set aside an adoption and observed:

"The suit thus falls under Sch. 2, Art. 17 (v), Court Fees Act. That Article contains the classes of suit, which require a court-fee of Rs. 10 under the Act, in every province where there has been no amendment of the schedule. But S. 9, Suits Valuation Act provides for amendment by way of rules made by the High Court with the sanction of the Local Government. In those Provinces such an amendment has been made with reference to suits under para. (vi) and such forms of suit falling under para. (vi). Therefore when a suit to declare an adoption valid affects (as is not to be denied) a title to property exceeding Rs. 100 in value, then the words 'ten rupees' must be read, for the purpose of the Court-fees Act, as '*ad valorem* such property.' In other words, Cl. 2, Sch. 2, Art. 17, should be read thus 'ten rupees unless otherwise ordered by any rule made under S. 9, Suits Valuation Act, 1887.'"

The view of Drake-Brockman, Judicial Commissioner, appears in his order passed on 23rd June 1915, in First Appeal No. 36 of 1915, in the following words:

"I have read the papers showing how the notification of 1888 (No. 2240, 7th June), which corresponds to that now reproduced in para. 1 of Civil Circular II-8, came to be issued and find that the then Judicial Commissioner did not intend to affect the court-fee payable in any case in which a fixed fee is prescribed by the Court-fees Act, cases falling under Art. 17 (vi), Sch. 2, alone excepted: see para. 3 of Registrar's No. 1597, dated 28th May 1888. The notification may thus be read as applying in accordance with that intention. Hence if the suit falls strictly and solely within Art. 17 (iii) or Art. 17 (v), Sch. 2, the proviso to the notification should not be applied any more than the third of the three clauses which precede it."

The relevant portion of the notification runs as follows:

"Under S. 9, Suits Valuation Act, 1887, the Judicial Commissioner, with the previous sanction of the Chief Commissioner, directs that suits of the following classes shall for the purposes of the Court-fees Act, 1870, the Suits Valuation Act, 1887, the Central Provinces Courts Act, 1901, be treated as if the subject-matter of such suits were of the value of four hundred rupees: (1) Suits

for the institution of conjugal rights, for declaration of the validity of a marriage, or for a divorce; (2) suits for the custody or guardianship of a minor; (3) suits for a declaration that an adoption is valid or invalid: Provided that if a suit for a declaration that an adoption is valid or invalid affects a title to property, then the value of that property, if it is under Rs. 100, shall be deemed to be the value of the subject-matter of the suit."

As explained in the reference, the view of Drake-Brockman, Judicial Commissioner, proceeds upon the assumption that S. 9, Suits Valuation Act cannot reasonably be read as conferring any power of valuation in respect of suits for which the Court-fees Act prescribes a fixed fee without any sort of reference to the possibility of estimating value. Moreover the relief (v) claimed in the memorandum of appeal falls under Cl. (iii), Art. 17, Sch. 2, Court-fees Act, since the appellant desires a declaratory decree where no consequential relief is prayed. The reference also raises the question whether, even if S. 9, Suits Valuation Act gives power to raise the court-fee above Rs. 10, the notification was necessarily intended to effect this result where the appeal as framed is for a relief such as is here claimed. As to the power conferred by S. 9, Suits Valuation Act, a suit for a declaration, without consequential relief, that an adoption is valid is undoubtedly, in my opinion, a suit which does not on the face of it admit of being satisfactorily valued. This view is, I consider, confirmed by the fact that a suit for a mere declaration of this kind falls under Cl. (iii), Art. 17, Sch. 2, and in Cl. (vi) of the same Article, the words used are:

"Every other suit where it is not possible to estimate at a money value the subject-matter in dispute."

It appears to me that the court-fee of Rs. 10 fixed for suits falling under Art. 17 was an arbitrary fee fixed for convenience and that S. 9, Suits Valuation Act enacted that this fee, fixed on an arbitrary valuation, should be regarded as provisional, and liable to be supplanted, in the case of selected classes of suits, by a court-fee based on what the High Court and the Local Government considered to be a reasonable basis of valuation. Whether in the case of a particular class of suits the High Court and Local Government exercised their discretion wisely, and whether or not in a suit of the present class a court-fee *ad valorem* of the property is a reasonable

fee, are questions beyond the jurisdiction of the Courts. The rules as they stand have the force of law.

It is also to be observed that the Chief Court of the Punjab has under S. 9, Suits Valuation Act, directed that suits of the nature described under head (v), Art. 17, Sch. 2, Court-fees Act, shall for the purposes of that Act be treated as if their subject-matter were of the value of Rs. 200 on which the fee is Rs. 15, although a suit falling under head (v) (suit to set aside an adoption) is one of a definite nature for which the Court-fees Act prescribes a fixed fee without any sort of reference to the possibility of estimating value. The Judicial Commissioner of Oudh also under S. 9, Suits Valuation Act has directed that suits in which the plaintiff asks for a decree establishing or annulling an adoption shall be treated as if their subject-matter was of the value of Rs. 400 for the purposes of the Court fees Act. As to the second question, whether the Notification was necessarily intended to have the result of making the court-fee in this particular class of merely declaratory suits dependent on the value of the property affected the meaning of a notification is primarily to be gathered from the terms of the notification itself, and no other meaning can in my opinion be given to the terms of this Notification than that the court-fee for a suit for a declaration that an adoption is valid or invalid is dependent on the value of the property, if the title to the property is affected by the validity of the adoption. Cl. (3) as well as the proviso on the face of them appear to have been intended to apply to suits of the present kind. It is true that from portion of the Registrar's letter submitting the draft notification it would seem that the Judicial Commissioner did not intend to affect the court-fee payable in any case for which a fixed fee is prescribed by the Court-fees Act; but the letter must be read as a whole, together with the draft notification submitted with it; and that draft notification and the previous correspondence plainly indicate the desire of the then Judicial Commissioner that a plaint in a suit for a declaration that an adoption is valid or invalid should bear a court-fee of a higher value than Rs. 10.

For these reasons my opinion is the same as that of Pridaux, A. J. C. and I consider

that the court-fee payable for relief (a) claimed in appeal should be ad valorem on the value of the property now held by the appellant as adopted son and heir of Bhaskar Rao.

[On receipt of the above opinion Pridaux, and Mittra, A. J. Cs. delivered the following]

Judgment.—The plaintiff-appellant's case is that Bhaskar Rao and Nilkant Rao were two brothers who about the year 1886 divided their estate in the manner described in the plaint.

Bhaskar Rao died on 24th June 1889, leaving a widow Mt. Laxmi Bai (defendant 1). Nilkant Rao died on 12th September 1889, leaving a widow Bhagirathi Bai (defendant 2). Defendant 3 Sham Rao claimed to be the illegitimate son of Nilkant Rao. The plaintiff further states that after the death of Bhaskar Rao and Nilkant Rao their widows confirmed the partition effected during their husbands' lifetime, and a registered deed of partition was executed on 27th January 1907. Defendant 3 had obtained a decree against defendants 1 and 2 in Suit No. 474 of 1910, but the plaintiff was no party to this suit, and so he says he is not bound by the decree. The plaintiff alleges that Nilkant Rao was a Kshatrya by caste, and defendant 3 was not a *dasi putra* and therefore not entitled to the property of Nilkant Rao. The plaintiff claims to have been adopted by defendant 1 on 7th January 1911 under an authority given by Bhaskar Rao in a document which is said to have been filed in Suit No. 3 of 1902 brought by defendant 4 against defendants 1 and 2. Defendant 4 was joined as a party on his own application, as he alleged that he was the adopted son of Nilkant Rao. The plaintiff however does not admit the adoption. The plaintiff sues for a declaration, (1) that he is the adopted son of Bhaskar Rao and entitled to the property left by the latter; (2) that he is entitled to the property of Nilkant Rao after defendant 2's death as his next reversioner; and (3) that the decree obtained by defendant 3 in respect of the said property of Bhaskar Rao and Nilkant Rao in Suit No. 474 of 1910 is not binding upon the plaintiff. The plaintiff also sues for confirmation of possession of the estate of Bhaskar Rao. Defendant 4, in addition to his rights as an adopted son of Nilkant Rao, pleaded that he was the next rever-

sioner of Nilkant Rao as the latter's sister's son.

The main defence by defendant 3, who is in possession of the estate, was a denial of the validity of the plaintiff's adoption. It was also alleged that there was no partition between the brothers, and that they were joint till their death; that Nilkant Rao obtained the estate by survivorship and after his death it passed to his illegitimate son. The defendants denied the document which is said to have authorized Laxmi Bai to adopt. Various issues were framed, but the case has been decided on grounds of law. The view taken by the lower Court is that the decree in the previous Suit No. 474 of 1910, operated as res judicata that the decision in that suit that the brothers were joint is binding on the plaintiff and that the plaintiff is not entitled to question the rights of defendant 3 as dastiputra of Nilkant Rao. It was also held that the plaintiff's adoption was bad inasmuch as it had the effect of divesting a vested estate, that is the estate of defendant 3. The plaintiff's suit has therefore been dismissed and this appeal has been filed by the plaintiff. There are two questions for decision. One is whether the decree in the previous suit is res judicata, and the other is whether the plaintiff's adoption is valid in law. It is however not argued before us that even on the finding that the brothers Baskar Rao and Nilkant Rao were joint the adoption of the plaintiff is valid. We have therefore at this stage to confine ourselves to a consideration of the first question. The learned Additional District Judge held that the Privy Council case of *Hari Saran Moitra v. Bhubaneswari Debi* (1) governs this case and the plaintiff who was then a minor, though adopted after the institution of Suit No. 474 of 1910, was bound by the decree though not made a party to that suit.

In the case before the Privy Council decree was passed against Bhubaneswari, who pending appeals to the High Court against the decree, adopted Jotindra Mohan, a minor, who was however not brought on the record as a party. The appellate decree was more unfavourable to the minor than the original decree. Their Lordships held that the minor was bound by the ultimate result of the litigation, as it was never suggested that

the case was improperly defended. In the case before us the adoption took place after the institution of the suit but before the decree was passed in the original Court. It is not suggested either in the pleadings or in the grounds of appeal that the minor's adoptive mother did not properly conduct the litigation, though in the arguments an attempt was made to show that documents not filed in the previous suit are now available. But this was a matter for pleadings and we cannot therefore allow it to be raised now. The case however is sought to be distinguished on two grounds. It is urged in the first place that in the Privy Council case there was already a decree before the adoption. It is also pointed out that the law of procedure has since changed.

We are unable to agree with the appellant's contention that although a minor, if adopted after a decree is bound by the final decree in the case without being made a party to the appellate proceedings, he is not bound if his adoption takes place pending the litigation in the first Court. Unless the minor is otherwise represented, he is entitled to be made a party in the first Court just as well as in the appellate Court in order that he should be bound by the decree. In the earlier Privy Council case of *Dhurm Das Pandey v. Mt. Shama Soondri Dibiah* (2), the adoption took place when the suit was pending in the Court of the first instance. Yet, in the later case *Dhurm Das Pandey v. Mt. Shama Soondri Dibiah* (2), was cited in support of the view taken by their Lordships. In our opinion the case before us cannot be distinguished on the first ground suggested.

It is perfectly true as argued for the appellant that the present Code of Procedure lays down rules which must be complied with in order to bind a minor defendant as a party and the law of procedure in this respect is less elastic than it was under the Code of 1859. But in this case the minor was not made a party. Therefore a consideration of the present rules of procedure becomes unnecessary. The principle underlying the decision in *Hari Saran Moitra v. Bhubaneswari Debi* (1) is that a minor an adopted son is sufficiently represented by the adoptive mother when the latter is sued as representing the estate and when

(1) [1889] 16 Cal. 40=15 I. A. 195 (P. C.).

(2) [1941] 3 M. I. A. 229=6 W. R. 43 (P. C.).

a decree has been obtained in a suit fairly and properly conducted.

It is pointed out that under Act 8 of 1859 there was no section corresponding to S. 372 of the Code of 1877 and 1882. The appellant's learned counsel argues that there was a creation or devolution of an interest pending the suit and therefore the provision of S. 372 of the previous Code, that is O. 22, R. 10, applies to the case. In our opinion an adoption is not the creation of an interest within the meaning of that section. It is the creation of a status to which certain incidents are attached by the law. The term creation is used in the sense of an assignment that is transfer of an interest not amounting to an assignment. Again the word "devolution" means the passing of an interest from one person to another. An adoption has the effect of divesting the estate of the adoptive mother. The interest acquired by the adoption is the estate as it was in the hands of the adoptive father subject to any rights properly created by the widow for legal necessity. We think therefore that the word "devolution" does not include the case of an adoption. No reported cases have been shown to us nor have we been able to find any in which S. 372, or O. 22, R. 10, has been held applicable to the case of an adoption pendente lite. In *Rambhat v. Lakshman Chintaman Mayalay* (3) Westrop, C.J., points out that an adoption pendente lite is not an alienation pendente lite.

If an adopted son has to be made a party then this is not in pursuance of any statutory provision specifically enacted for the purpose but under the inherent powers of the Court which are exercised in accordance with natural justice. In other words the law of procedure since 1859 has not been changed so far as the joinder of an adopted son pendente lite is concerned. It is argued for the appellant that the respondent Shamrao knew of the adoption before the decree was passed in the previous suit. For the purposes of this appeal we must assume this to have been the case. But the position of the respondent Shamrao is that he was disputing the alleged adoption and therefore it was for the adoptive mother to have applied for the plaintiff being brought on the record as a party. In the judgment of *Hari Saran*

Moitra v. Bhubaneswari Debi (1) their Lordships at p. 55 say:

"Act 10 of 1877 came into force on 1st October 1877, nearly three years after the decree of the High Court. If it was material that no action was taken under S. 372, it appears to their Lordships that the question whether the adoption was or was not known to the decree-holder was a matter upon which an opinion should have been pronounced."

Their Lordships decided the case of *Hari Saran Moitra v. Bhubaneswari Debi* (1) without referring to whether or not the plaintiff in that suit had knowledge of the adoption. This may be either because Act 10 of 1877 was inapplicable to the case or it may be that S. 372 of the said Act did not contemplate a case of an adoption. We have therefore considered ourselves free to hold that S. 372 of the previous Code or O. 22, R. 10, has no application to an adoption. In the well-known *Shivagunga* case *Katama Natchiar v. Rajah of Shivagunga* (4) it was laid down that where a Hindu widow sues or is sued as representing the inheritance, any decree fairly obtained against her will bind the succeeding heirs. Such a decree will undoubtedly bind a son adopted after the decree. This is on the principle that the widow represented the inheritance when the decree was passed, but the case of *Hari Saran Moitra v. Bhubaneswari Debi* (1) seems to extend the principle even when the widow has ceased to represent the inheritance by reason of an adoption of a minor son pendente lite. Such a minor son is sufficiently represented by the widow in the absence of fraud collusion or gross negligence on her part. The principle is stated by their Lordships by the following quotation from the earlier case in *Dhurm Das Pandey v. Musammat Shama Soondri Dibiah* (2):

"All the facts being stated, it is assumed as matter of law that after she had executed the act of adoption, she prosecuted the suit only as guardian of her adopted son. Then as the suit must be considered as afterwards prosecuted by her in her name for his benefit, the decree must be considered for his benefit, and that she is put in possession as trustee for him."

Subbanna v. Venkatakrishnan (5) is a case where the adoption had taken place before the institution of the suit. Therefore, the principle laid down in *Hari Saran Moitra v. Bhubaneswari Debi* (1) does not apply to it. In *Rambhat v. Lakshman Chintaman Mayalay* (3) it

(4) [1861] 9 M. I. A. 539=2 W. R. 31 (P. O.).

(5) [1888] 11 Mad. 403.

was held that a father did not represent the family in respect of a gift or sale and a decree obtained against him was not binding upon a son adopted during the pendency of the suit. *Padgaya Somshetti v. Baji Babaji* (6) has no bearing on the case before us. In *Raj Doollub Sircar v. Ooma Churn Biswas* (7) the father was sued in his personal capacity and not in a representative capacity, and hence the decree was held not binding on the son. These are all the cases cited on behalf of the appellant. We have come to the conclusion that the plaintiff was sufficiently represented in the previous litigation by his adoptive mother. The plaintiff was then a minor and his adoptive mother would in ordinary course have been conducting the litigation on his behalf. There is no allegation that there was fraud, collusion or gross negligence on her part in putting forward the right defence. We therefore hold that the plaintiff is bound by the decree passed in Suit No. 474 of 1910. As we have already pointed out, it is not disputed that if that decree operates as res judicata, we must hold Bhaskar Rao and Nilkant Rao were joint in estate. After the death of Nilkant Rao, the last surviving coparcener, his estate was inherited by his illegitimate son Shamrao. The plaintiff's adoption, therefore, which has the effect of divesting a vested estate, is invalid in law. The result is that the appeal is dismissed with costs.

P.N./R.K. *Appeal dismissed.*

(6) [1887] 11 Bom. 469.

(7) [1874] 21 W. R. 103.

* A. I. R. 1918 Nagpur 7

STANYON, A. J. C.

Mt. Ujiyara—Defendant—Appellant.

v.

Tilochan Gond—Plaintiff—Respondent.

Second Appeal No. 231 of 1916, Decided on 20th August 1917, from appeal decree of Divl. Judge, Chhattisgarh Divn., in Civil Appeal No. 3 of 1916, D/- 1st March 1916.

* (a) **Hindu Law—Succession—Apostasy** taking form of conversion to religion which in itself regulates devolution of property—Convert becomes subject to law of adopted religion.

Apostates from the Hindu religion cease to be Hindus and where such apostasy takes the form of conversion to a religion which in itself regulates the devolution of property, e. g., the Mahomedan religion, then, except on proof of

a well-established custom to the contrary and that only in regard to inheritance and succession, the convert becomes subject to the law of his adopted religion. [P 11 C 1]

(b) **C. P. Laws Act (1875), S. 5—"Hindu" meaning of, explained.**

The terms "Hindu" in S. 5, Central Provinces Laws Act, 1875, refers to persons who profess some form of the Hindu religion, whatever be the branch, school, sect, or offshoot or denomination to which they may belong, but it does not extend to persons who have never professed any form of the Hindu religion or to those who have been converted from it to some entirely different religion. The word would apply to dissenters and non-conformists but not to apostates. Thus a Hindu is a Hindu, but a Brahmin converted to Buddhism or Islam is not. [P 11 C 2]

(c) **Hindu Law—Applicability—Gonds not being Hindus are not governed by Hindu law except by custom.**

The Gonds in the Central Provinces are not Hindus and they are not governed by the Hindu law except when it is adopted by any family, sect or branch among them. [P 12 C 2]

(d) **Hindu Law—Applicability—Gonds not being Hindus at all cannot be regarded as Sudras.**

Every Hindu, properly so called, who does not belong to one or other of the three regenerate classes is a Sudra, and to him the Hindu law relating to Sudra applies of its own force, but no non-Hindu can be a Sudra, any more than he can be a member of any of the regenerate classes. Since a Gond is not a Hindu at all he cannot be brought within the category of Sudras. [P 13 C 2]

(e) **Hindu Law—Applicability—Hindu must be presumed to be governed by law of his locality.**

Although the Hindu law is primarily a personal law, it has also become attached to localities, and therefore a Hindu must be presumed to be governed by the law of the locality where he resides. [P 13 C 2]

(f) **Hindu Law—Applicability—Non-Hindu calling himself Hindu or adopting Hindu usages—Hindu law does not apply to him.**

A man does not become a Hindu by calling himself one, nor is the adoption by a non-Hindu of usages resembling some parts of the Hindu law a sufficient ground for applying the whole of that law to him en bloc, in the same way and to the same extent as if he were a Hindu. [P 14 C 2]

(g) **Hindu Law—Applicability—Family adopting Hinduism—Burden of proving that it is governed by Hindu law is upon person asserting so.**

In the case of a family which is not originally Hindu but which has adopted Hinduism, the burden of proving that the family is governed in a particular matter by the Hindu law is upon the person who asserts that it is so governed. [P 16 C 1]

(b) **Precedents—Stare decisis—Unconscious application of wrong law unchallenged owing to ignorance cannot set up "stare decisis."**

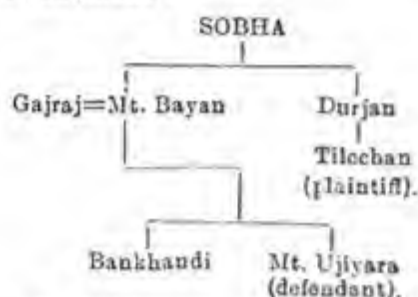
An unconscious application of wrong law cannot set up a principle of stare decisis merely because it has been left unchallenged for a few

years owing to the ignorance of the people affected by it. [P¹⁵ C 1]

M. V. Bose—for Appellant.

D. T. Mangalmurthi—for Respondent.

Judgment.—The following genealogical tree will facilitate comprehension of this judgment :



The parties are Gonds domiciled in the Bemetara Tahsil of the Drug District, but to which subdivision or sect of the Gond tribe they belong cannot be ascertained from the record. The property in dispute is an 8 annas share of the village Amlid in the Bemetara Tahsil. It is the case of the plaintiff that the whole village once belonged to Sobha; that on the death of Sobha it devolved first on his sons, and then on his grandsons Bankhandi and Tilochan; that the grandsons effected a partition, after which each of them held an 8 annas share in severalty, that Bankhandi died about 22 years before this suit and his half-share was inherited by his mother Mt. Bayan, and that on her demise, which took place on 13th August 1914, the plaintiff became entitled to the share as the reversioner of Bankhandi but that the defendant had wrongfully possessed herself of the same and obtained mutation of names in her favour. On these allegations the plaintiff brought the present suit to recover the share.

It has been found that the village of Amlidih was once the property of Sobha that Bankhandi and Tilochan partitioned it after it had devolved on them; that on Bankhandi's death his share was inherited by his mother, who held it till her death on 13th August 1914. These facts are now beyond dispute.

But it is manifest that the plaintiff claims to apply the Hindu law of the Mitakshara to this case. If that law applies he is beyond doubt the present owner of the share in dispute. But the defendant has pleaded that the family are Gonds and not Hindus, and that the Mitakshara does not govern the devolu-

tion of the estate. The first Court took it to be a matter beyond discussion that inheritance in the family of the parties is governed by the Mitakshara as interpreted by the Benares School—that being the Hindu lex loci in the Central Provinces. It therefore gave the plaintiff a decree. The lower appellate Court considered more closely the defendant's plea as to the personal law applicable, and ruled that, prima facie, the Mitakshara applied, and the onus lay on the defendant to prove that it was otherwise; and that she had failed to establish any custom at variance with the law. The decree of the first Court was therefore confirmed. The defendant has now made this second appeal, and again it is urged that the Mitakshara does not govern inheritance in her family; that it lay on the plaintiff to prove that he is the heir in preference to the defendant to the estate which belonged to the defendant's mother; and that he has failed to discharge that burden. It will be seen that the main issue in the case relates to the onus of proof. On the one hand, is it to be presumed, until the contrary is shown, that inheritance among the Gonds generally, or at least among Gonds of the class and locality to which the parties belong, is governed by the Hindu law? Or, on the other hand, is it the case that Gonds are non-Hindus who must be proved to have adopted the Hindu law as their own before it can be applied to them? If the former is the correct point of view, then this appeal must fail. If the latter is the right standpoint from which this case should be approached, then this appeal must succeed.

The decision of the question before me has been rendered difficult. (1) by uncertainty attaching to the significance of the words "Hindu" and "Sudra"; (2) by the conditions arising out of apostasy and dissent on the part of tribes, sects, and families of Hindu origin, whose abandonment of the Hindu orthodoxy in religion has been accompanied by the adoption of customs at variance with the personal law of Hindus; and (3) by the fact that tribes, communities, and families, non-Hindu in origin, by imitation and assimilation due to a long association with Hindus, have so far accepted the Hindu law as their own that the British Indian Courts have habitually applied it to them in the same way as

if they were Hindus. The policy of the British Government has always been directed towards the preservation of the personal laws and customs of each and every one of the diverse races inhabiting India, and successive legislative enactments have been brought into force from time to time to maintain and give effect to that policy. The original statute was 21, Geo. 3, C. 70, the preamble whereof stated :

"that the inhabitants should be maintained and protected in the enjoyments of all their ancient laws, usages, rights and privileges;"

while the Act provided that

"inheritance and succession to lands, rents and goods and all matters of contract and dealing between party and party shall be determined in the case of Mahomedans by the laws and usages of Mahomedans, and in the case of Gentils by the laws and usages of Gentils; and when only one of the parties shall be a Mahomedan or Gentil, by the laws and usages of the Gentils."

Apparently the word "Gentils" was used to denote the non-Mahomedan inhabitants of this country much after the manner in which Gentiles were distinguished from the Jews of Palestine in ancient times. The significance of the word was discussed in *Lopes v. Lopes* (1), where it was referred to as "the Portuguese idiom for Gentiles," and held to signify "Hindus." In a large and liberal sense of that term." From this decision we learn that an even more general phrase, "India Natives," was once employed by British legislators and that a charter of 1726

"contains the earliest trace (in Royal Charters) of a reservation to the natives resident in our territories in India of their laws and customs."

The above statute (21 Geo. 3, C. 70) applied only to Bengal, but the same provisions were made for Bombay and Madras by 37 Geo. 3, C. 142, 40 Geo. 3, C. 79 and 4 Geo. 4, C. 71. The principle enforced by these statutes has been embodied in subsequent enactments of the Government of India, until now every part of British India has legislative preservation of the personal laws and customs of its people. In a very recent case, *Rani Itagwan Kuar v. Bose* (2), their Lordships of the Privy Council made the following remarks :

"A long series of legislative provisions have been enacted for the purpose of securing to the people of India the maintenance of their ancient law, amongst others in matters of inheritance

and succession, and many minor enactments have been passed to facilitate the administration of the laws so preserved. The object and principle of this legislation has been throughout to enable the people of various races and creeds in India to live under the law to which they and their fathers had been accustomed, and to which they were bound by so many ties. The framers of the earlier Acts, regulations, and charters had a less detailed acquaintance than we have now with the diversities of creed and of indigenous law existing in India. They were familiar with two great classes, Mahomedan and Hindu, each with its own law, based on ancient and religious principles. They thought no doubt that these laws were amply providing for the civil rights according to Mahomedan and Mahomedan personal law, and for rights as they were sometimes called, the Hindu law. In process of time, however, more and more clearly understood that there were more forces than one of the Mahomedan law, and more forces than one of the Hindu law, and the Courts acting in the name of the Legislature, have applied this law of such and such persons, and such and such law, and in the course of years it has become known that there were religious bodies in India which had not been noticed and under various circumstances, developed and in the application of the Hindu system, and whose members have nevertheless continued to live under Hindu law. Of these the Hindus and such are conspicuous examples. These cases have been considered by the Courts and in dealing with them a liberal construction was always placed upon the enactments by which Mahomedan and Hindu were limited in the enjoyment of their own laws."

The share of the Central Provinces in these legislative enactments for the preservation of personal laws is represented by the Central Provinces Laws Act, 1875 (20 of 1875). Sec. 5 and 6 thereof provide as follows :

"In questions regarding inheritance, special property of families, betrothal, marriage, dower, adoption, guardianship, minority, bastardy, family relations, wills, legacies, gifts, partitions or any religious usage or institution, the rule of decision shall be the Mahomedan law in cases where the parties are Mahomedans, and the Hindu law in cases where the parties are Hindus, except in so far as such law has been by legislative enactment altered or abolished, or is opposed to the provisions of this Act. Provided that when among any class or body of persons or among the members of any family any custom prevails which is inconsistent with the law applicable to such persons under this section, and which, if not inconsistent with such law, would have been given effect to as legally binding such custom shall notwithstanding anything herein contained be given effect to. In cases not provided for by S. 5, or by any other law for the time being in force, the Courts shall act according to justice, equity and good conscience."

It will be convenient to notice here certain other British Indian enactments which have a bearing in matters of inheritance and succession in British India. Act 21 of 1850 (which by Act 14 of 1897

(1) [1869 69] 5 B. H. C. R. O. C. J. 172.

(2) [1901] 31 Cal. 11=30 I. A. 249=84 P. R. 1903 (P.C.).

was given the short title of "the Caste Disabilities Removal Act, 1850" and has sometimes been referred to as "the Lex Loci Act") provides as follows :

"So much of any law or usage now in force within the territories subject to the Government of the East India Company as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance by reason of his or her renouncing or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as law in the Courts of the East India Company, and in the Courts established by Royal Charter within the said territories."

This enactment was extended to the whole of British India by the Local Laws Extent Act, 1874 (15 of 1874) and to the Scheduled Districts of the Central Provinces by Notification in the Gazette of India, 1879, Part I, p. 771. In the Indian Succession Act, 1865 (10 of 1865), the following provisions are relevant :

"2. Except as provided by this Act, or by any other law for the time being in force, the rules herein contained shall constitute the law of British India applicable to all cases of intestate or testamentary successions."

* * * * *

"331. The provisions of this Act shall not apply to intestate or testamentary succession to the property of any Hindu, Mahomedan, or Buddhist ;"

332. The Governor-General of India in Council shall from time to time have power to exempt from the operation of the whole or any part of this Act, the members of any race, sect, or tribe in British India, or any part of such race, sect, or tribe, to whom he may consider it impossible or inexpedient to apply the provisions of this Act, or of the part of the Act mentioned in the order."

Under the last of the above provisions Native Christians in Coorg, Jews in Aden, and certain aboriginal races in Assam have been exempted from the operation of S. 2 by notifications issued respectively in 1868, 1886 and 1887 ; but no exemption of any persons in the Central Provinces outside the categories of Hindus, Mahomedans and Buddhists has so far been made by Gazette Notification. The Parsi Intestate Succession Act (21 of 1855) however exempts Parsis from the law of intestate succession embodied in Act 10 of 1865. Turning now to a closer consideration of Ss. 5 and 6, Act 20 of 1875, it seems to me that the purpose of the legislature was to provide for the preservation, as far as practicable of the ancestral domestic law of each and every class of the inhabitants of the Central Provinces by placing the entire population under three main heads which

may be named (1) Mahomedans, (2) Hindus and (3) Others. The law thus set up may be summarized as below :

For all classes.—The statute law, so far as it applies, is the paramount authority.

For Mahomedans.—Mahomedan Law

For Hindus.—Hindu Law

Subject to modifications created (1) by statutory law and (2) by valid custom.

For Others.—Personal law, if any, subject to Statute law and valid custom ; and failing any established law or custom, an application of the principles of equity, justice and good conscience as understood by the British Indian Courts.

The questions immediately before me may be stated thus :

"(1) Are the parties to this suit Hindus within the meaning of that term in S. 5, Act 20 of 1875 ? If not

(2) By what law or custom is the decision of this case to be governed ?"

As pointed out by the Judicial Committee in the case above cited the Indian legislature has used the term "Hindu" in a much wider sense in some enactments than in others. In some it has always been interpreted to include Jains and Sikhs ; in others (e. g., the Hindu Wills Act, 1870) it is used to signify Hindus other than Jains and Sikhs. Indeed the history of Indian legislation suggests a progressive reduction of the term "Hindu" to its proper limitations. We first see the term "India Natives." Then we get "Mahomedans and Gentus" to represent the whole Indian population. Next we have it explained that Gentus do not include people of European origin such as the Portuguese, and the word is taken to be synonymous with Hindus as denoting nonMahomedan Asiatics domiciled in India. Soon after we see Buddhists removed from this general category ; and about the same time some dissenters from the orthodox Hindu religion are distinguished by special denominations—Jains and Sikhs—from other Hindus.

This treatment of the subject introduces complexity and doubt into the interpretation of the word "Hindu" for juristic purposes at the present day. The customary significance of the word in popular parlance is even more uncer-

tain. In Trevalyan's Hindu Law at pp. 18 and 19 the expression "Hindus" is defined as including not only the persons who profess what is called the Hindu religion, but also such of their descendants as have not openly abjured that religion. That implies that apostates from the Hindu religion cease to be Hindus; and it seems to be accepted now as a rule of law that where such apostasy takes the form of conversion to a religion which in itself regulates the devolution of property, e.g., the Mahomedan religion, then, except on proof of a well-established custom to the contrary, and that only in regard to inheritance and succession the convert becomes subject to the law of his adopted religion: *Abraham v. Abraham* (3), *Mahomed Sulek v. Haji Ahmed* (4), *Raj Bahadur v. Bibee Dayal* (5), *Bai Muchhrai v. Bai Hirbai* (6), *Rasid Karmali v. Sherbanoo* (7).

Dr. Gour in his comprehensive work on the Law of Transfer in British India, 4th Edition, Volume I, at pp. 28 and 29, in dealing with the question who are Hindus, writes:

"Although the term 'Hindu' is popularly understood to comprise only such people as follow the Hindu religion, or rather its ceremonial observances, a wider class of people are subject to Hindu law. And while it may truly be said of a Hindu, *nascitur non fit* still it is often difficult to reconcile the juristic conception of the term with its popular notion."

It seems to me that some of this difficulty is due to a confusion of the question who is a Hindu with the question who is subject to the Hindu law. I shall endeavour to keep these questions distinct in this judgment. Mr. G. C. Sastri, in his work on Hindu Law does not give us any express definition of a Hindu; but the whole tenor of the treatise shows that the learned author applied the name to those persons only who profess the Hindu religion. In West and Buhler's Hindu Law, though the extent of the operation of the Hindu law is dealt with fully, there is no express definition of the word "Hindu"; but here also the expression seems to have been used throughout in a theological sense. There is a certain amount of case law in support of the view that the word "Hindu" is denominative of a religion and not of a race.

I need only refer to the following remarks of Parsons, J., in *Dagree v. Pacothi San Jao* (8):

"There is no race of Hindus. It is not the inhabitants of Hindustan who are Hindus, but those only of them who profess a religion which is called the Hindu religion. Just so there is no race of Mahomedans or of Buddhists, or of Christians. An argument that a Christian, who has adopted the Mahomedan religion, is nevertheless still a Christian, is on the face of it an absurdity; but it is as good an argument as one that a Hindu, who has been converted to the Christian religion, is still a Hindu."

Where a religion is so inextricably entwined with the secular law of inheritance and succession as is the case with what is accepted in British India as the Hindu law, it is impossible to suppose that the British Indian legislature intended by enacting such provisions as we find in S. 5, Act 20 of 1875, to apply the term "Hindu" in a wider sense to the people than to the law, and by a divorce of legal conceptions from religious doctrines, to make the Hindu law apply of its own force to races, tribes and families who are wholly outside the extreme limits of the Hindu religion. Upon the best consideration that I have been able to give the matter I am of opinion that the view propounded by Parsons, J., in the above Bombay case is correct and I therefore hold that the term "Hindus" in S. 5, Central Provinces Laws Act, 1875, refers to persons who profess some form of the Hindu religion whatever be the branch, school, sect, offshoot or denomination to which they may belong but that it does not extend to persons who have never professed any form of the Hindu religion or to those who have been converted from it to some entirely different religion. The word will apply to dissenters and nonconformists, but not to apostates. Thus a Jain is a Hindu, but a Brahman converted to Buddhism or Islam is not.

The next question I have to consider is whether the Gonds of the Central Provinces are Hindus within the meaning of that term in S. 5, Act 20 of 1875; for on the answer to that question depends the reply to the further question whether the Hindu law applies of its own force to matters regarding inheritance and succession among them. For a proper solution of the problem some historical and ethnological research has been necessary. All the existing bibliography

(8) [1895] 19 Bom. 783.

(3) [1861-63] 9 M. L. A. 195.

(4) [1886] 10 Bom. 1.

(5) [1882] 4 All. 313.

(6) [1911] 35 Bom. 264=10 I. C. 815.

(7) [1905] 29 Bom. 85.

is not available to me but I have consulted Hislop's Papers on the Aboriginal Tribes of the Central Provinces, 1866, which is the leading treatise on the subject, Steel's Law and Custom of Hindu Castes, 1868, Therring's Hindu Tribes and Castes (1879), Russell's Tribes and Castes of the Central Provinces (1916) and The Story of Gondwana (1916) by the Right Reverend Dr. Eyre Chatterton, Bishop of Nagpur and from these works I have extracted the following information.

The Gonds constitute the principal tribe of the Dravidian family and are perhaps the most important of the non-Aryan or forest tribes in India. Census operations carried out in 1910-11 revealed that there were 3,000,000 Gonds in India at that time of whom no less than 2,300,000 were domiciled in the Central Provinces. These figures indicate the necessity for an authoritative decision by this Court on the question of the domestic law applicable to these people. Such information concerning their ancient history as is available leaves no room for doubt that in origin they were a people entirely distinct from the Aryans, to whom we owe the existing Hindu law and religion. At what time or under what circumstances the Gonds first became domiciled within the area which has been called Gondwana after them, are pre historic facts whereof the knowledge has now been lost in the fading horizon of the ever-receding and unmeasurable past. But sufficient indications remain to sustain the hypothesis that the original emigrants to Gondwana belong to the Dravidian family then settled in the South of India and though Russell suggests that the immigration may have taken place after the Aryan invasion which brought what is now called Hinduism into India, the better view seems to be that it preceded it. The Bishop of Nagpur at p. 6 of his book writes :

"Those who know Risley's work on the people of India will remember that the earliest and most numerous of the seven races to which he would trace the present people of India is the Dravidian race. It is to this race, 'the ancient Britons of India . . . that the Gond belongs.'"

"Where those Dravidians Koitors dwelt before they settled in the plains and uplands of the Central Provinces, is a question which cannot now be answered. . . . The more probable view however is that the Gonds were an uncivilized branch of the Dravidians who in

early times moved up from the Deccan into the Central Provinces, where they made their home in company with other aboriginal tribes, Kols, Korkus and Bhils. Here they lived their primitive life in the ways they loved best. . . . Then with the coming of the Aryans into India the beginnings of a larger and more civilized life dawned for Gondwana . . ."

Further on in his interesting work the Bishop refers to a passage in the Epic of the Ramayana showing that the highly civilized Aryans of those days regarded the Gonds as "Shapeless and ill-looking monsters," and as "base-born wretches" who "perpetrate the greatest outrages." In all the works we find the Gonds with a pantheon of gods almost wholly different from those of the Hindu mythology and with some habits, rites and ceremonies which would be wholly repugnant to Hindu ethics and Brahminical doctrines.

All these circumstances make it clear that the origin of the Gonds was non-Hindu, even using the term Hindu in the wide significance given to it by the Judicial Committee in *Rani Bhagwan Kuar v. Bose* (2). And it cannot be said that these aboriginal people, natives of the once isolated tracts of dense forest and extended hills named Gondwana, have even now been so affected and transformed by the ethnical and social changes which have taken place under the successive invaders of India—Aryans, Scythians, Mongols, and Latins—as to have become merged in the general Hindu population. In the case of *Gobra v. Man Singh* (9), S. A. No. 219 of 1877, decided by this Court on 30th August 1877, the learned Judicial Commissioner Mr. (afterwards Sir Charles) Grant (who compiled the Central Provinces Gazetteer of 1871 containing a notice of the Gonds) wrote :

"The plaintiff's father and mother belong to the Gond race, who come even below the lowest Hindu races in social standing; and as illegitimacy is held not to be a bar to inheritance among Hindu Sudras, such a modified form of it as would arise from a left-handed marriage (as in this case) can scarcely be regarded as creating any disability among races even more careless of the social law and ceremony."

It is manifest from this passage that so recently as 40 years ago Gonds were regarded by the highest judicial authority in these Provinces as something apart from, and even lower than, Hindu Sudras.

It was argued before me that the Gonds of these Provinces are Sudras. It is necessary to examine that contention and

dispose of it. Though the text-books and commentaries of Hindu law deal with Sudras, I have been unable to find any generally accepted definition of that expression beyond this: that it refers to Hindus who do not belong to the twice-born classes. The Hindu law divides Hindus into the following four divisions or castes:

(1) The Brahmins or priestly caste; (2) the Kshatriyas, or warrior caste; (3) the Vaishyas or agricultural caste; (4) the Sudras, or menial castes.

Various definitions of the Sudra, more or less of conjectural kind, have been put forward. Thus in *Edin. 8 of Mayne's Hindu Law*, at p. 107, a footnote (which also appeared on p. 92 of *Edin. 7*) reads: "I take the Sudras as representing aboriginals in early time, but I am aware there is much controversy on the point."

There is not even the semblance of authority to be found for this assumption in any of the Hindu text-books. In *Chapat Narhar Sastry v. Parmanand Ganesh Sastry* (10) Westropp, G. J., stated that the Hindu law regards Sudras as slaves. This statement is strongly controverted by Mr. G. C. Sastri in his book on Hindu Law, at p. 151. He evolves a definition of his own for which he claims authority from certain texts cited by him. According to this view every Hindu is born a Sudra: but if by birth he is also a Brahman, a Kshatriya or a Vaishya, he can become regenerate by learning the sacred literature. If such a one fails to attain knowledge of the Vedas, he remains a Sudra. The learned author is constrained to admit the existence of a text which forbids to Sudras the privilege of studying the Vedas; but makes no attempt to explain the inconsistency which arises if the three superior castes are to be considered as within the category of Sudras unless they learn that which Sudras are forbidden to read. The idea that a Brahman begins life, and may end it, as a Sudra is novel and revolutionary. Mr. Sastri claims authority for it chiefly from a text of Manu (Ch. 2, 168) which he translates thus:

"That twice-born man who without studying the Vedas, applies diligent attention to anything else, soon falls even when living, together with his descendants, to the conditions of a Sudra."

It will be observed that the text refers

in express terms to a "twice-born man," and does not sustain Mr. Sastri's view that the second birth is postponed until after the Vedas have been learned. To my mind it contains nothing but a pious warning to every Hindu of the regenerate classes that, if he neglects the study of the sacred literature, he and his descendants will fall to the level of Sudras: not that they will become or remain Sudras, but in ignorance and consequent degradation will resemble Sudras.

But Mr. Sastri's conception of a Sudra seems the most correct so far as it assumes every Sudra to be a Hindu by birth and religion, and I am of opinion that every Hindu properly so called, who does not belong to one or other of the three regenerate classes, is a Sudra: and that to him the Hindu law relating to Sudras applies of its own force, but I think that no non-Hindu can be a Sudra any more than he can be a member of any of the regenerate castes. Since a Gond is not a Hindu at all, it follows that he cannot be brought within the category of Sudras.

But the feeling that the Gond is not within any definition, juristic or popular, of a Hindu does not conclude the matter. Dr. Gour in his said work, Vol. 1, at pp. 28 and 29, has set out instances, supported by evidence, in which the Hindu law has been followed in matters relating to inheritance and succession, by persons who are not Hindus by caste or religion. In dealing with this branch of the subject it is necessary to distinguish between (1) apostates and dissenters from the Hindu religion, and (2) those who by origin, birth and creed have always been non-Hindu. The former class have been subjected to a considerable amount of legislative and judicial treatment, and the published case-law regarding them has not always been uniform and consistent. But with them I am not now concerned. Here I am presented with the case of a tribe which has always been non-Hindu. How far, if at all, should inheritance and succession in this tribe be governed by the Hindu law? In this connexion it is necessary to bear in mind that although that law is primarily a personal law, it has also become attached to localities; and that, therefore a Hindu is presumed to be governed by the law of the locality in which he resides: *Ram Das v.*

(9) D. C. R. Part 8, No. 35.

(10) [1878-79] 3 Bom. 273.

Chandra Dassia (11), *Fanindra Deb Raikat v. Rajeswar Das* (12), *Jugo Bundhoo Tiwaree v. Kurum Singh* (13) and *Balaji v. Mt. Maina Bai* (14).

The contrary view taken in *Shridhar v. Maina Bai* (15) seems to have been overruled. This Court has laid down that the Mitakshara of the Benares School is the Hindu lex loci in the Central Provinces: *Hira Lal v. Mt. Jani Bai* (16), *Deorao v. Sakhu* (17). It is immaterial now whether that law is based on immemorial local customs which Brahmanism found, adopted and shaped (as conjectured by Mr. Mayne in his Hindu Law), or is of divine origin as believed and claimed by Mr. Sastri and other Hindu commentators. The fact stands out beyond all dispute that the Mitakshara, as now accepted and applied, is saturated with Brahmanism and Hindu religious doctrines constitute the warp and woof of the principles and order of inheritance and succession contained in it. No doubt in some cases the religious element is entwined with legal conceptions which are not peculiar to Hindus, but are found in many other systems of law, e.g., the heirship of a son to his father; but in other doctrines we find principles which are peculiar to the Hindu religion, indicating with reasonable certainty that in such matters the secular law followed out of religion. The exclusion of the sister from the line of heirs, and the reversion of an estate held by a woman to the heirs of the last male holder after her death are matters of that kind.

Now I am not unmindful of the advantage, in the administration of justice, of having a settled lex loci and of applying it to as many as possible of the inhabitants domiciled within the area of its operation. It may be open to doubt whether, as a matter of sound policy, every fragment of custom ought to be sought out and preserved. A wider and more uniform customary law may be more consistent with moral and material progress than an indefinite segmentation into slightly varying usages which causes perpetual doubt and difficulty in

necessary transactions. But the legislative mandate is clear and conclusive. The usage of the country is the law of the people, and the Courts of British India stand bound by statute and practice to preserve and apply to each class, tribe, caste and family the ancestral personal law thereof unless it has been substituted by some other law or valid usage. It seems to me that it would be as incongruous to apply to the wild Gonds of the Central Provinces the peculiar principles of the Hindu law as their Lordships of the Privy Council considered in *Rani Bhagwan Kuar v. Bose* (2), it would be to govern inheritance among the Sikhs by the Indian Succession Act, 1865. Mr. Mayne, in his above work, enjoins much caution in applying Hindu law to non-Brahminical tribes. Mr. Sastri, at p. 363 of his treatise gives a clear opinion that a person who is from birth a non-Hindu cannot be subject to the personal law of the Hindus. That opinion appears to me to be correct.

There are races, tribes, communities, and families, non-Hindu in origin who have adopted some of the usages, both religious and secular, of the Hindus with whom they have been associated for centuries. It is natural that this imitation or assimilation should take place, more particularly in such domestic matters as the order of inheritance and succession, among tribes who have no written personal law of their own. But a man does not become a Hindu by calling himself one; nor is the adoption by a non-Hindu of usage resembling some parts of the Hindu law a sufficient ground for applying the whole of that law to him en bloc, in the same way and to the same extent as if he were a Hindu. These considerations have apparently been overlooked by some commentators and by most of our subordinate Courts, who seem to have regarded the Hindu law as a common law of the land, applicable to all cases which are not shown to be outside it. It is natural that such Courts, as at present constituted in these provinces, should have been led by the presence at their elbows of a written code of law, to apply it beyond its scope to cases not governed by it, and that legal practitioners should have helped this error in cases where no other known system is apparent. Indeed it is a consummation devoutly to be desired that as many as

(11) [1893] 20 Cal. 409.

(12) [1885] 11 Cal. 463=12 I. A. 72.

(13) [1874] 22 W. R. 341.

(14) D. C. R. Part 8, No. 102.

(15) D. C. R. Part 8, No. 25.

(16) [1889] 2 C. P. L. R. 18.

(17) [1898] 11 C. P. L. R. 49.

possible of the diverse races and tribes occupying this vast country should be brought under a common law of inheritance and succession; but the time for that is not yet.

The Gonds in these provinces have not avoided the Hindu influences to which they have been subjected for centuries. Some branches of the tribe—notably the Raj Gonds—have closely imitated Hindu customs, have adopted Hindu names, have taken to wearing the sacred thread and offer funeral cakes to the dead after the manner of regenerate Hindus. To many of these the local Courts have applied without question by the parties and as a matter of course the Mitakshara law in cases relating to inheritance and succession. But an unconscious application of wrong law cannot set up a principle of stare decisis merely because it has been left unchallenged for a few years owing to the ignorance of the people affected by it; and the circumstance that in some cases our Courts may have treated as Hindu families of Gonds who have not adopted the Mitakshara as their personal law, ought not to affect the decision of this case where the question of the law to be applied has been expressly raised. Moreover an issue as to Customary law must be decided according to the particular facts of each case as it comes up. There are many classes of Gonds, widely differing from one another in habits and status; and it does not follow because a family of Raj Gonds in the Jabulpore or Mandla Districts have become so Hinduized as to justify the application of the Mitakshara in determining disputes as to inheritance and succession among them, that the same course would be proper in the cases, say, of Madias and Dhurs of Chhattisgarh or the Koyas or Gaitas of the Chanda District.

The case of *Sultan Shah v. Dan Chander Shah* (18) came before this Court from the Betul District. The parties were Raj Gonds of a family converted to Islam in the days of Mogul rule. The lower appellate Court having decided the case according to Mahomedan law, the plaintiff appealed to this Court on the ground, inter alia, that the parties being Raj Gonds were governed by the Hindu law in matters of marriage, inheritance and succession. Ismay, Judicial Commissioner, rightly treated the question as

(18) S. A. No. 331 of 1896.

one of fact, and sent back the case for a finding, and eventually disposed of it by a judgment from which I make the following extract:

"It is now found that the parties are governed by the Hindu law as respects inheritance. This finding is objected to on the grounds that the onus was on the appellant to prove that the parties are not governed by Mahomedan law and that the evidence to prove the custom is legally insufficient. I am not at all prepared to say that the onus was on the appellant. It may no doubt be laid down as a general rule that in questions of succession and inheritance the Hindu law is to be applied to Hindus and the Mahomedan law to Mahomedans. *See Rajah v. Devaraj Shah* (19). But there are many cases in which the universality of a custom superseding the law has been recognized. The Khojals and Gutchi Monahs have always been regarded as Hindus converted to Mahomedanism, but it has been constantly held that in the absence of proof of special custom they are governed by the Hindu law of inheritance. Similarly it has been held by this Court (Civil Appeals, Hindu and Mahomedan law) that the isolated Mahomedan communities who have for centuries dwelt amongst Hindus on the Satpura plateau have allowed their law of succession to be influenced by Hindu practice. In the present case the parties are Raj Gonds whose ancestors adopted the religion of Mahomed in the days of Aurangzeb. Notwithstanding their conversion they still marry into Gond families, and the presumption that they recognize the Mahomedan law of succession, if any such presumption can be said to exist, must be singularly weak. The village custom now in dispute passed from husband to widow, and on the widow's death from father to daughter in direct accordance with the rules of Hindu law. It must be borne in mind that in comparison with Hindu, very few Gonds embraced the religion of Mahomed."

The late Mr. Hishop, who was eminently qualified to write on the subject, notes as follows:

"The only instance that has come to my knowledge is that of Bakht Boland the Rajah of Dewagah who was converted to Islam when on a visit to Aurangzeb at Delhi. Still his descendants, though adhering to the change of creed, have not ceased to marry into Gond families, and hence the present representative of that royal house is not only acknowledged by the whole race about Nagpur as their head and Judge, but is physically regarded as a pure Raj Gond. Essay on the Hill Tribes on the Central Provinces, p. 5."

It is manifest that the decision of Ismay, Judicial Commissioner, rested on the facts of the particular case before him, and that it affords no authority for any presumption that all Gonds are governed by the Hindu law. Indeed there was no question before the learned Judicial Commissioner whether Gonds are Hindus who are ori-

(19) [1863-66] 10 M. I. A. 511=2 Sar. 189 (P.C.)

ginarily amenable, as such, to the Hindu law. It was found as a fact that, despite its conversion to the faith of Islam, the family had habitually governed itself by Hindu law in matters of marriage, inheritance and succession. Under such circumstances that law was correctly applied, for clear proof of usage will outweigh all but statute law: *Abraham v. Abraham* (3), *Muthusami Mudaliar v. Masilamani* (20). There is clear authority for the view that the onus of proving that a non Hindu family has accepted the Hindu law rests on him who alleges it. In *Fanindra Deb Raikat v. Rajeshwar Das* (12) their Lordships of the Privy Council laid down that in the case of a family which is not originally Hindu, but which has adopted Hinduisim, the burden of proving that the family is governed in a particular matter by the Hindu law is upon the person who asserts that it is so governed. The ratio decidendi seems to be that the adoption by a family of some parts of a law foreign to it does not raise any presumption in favour of its adoption of other parts thereof. We have seen that a Gond family may adopt Mahomedan religion without adopting the Mahomedan law of inheritance. Similarly a Gond family may adopt the Hindu law of marriage without accepting the Hindu law of adoption or survivorship.

In the present case, by setting himself up as the owner of the property in suit, the plaintiff necessarily rests on two rules peculiar to the Mitakshara law of inheritance, namely, (1) that on the death of Mt. Bayan the estate did not descend to her daughter but reverted to the heir of her son, the last male holder; and (2) that the defendant being the sister of that propositus, is excluded from inheritance. The burden of proving that these rules apply to the family of the parties lies heavily on the plaintiff. Owing to misapprehension of the law in the Courts below the onus of proof was misplaced on the defendant. It seems just to give the plaintiff an opportunity of proving his allegations, and the case must therefore go back.

It may be well to note that the rules of inheritance relied on by the plaintiff must be proved to be in force in their family by such evidence as the Courts usually require to justify them in giving

effect to a custom. If the custom is not proved the suit must fail. It will not be necessary to decide what other law or custom of inheritance may be applicable. The defendant is in possession of property which has descended to her from her mother, and the plaintiff can only succeed if he establishes a better title. And in this connexion it may be well to point out that evidence of occurrences in the family which are not peculiar to Hindu law will not suffice to raise a presumption that the family has adopted that law. The devolution of property from father to son, or the equal division by several heirs of an estate inherited jointly from a common ancestor, are incidents common to all systems of inheritance. But evidence of adoption, of succession by survivorship to the exclusion of females, of reversion to the heirs of the last male holder taking place on the determination of an intervening female estate, of the exclusion of sisters from inheritance and other such matters peculiar to the Mitakshara having taken place in the family, would sustain the plaintiff's case. For the above reasons the appeal is allowed; the decree of the lower appellate Court is reversed under O. 41, R. 23, Civil P. C., its decision on the preliminary point as to the law governing the parties being held to be erroneous. The case is remanded for a fresh decision on the merits with advertence to the above remarks. The appellant will be given the usual refund certificate. Other costs here and hitherto will abide the result.

P.N./R.K.

Case remanded.

A. I. R. 1918 Nagpur 16

MITTRA, OFFG. A. J. C.

Shamrao Amrut Deshpande—Plaintiff
—Appellant.

v.

Imam—Defendant—Respondent.

Second Appeal No. 307-B of 1915, Decided on 15th August 1916, against decree of Addl. Dist. Judge, Akola, in Civil Appeal No. 111 of 1914, D/- 12th May 1915.

Hyderabad Assigned Districts Land Revenue Code (1896), Ch. 18 — Pre-emption — Price mentioned in sale deed is prima facie pre-emption price.

Under the Berar Land Revenue Code the price stated in the sale deed is prima facie the price for pre-emption, unless it is shown that it has not been fixed in good faith. [F 18 C 1]

G. V. Kukade—for Appellant.

G. L. Subhedar—for Respondent.

Judgment.—One Raoji and his brothers owned a half-share in three survey numbers. The other half-share belonged to one Bhagwan and his brother Baliram. On 19th March 1909 the plaintiff-appellant purchased the half share of Raoji and his brothers for Rs. 2,000. On 27th June 1911 the defendant-respondent purchased from Bhagwan the remaining half-share for a consideration which is recited to be Rs. 1,500, the exact nature of which will have to be determined later. On 6th July 1911, the plaintiff purchased the one fourth share of Baliram for Rs. 550. It has been now decided in another suit that Bhagwan had no right to sell anything more than his own one-fourth share, so the plaintiff now owns three-fourths, and seeks to pre-empt the remaining one-fourth. The property sold was subject to a mortgage, dated 23rd May 1907, for Rs. 1,000 in favour of one Ganpat Ekoji Ghule. This was executed by both Raoji and Bhagwan. This mortgage has not been paid off by the defendant. The first Court held that the plaintiff is entitled to pre-empt on payment of Rs. 250 on the ground that the defendant paid his vendor Bhagwan only Rs. 500. The lower appellate Court has held that the plaintiff is bound to pay Rs. 750, half the amount of the consideration recited in the sale deed. The plaintiff has filed this appeal.

The sale deed in favour of the defendant recites that there is a mortgage on this property in respect of which Bhagwan, the vendor, is liable to the extent of Rs. 500 for principal and the total amount of Rs. 1,000, including interest. That a *hawala* was taken by the purchaser for this debt, and the remaining amount of Rs. 500 was paid in cash. A certified copy of the mortgage referred to has been filed as Ex. P-7. It is a mortgage by conditional sale, and therefore does not contain any personal covenant. The term "*hawala*" seems to have been loosely used, for it is not alleged or suggested that Ganpat Ekoji was a party to this arrangement. The question which I have to decide is what is the price fixed for the sale. Now Bhagwan could only sell the equity of redemption subject to the mortgage in favour of Ekoji. For this he received Rs. 500 as consideration. The defendant, no doubt, agreed to clear off an encumbrance on the property. The amount due on the mortgage could only

be ascertained in Berar, as the rule of *damdapat* prevents the recovery of more than double the principal amount. The covenant on the part of the defendant to pay off this amount was superfluous. It was an obligation attached to the property which the defendant bought from Bhagwan. As I have already said, Ganpat Ekoji's mortgage was one by conditional sale, and no personal claim could have been made against the mortgagee, or against his assignee, even if the term "*hawala*" had been used in its strict sense. I hold that the price for the sale of the equity of redemption was only Rs. 500. It is urged on behalf of the respondent that his vendor could enforce the payment of Rs. 1,000 to Ghule, if he is himself compelled to pay the amount.

But I have already shown that the vendor could not be compelled to pay the amount personally. If he voluntarily paid the amount after ceasing to be the owner of property on which the amount is charged, he could scarcely recover under S. 61 Contract Act. Could he sue the defendant for damages for breach of a covenant? The answer depends upon whether the vendor would suffer any loss. I am of opinion that he could not. It seems to me clear that the covenant simply meant that the property was not sold free of encumbrances, and that the purchaser's title was subject to this mortgage. I hold that the price fixed for the sale of the equity of redemption is Rs. 500 and as the plaintiff is pre-empting only the equity of redemption, the consideration should be deemed to be Rs. 500. If the defendant had been in a position to transfer the property free of encumbrances, he would have been entitled to the full amount, and this he could do if he had already redeemed the mortgage and thus acquired the rights of the mortgagee. It is the plaintiff who will have to pay off the mortgage if he pre-empt. Both the Courts below have assumed that the plaintiff is only liable to pay half the consideration for the sale, whether it is Rs. 1,500 or Rs. 500. But the point has not been discussed in the judgment of either Court.

In *Madhub Chunder v. Tomee Bewah* (1), Kemp and Markby, JJ., held that a person claiming to exercise his right of pre-emption must take the bargain as it was made, and any apportion-

(1) [1867] 7 W. R. 210.

ment of the purchase-money is altogether illegal. But a different view has been taken by the Allahabad High Court in *Muhammad Latif v. Gobind Singh* (2). I am not concerned here with the Mahomedan law, or the Customary law regarding pre-emption. I have to interpret the provisions of Ch. 18 of the Hyderabad Assigned Districts Land Revenue Code, 1896. Under this Code, a right of pre-emption accrues when the interest or any part of the interest of a co-occupant in any survey number is transferred. The co-occupant proposing to sell must give notice to all other co-occupants of the price at which he is willing to sell. Upon such notice within two months from the date of its service, the pre-emptor must deposit the "price aforesaid" with the Tahsildar. The right of pre-emption also may be enforced by a suit, if notice is not given and the proposed sale is completed. It is only upon proof that the price stated in the notice or the price mentioned in the sale deed was not fixed in good faith that the Court is to fix such price as appears to be the fair market-value of the interest proposed to be sold, or sold. It would therefore seem the price fixed is *prima facie* the price for pre-emption, unless it has not been fixed in good faith.

In the present case Bhagwan was actually in possession of the eight annas share, which he and his brother Baliram had inherited from their uncle. He had managed to keep his brother out of possession for nearly six years and had, therefore a possessory title over his separated brother's share. The purchaser obviously knew of the existence of this brother as a coheir. If he has really paid Rs. 500 for Bhagwan's interest, as found by the Courts below, then it is difficult to hold that the price was not fixed in good faith. It cannot be assumed that the defendant with knowledge that title to four annas share was open to doubt has paid an equal amount for it, as he has paid for the portion over which his vendor had a good title. No proportionate abatement can therefore be made in this case. The Berar Code allows the Court to determine the market-value only when the price has not been fixed in good faith. There is no reason to suppose that the defendant paid an inflated price with the object of defeating the plaintiff's right of pre-emption. I hold therefore the plain-

tiff is bound to pay Rs. 500 as the price of pre-emption. A fresh decree will be drawn up in modification of the lower Court's decree by allowing the plaintiff to pre-empt on payment of Rs. 500 within three months from this date with proportionate costs throughout.

P.N./R.K.

Decree modified.

A. I. R. 1918 Nagpur 18

STANYON, A. J. C.

Somwarpuri Guru Chandanpuri—Defendant—Appellant.

v.

Gopalsingh and another — Plaintiffs—Respondents.

Second Appeal No. 316.B of 1914, Decided on 28th April 1915, from decree of Dist. Judge, Akola, in Civil Appeal No. 160 of 1913, D/- 16th June 1914.

(a) *Hindu Law — Alienation — Defacto manager of minor's estate.*

A defacto manager of a Hindu minor's estate has, in the case of necessity or for the benefit of the minor, power to alienate the minor's property : 26 Cal. 820, *Foll.* [P 19 C 1]

(b) *Hindu Law—Minority and guardianship — There is such thing as de jure guardian (Obiter).*

Obiter.—The Hindu law makes the King and no one else the guardian of all the minors. Strictly speaking, there is no such thing as de jure guardian under that law. [P 19 C 2]

G. P. Dick and T. N. Bapat—for Appellant.

Hant and A. J. Balm—for Respondents.

Judgment.—One Lalpatsingh was the occupant of the survey number of unalienated land in Berar which is in dispute in this case. He died some years ago, leaving a widow and two minor sons who are the plaintiffs in this case. The widow remarried and left the plaintiffs and their property to the care and management of one Zamsingh, said to be the brother-in-law of the plaintiffs though this fact is not found. In 1901 while the plaintiffs are minors and living with him, Zamsingh sold the land to the defendant for Rs. 1,300, whereof Rs. 600 it is alleged, were already due to him on a decree obtained against the father of the plaintiffs and Rs. 700 were due to another creditor of the father whom the defendant undertook to pay. In making this sale Zamsingh professed to act as the guardian of the minor plaintiffs. Having since come of age the plaintiffs sue to recover the land on the ground that the sale by Zamsingh is not binding on them.

(2) [1933] 5 All. 382=(1883) A. W. N. 66.

The Courts below have decreed the suit on the ground that the sale being made by an unauthorized person is void. The first Court found it proved that Rs. 1,300 were due by Lalpatsingh as alleged by the defendant and that the sale was a wise proceeding, but the lower appellate Court recorded no finding on the merits. The defendant has made the present appeal.

I am of opinion that the case must go back in order that the fact may be found. With due respect I think that the dictum in *Husen v. Rajaram* (1) that every alienation by the *de facto* guardian of a minor is wholly void is too widely stated. It is based mainly on cases in which the parties were Mahomedans, whose personal law as to guardianship is quite different from that of Hindus. The well-known case of *Hunoomanpersaud Poddar v. Mt. Balsoor Munshi Kanyasree* (2) was one of alienation by a Hindu manager who was only a *de facto* guardian of the minor, and the alienation was held to be valid when made for necessary purposes. *Mohammud Mahtab v. Vafar Mandul* (3), a case which does not seem to have been dissented from or overruled and which is not mentioned in *Husen v. Rajaram* (1), is a direct authority for the proposition that a Hindu *de facto* manager of an infant's estate has, in case of necessity or for the benefit of the minor, power to sell his property. *Mirza Din v. Sheikh Ahmed Ali* (4), upon which also the decision in *Husen v. Rajaram* (1) is based, was a decision on the Mahomedan law of guardianship, as will appear at pp. 216 (of *L. L. R.* 31 *Alt.*) (where the ratio decidendi of the Indian High Courts is given) and 221 (of *L. L. R.* 34 *Alt.*) where their Lordships open their discussion of the question at issue by pointing out that the alienation was made in a family who were Mahomedans governed by the Mahomedan law relating to guardianship. The case with which their Lordships dealt was that of an alienation effected not by a guardian but by a wholly unauthorized person and he was found to be so because of the personal law applicable to him. Mahomedan law specifies the guardian *de jure* and pro-

vides for the testamentary appointment of such persons. But the Hindu law makes the King and no one else the guardian of all the minors. Strictly speaking there is no such thing as *de jure* guardian under that law. By custom the father and mother are recognized as guardians. But these recognitions are partly arbitrary so far as guardianship is concerned. There is no text to support them so far as I can find. But the Hindu law does recognize managers of family property and such managers are *de facto* guardian depending on the circumstances of each case. The powers of alienation possessed by such managers have been exhaustively dealt with in numerous treatises and cases on Hindu law, in relation both to adults and to minor owners of the property concerned, and it is in the light of these authorities that the present case must be decided after the facts have been ascertained. When Lalpatsingh died his widow, if she was the mother and not merely the stepmother of the plaintiffs, became their customary guardian. The circumstances under which she made over to the plaintiffs and their property to Zaid Singh must be ascertained, if possible. If it was that Halilux, A. J. C., cites a passage in *Husen v. Rajaram* (1) at p. 136 (of *L. L. R.* 31 *Alt.*) a guardian *de jure* then the question will arise whether she could appoint a manager to act for her. The case is one of Hindus and must be judged by the laws and authorities applicable to Hindus. The lower appellate Court should also come to a definite finding on the alleged legal necessity. That a transaction may not bind a minor and yet impose an obligation of his estate is well clear by the Privy Council in *Moheri Bibee v. Dharmodas Ghose* (5). Therefore even if the sale is set aside, the question of ordering a refund of the purchase-money is one to be considered in this case as a matter of equity and good conscience. The appeal is allowed. The decree of the lower appellate Court is reversed and the case remanded for fresh decision with reference to above remarks. There will be a refund of court-fees and costs will abide the result.

P. N. R. K.

Case remanded.

(5) [1903] 30 Cal. 519=30 I. A. 114 (P. C.).

(1) A. I. R. 1914 Nag. 75=26 I. C. 513=10 N. L. R. 133.

(2) [1854-57] 6 M. L. A. 393=15 W. R. 61 n.

(3) [1899] 26 Cal. 829.

(4) [1912] 31 All. 213=13 I. C. 976=33 I. A. 49 (P. C.).

A. I. R. 1918 Nagpur 20

MITTRA, A. J. C.

Vithu—Plaintiff—Appellant.

v.

Devidas and another—Defendants—Respondents.

Second Appeal No. 157-B of 1917, Decided on 3rd August 1918, against the decree of Dist. Judge, West Berar, in C. A. No. 180 of 1916, D/- 21st February 1917.

(a) Hindu Law—Minority and guardianship—Step mother is not natural guardian.

A step mother is not natural guardian of her minor step son under the Hindu law.

An alienation of a minor stepson's property by a step-mother therefore stands on the same footing as an alienation by any de facto guardian. [P 21 C 1]

(b) Hindu Law—Minority and guardianship—Suit by minor to recover property sold by his stepmother is governed by Limitation Act (1908), Art. 144 and not by Art. 44.

Article 44 does not apply to an alienation by an unauthorized guardian and consequently to an alienation by a stepmother of property belonging to her minor stepson: 26 I. C. 179, *Foll.* [P 21 C 2]

A suit by a Hindu minor after attaining majority to recover possession of property sold by his stepmother during his minority is governed by Art. 144 and by Art. 44. [P 22 C 1]

(c) Limitation Act (1908), Art. 44—Art. 44 applies to all transfers.

Article 44 does not merely apply to sales but applies to all transfers of property. [P 21 C 2]

H. S. Gour—for Appellant.

M. V. Joshi—for Respondents.

Judgment.—The plaintiff sues for possession of fields sold in 1907 during his minority by his stepmother Mt. Rukhma for Rs. 2,000. It has been found that there was no legal necessity for the sale except to the extent of Rupees. 237-9-0. The lower appellate Court has held that the suit was instituted more than three years after the plaintiff attained majority. The suit has been dismissed as barred by Art. 44, Lim. Act. The view taken by the lower appellate Court is that Mt. Rukhma was the de facto guardian and manager of the plaintiff's estate, though there were separated kinsmen in the male line. It has followed an unreported ruling of this Court in *Somwarपुरी Guru Chandanपुरी v. Gopalsingh* (1), in which my learned predecessor, Sir Henry Stanyon, dissented from, *Husen v. Rajaram* (2). In the reported ruling the step-mother conveyed

the property when the minor's mother was alive, but no such distinction was made in the judgment. It was laid down that.

"An alienation of the property of a minor by a person who is that minor's guardian de facto is not merely voidable but absolutely void, and the minor need not sue to have it set aside before he can obtain possession of the property."

The decision was based upon the following dictum of their Lordships of the Privy Council in *Mata Din v. Ahmad Ali* (3):

"It is difficult to see how the situation of an unauthorized guardian is bettered by describing him as a de facto guardian. He may by his de facto guardianship assume important responsibilities in relation to the minor's property, but he cannot thereby clothe himself with legal power to sell it."

The case before the Privy Council, as pointed out by Sir Henry Stanyon, A. J. C., was one governed by the Mahomedan law of guardianship. Stanyon, A. J. C., also says

"that strictly speaking there is no such thing as a de jure guardian under the Hindu law. By custom the father and mother are recognized as guardians."

The learned Judge then points out that an alienation by a de facto guardian, if for legal necessity or for the benefit of the minor would be binding. I admit there is considerable force in the argument set forth in the unreported ruling, but I find that the High Courts have even in cases of Hindu law followed the dictum of Lord Robson in *Mata Din v. Ahmad Ali* (3). These cases appeared after the decision of *Somwarपुरी Guru Chandanपुरी v. Gopalsingh* (1). The question which I have now to consider is the position of a stepmother in relation to her minor stepson. According to Mayne, the father and next to him the mother is the natural guardian of a Hindu minor: in default of parents his nearest male kin should be appointed. In *Thayammal v. Kuppanna Koundan* (4), Sadasiva Aiyar, J., says:

"I hold that under Hindu law, nobody else than the father and mother of a minor (with probable exceptions in favour of the elder brother and the direct male and female ancestors of the minor) is entitled as a matter of natural right to be and to act as guardian of a minor's person and properties. Recourse must be had to the Court (representing the rights of the King which are paramount to even the rights of the parents) where there is no natural guardian alive."

(3) [1912] 34 All. 213=15 O. C. 49=13 I. C. 976=39 I. A. 49 (P. C.).

(4) A. I. R. 1915 Mad. 659=26 I. C. 179=33 Mad. 1125.

(1) A. I. R. 1919 Nag. 18=49 I. C. 246.

(2) A. I. R. 1914 Nag. 75=26 I. C. 813.

The case before him was however not that of a stepmother. In *Rambace v. Umurchand Deochund* (5) a stepmother was held to be the natural guardian on the authority of the following verse from Manu:

"If among all the wives of the same husband, one bring forth a male child, Manu has declared them all, by means of that son, to be mothers of male issue."

This view, though in accordance with the opinion of the Shastri, is dissented from in *Maharajee Ram Buvjee Koorwaree v. Maharajee Soubh Koorwaree* (6), so far as regards the interpretation of the text of Manu. Lock and Macpherson, J.J., point out that the step-mother does not stand as a mother for all purposes. Although the argument that under no circumstances can she inherit from a stepson is inapplicable to Bombay and Barar, the observation of the learned Judges that the text of Manu does not make the stepmother a mother so that she may inherit as mother is true also of Bombay and Barar. She inherits as wife and widow of the father from the stepson that is as a gotra sapinda, and she comes in Bombay after the paternal grandmother (Mayne's Hindu Law, Edn. 8, para 506). Reliance is placed on behalf of the respondents on *Jagoo v. Oodul* (7). That case is no authority for holding that the step-mother is a natural guardian. It merely lays down that an alienation by her may bind the stepson's estate, if it is justified by necessity, or is for his benefit. In *Krista Kissor Neeghy v. Kadermoye Dosjee* (8) it was laid down that the claims of relatives to the guardianship of a minor stand upon a different footing from those of parents, and it is pointed out that all relatives mentioned in Macnaghten's Principles and Precedents of Hindu Law, Ch. 7, have not an absolute right to take upon themselves the guardianship of a minor without any permission or authority from the ruling power.

Upon a consideration of the authorities I have come to the conclusion that the stepmother is not a natural guardian under the Hindu law. The alienation by a stepmother therefore stands on the same footing as that of any other

de facto guardian. She is an "unauthorized guardian," to quote the words of their lordships of the Privy Council, and not a guardian within the meaning of Art. 14, and to an alienation by such a guardian the Article does not apply: *Thayammal v. Kuppaswami Venkudam* (9). I may point out that Art. 41 of the present Limitation Act applies not merely to sales but to all transfers of property, and the restricted construction placed on the meaning of the word "guardian" by the Madras High Court appears to me to be sound. For the appellant the case of *Rajappa Dandappa Tashai v. Chandasappa Shirodhanappa* (10) is relied upon. This case fully supports the appellant's contention but goes further than it is necessary for me to hold. For, according to the Bombay view, even an alienation by a mother would not be governed by Art. 14 or Art. 31, Lim. Act. The attention of the learned Judges was however not drawn to certain observations made by the Privy Council in the case of *Gunasambanda Pandara Saundhi v. Velu Pandaram* (11). At p. 275 Sir Richard Couch says in respect of an alienation made by the mother of a minor:

"Chockalinga attained majority in 1890 and had by Art. 41 of the Act three years for suing to set aside the sale by his guardian. He did not do so and by S. 25, Lim. Act his right became extinguished."

Sham Chandra v. Godadhar Mandal (11) cited for the respondents was decided before the Privy Council case of *Mata Din v. Ahmad Ali* (12). The actual decision in the case however supports the view taken by me though there are dicta in favour of the respondents. As regards the application of Art. 91 there has not been much argument before me. Ordinarily it applies to an instrument executed by a party or his predecessor-in-interest. Hence it has been held by this Court in *Asaram v. Ratan Singh* (12) that a minor member of a joint Hindu family is not bound to set aside a sale effected by the managing member and Art. 91 does not apply to a suit for recovery of possession of his share by the minor on attaining majority. Such a sale may in certain cases be binding on him just as a sale by a de facto guardian

(5) 2 Boonadalle's S. A. R. 163.

(6) [1867] 17 W. R. 321.

(7) [1908] 4 N. L. R. 20.

(8) [1878] 2 C. L. R. 588.

(9) [1916] 33 I. C. 444.

(10) [1900] 23 Mad. 271=27 I. A. 62. (P.C.).

(11) [1911] 9 I. C. 377.

(12) [1916] 32 I. C. 217.

But in neither case is the minor bound to set aside such a sale. There was no necessity for the sale. Out of the total consideration of Rs. 2,000 only Rs. 237-9-0 was found to have been required for necessary purposes. The suit is governed by Art. 144 and is within time. The decrees of the Courts below are set aside and in lieu thereof it is decreed that the defendants do put the plaintiff in possession of the property mentioned in the plaint upon the plaintiff paying Rs. 237-9-0 to the defendants. The plaintiff will get his costs in all the three Courts.

P.N./R.K.

*Decrees set aside.***A. I. R. 1918 Nagpur 22**

KOTWAL, A. J. C.

Jangilal—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 24 of 1918, Decided on 17th April 1918.

(a) Criminal P. C. (1898), S. 350—S. 350 introduces exception to general rule that decision of guilt or innocence must be by judge who hears all evidence—That exception should not receive wider interpretation than its words justify.

The general rule is that the decision as to the innocence or guilt of an accused person must be by the Judge who has heard all the evidence. 1 N. L. R. 187 and 36 I. C. 867, *Foll.*

Section 350, introduces an exception to this general rule and the exception should not receive a more extended interpretation than its actual words clearly justify. 35 Cal. 437; 14 I. C. 314; 1 I. C. 54 and 44 I. C. 682, *Disapp.*

[P 25 C 2]

(b) Criminal P. C. (1898), Ss. 223, 224, 230, 233, 234 and 346—Case transferred from one Magistrate to another—Expression of intention by counsel in High Court not to claim de novo trial does not estop accused from claiming same—Accused in his capacity as Revenue Officer cheating three persons by dishonestly inducing them to deliver some of money collected by them from several others—Inducements also offered to persons who contributed who were about 15 in number—There were as many separate offences as there were persons to whom inducements were offered—Offences could not be combined in one trial.

The applicant was challenged and convicted on three charges under S. 420, I. P. C., which were tried together under S. 234, Criminal P. C., on the allegation that in his capacity as a Revenue Inspector he cheated three persons by dishonestly inducing them to deliver to him sums of money collected by them from several others, they themselves contributing to the sums their own quota of subscriptions. The applicant under orders from the Tahsildar caused a list of the tenants of a certain village to be prepared, showing the amount each of the tenants would

have to pay towards the War Loan. Sometime after he offered to some of them within the hearing of others to cut down the subscriptions to half if he was paid Rs. 2 a piece, and to omit altogether the names of persons who were to pay Rs. 7-12-0 if they paid him Rs. 1 each. The villagers were then told to bring the money and they met in two groups. Seven out of one group paid Rs. 2 each to K who thus collected Rs. 16 including Rs. 2 of his own and paid the amount to the applicant, who made the necessary corrections in the list already prepared. Similarly C collected Rs. 9 from 6 persons including himself out of the other group and paid it to the applicant who, made corrections in the list as promised. The case was originally tried by the District Magistrate but on an application for transfer to the Judicial Commissioner it was sent to the file of a First Class Magistrate in the same District. In the course of his arguments in the proceedings under the transfer application the applicant's counsel expressed his intention not to apply for a re-hearing of the case. The Magistrate, to whose file the case was transferred held that this constituted a waiver on the part of the accused and consequently refused to grant the prayer of the applicant for a trial de novo. On appeal the Sessions Judge set aside the conviction and sentenced on one charge only and upheld those on the other two. The applicant urged amongst others the following grounds: (1) that there was an illegal contravention of S. 350, Criminal P. C., in refusing to grant a trial de novo, (2) that there was a non-compliance with Ss. 223 and 224, Criminal P. C., causing in fact a failure of justice and illegal misuse of S. 336 inasmuch as the charges did not give necessary notice of the matter charged, (3) that the charges framed were in contravention of the provisions of Ss. 223 and 224 Criminal P. C., as there were 15 persons cheated and 15 separate offences committed and the offences were wrongly combined in one trial:

Held: (1) that the statement of the applicant's counsel not to apply for a fresh trial did not operate as an estoppel and the trial Court was wrong in refusing the applicant's demand for a trial de novo; [P 25 C 2]

(2) that the omission to specify in the charge the manner in which the applicant cheated, whether by illegal act or omission, could not be regarded as material as it had not misled the accused. [P 26 C 1]

(3) that all or most of the persons who parled with money having been present when the terms were proposed by the accused, the representations made and inducements offered were made and offered to each of the villagers collected there and when the applicant took the money paid by each villager he committed a distinct offence, and the trial of the case was, therefore bad for misjoinder of charges as under S. 234, the applicant could not be tried for more than three charges. [P 27 C 1]

(c) Criminal Trial—Prosecution witness deposing to circumstances against accused—Magistrate should let accused know by questions put to him which of them tell against him.

If circumstances are deposed to against the accused by a prosecution witness, it is necessary that the Magistrate should let the accused know by questions put to him in examination which

of them tell against him in his mind; it is more particularly necessary where the witness has deposed to other circumstances favourable to the accused which nullify the value of the circumstances against him. (P 27 C 2)

Henry Stanton—for Applicant.

G. P. Dick—for the Crown.

Judgment.—(1) The applicant Jangilal was the Revenue Inspector of the Bahera Circle in the Bametara Tahsil, Drug District, till the 9th May 1917, when he was suspended by the Deputy Commissioner, Drug, on Police reports that he was taking money from villagers on the pretence that he could save them from being compelled to subscribe to the war loan. After an investigation by the police the applicant was charged and tried and convicted on three charges under S. 120, I. P. Q. The three charges were tried together in for S. 231, Criminal P. C. The applicant has been sentenced to rigorous imprisonment for one year and a fine of Rs. 100 on each count, the sentences of imprisonment to run consecutively. On appeal the Sessions Judge, Rajmou, has set aside the conviction and sentence on one charge. This latter charge related to the taking of money from the villagers of Innaur Muran. The other two related to the money taken from the villagers of Innaur Bhotidih. I am now dealing with the latter two only.

(2) The case against the applicant is disclosed by the evidence in briefly this: At first the case was directed by the Tahsil-dar to prepare lists of tenants, and other persons in his circle who were likely to subscribe to the loan; see accused's written statement dated 20th August 1917. On 1st April 1917 the tenants of Bhotidih were collected at mantri Poonri and on the same day Chahalal, patwari (P. W. 12), prepared a rough list for this village showing the names of the tenants and the rents paid by them, and the applicant filled in the amounts against each tenant's names. From this Chahalal prepared a list, Ex. C. The villagers were then told what sum each would have to pay. They pleaded that they were too poor to pay anything, but they were told by the applicant that they "would have to pay" (P. W. 6) or were told to "be off" (P. W. 7). They then went home. Seven or eight days afterwards being told by the kotwar that they were wanted again, they went to Munderbol, a place about a kos from

Bhotidih. They saw the applicant in the rest house sitting on a charpoy. He told them to wait and after a while got up and went outside the village. The villagers followed him and the applicant then beckoned to them and said that two or three men only should go to him. Thereupon Karia (P. W. 6), Giraidas (P. W. 7), Sakhu (P. W. 10), Jambath (C. W. 6) and Ramchiron (P. W. 7) went to him. He then asked to look after the villagers' interests—*"dohi dahi karunga"*—if they would pay him something. He asked to put down their subscriptions to find if he was paid Rs. 2 a piece and to "pay off" the Rs. 7,120 people elsewhere if they paid Rs. 1 each.

The other villagers led by this time came at six and sat down within hearing distance. From Karia was told to bring the money. The villagers then returned to their village where they met in two groups. Seven persons paid Rs. 2 each to Karia (P. W. 6) who was collected Rs. 14 including Rs. 2 of his own. Similarly Chahalal (P. W. 7) collected Rs. 9 from six persons including himself. Thereupon they went to Munderbol to the applicant, and told him they had brought the money from 12 and seven persons respectively. He told them not to let it break and took it, went near a lamp, asked whose money they had brought, wrote something, and said he was writing out the Rs. 7,120 people and relieving them by half. The two then went home. Gauraman (P. W. 11), the patwari in whose absence Chahalal (P. W. 12) was acting when he prepared the list Ex. (C), had been cooking his food while this interview was taking place. Before retiring for the night he looked at his lists and said that in the list Ex. (C) there were corrections in red ink which did not exist when that list had been made over to him by Chahalal. Next morning he asked the applicant why the corrections were made, and he replied that he had filled in the amounts without inquiry into the *haisiyat* of the villagers, but as some had begged and prayed he had changed their items. He made a fresh copy of Ex. (C) as corrected by applicant by his direction (Ex. D).

(3) The case as detailed above rests principally upon the evidence of P. W. 6 and P. W. 7 and of P. W. 11 and P. W. 12, the two patwaris whose evidence is mainly

in connexion with the lists Exs. (C) and (D). One piece of material evidence in the case is that of P. W. 10, Bhagirathia banker of Raipur, who deposes to the accused having paid Rs. 1,600 on account of an outstanding loan on 4th May 1917. The other evidence supports some part or other of the above story and is of minor importance.

(4) Upon this evidence the applicant was charged as follows:

"First head: That you, on or about 7th April 1917, at Munderbod, cheated Karia Chamar by dishonestly inducing him to deliver Rs. 16 to you, and thereby committed an offence punishable under S. 420, I. P. C., and within my cognizance."

The second and third heads of the charge were in the same terms, but referred to the Rs. 9 paid by Chirai Chamar and Rs. 15 paid by Hira at Bhainsa. There were also three alternative charges under S. 161, I. P. C., in respect of the three sums named above. The applicant denied taking any of the above sums, and denied going to Munderbod at any time between 1st and 10th April 1917. He produced no evidence in defence. The trying Magistrate came to the conclusion that the evidence justified conviction under S. 420, I. P. C. He says in para. 7 of his judgment:

"There is no doubt that the accused obtained money from the above persons by practising a deception on them. He well knew that he had no authority to fix an amount on them or to reduce any amount so fixed. There is also no doubt that the poor credulous villagers made the payments firmly believing that the accused had power to reduce the amounts which he had imposed in the exercise of his authority. Since there was deception it is immaterial in which way it was practised. It may arise even from a dishonest concealment of facts (Explanation to S. 415, I. P. C.) as in the present case. The accused in receiving the moneys from Hira, Karia and Chiraidas undoubtedly acted fraudulently and I accordingly find him guilty of three offences under S. 420, I. P. C."

It is not quite clear what persons the Magistrate refers to when he speaks of the "above persons," whether all the 15 who contributed to the total amount received by the applicant or to Hira, Karia and Chiraidas alone who are named as the persons cheated in the charge. The Sessions Judge has held that the applicant must be taken to have cheated only Karia and Chiraidas.

"The essence of his action, he says, was dealing with collections of people through representatives and realizing lumpsums of money from the representatives."

It might be mentioned at this stage

that the proceedings in this case originally commenced in the Court of the District Magistrate. After the latter had taken down the depositions of nine witnesses the applicant obtained an order from this Court for a transfer of the case, which was then tried by Mr. Smellie, the Magistrate who has given judgment in the case. Before Mr. Smellie commenced his proceedings the accused applied for a *de novo* trial. This was refused on the ground that the right to claim it had been given up by the accused's counsel before the High Court when he obtained the order of transfer from the District Magistrate's Court. The argument in appeal before the Sessions Judge proceeded on grounds substantially the same as those urged in revision in this Court. The grounds are: (1) that the trial was preceded by such executive action and judicial procedure as operated to prejudice the applicant materially and this Court ought not to allow a conviction so obtained to stand; (2) the trial was illegal in some respects and materially irregular in others; (3) neither the facts charged, nor the variation of them irregularly introduced by the Sessions Judge, nor the prosecution evidence, if believed, satisfy the definition nor furnish and establish the ingredients of an offence under S. 420, I. P. C. (4) Under the 1st ground it is urged: (a) that the actions of the police and the District Magistrate in suspending the applicant in order to obtain evidence with reference to the charge against him, and in making the inquiry behind his back was unfair and prejudicial to his subsequent judicial trial, and the lower Courts have ignored the presumption against the credibility of witnesses which arose from the above executive actions; (b) further that the applicant's suspension by the District Magistrate and the latter's conduct in the course of the proceedings, which took place in his Court before the transfer, showed that he had already condemned the applicant, and this must have unconsciously prejudiced the trying Magistrate.

As regards point (a) I notice that the learned Sessions Judge has considered the matter urged therein in para. 47 of his judgment. As regards (b) the statement, that the trying Magistrate must have been prejudiced, can at the best be only a conjecture. All the circumstances which are relied upon in support of this

point had happened before the order for transfer from this Court was obtained and might have been urged then to get the case transferred out of the district, but it is admitted that only a transfer to another Magistrate in the district (who must necessarily be one subordinate to the District Magistrate) was applied for. It is not suggested that the trying Magistrate was particularly prone to such unconscious prejudice.

Under the second ground it is urged that there was: (a) illegal contravention of S. 350, Criminal P. C.; (b) non-compliance with Ss. 222 and 223 Criminal P. C., causing in fact a failure of justice, and illegal misuse of S. 230; (c) contravention of S. 233 read with S. 241, Criminal P. C.; (d) failure to comply with S. 342, Criminal P. C., to an extent which caused serious prejudice to the accused, and therefore a failure of justice. Before the Sessions Judge the argument with reference to S. 350 was based on the assumption that it was applicable to the present case, which was one transferred from the Court of one Magistrate to that of another. In para. 13 of his judgment the Sessions Judge says:

"A large number of rulings have been cited to show that S. 350 applies to cases in which the trial is transferred from one Magistrate to another as well as to cases in which the Magistrate is transferred, dies or otherwise vacates his office, a proposition of which I needed no convincing."

It is somewhat strange that the applicant should have failed to rely upon the rulings of the Court to the contrary which would have served his purpose better and more fully, and that both the trying Magistrate and the Sessions Judge should have overlooked or ignored the rulings of their own High Court which they were bound to follow. These rulings are *Emperor v. Kasim* (1), *Emperor v. Gokul* (2), *Ladha v. Emperor* (3) and *Emperor v. Ramprasad* (4). In this Court the argument advanced with reference to S. 350 is twofold: First, reliance is placed upon the above rulings to show that the section does not apply to transferred cases and therefore the case ought to have been tried *de novo* by Mr. Smellie. Second even if S. 350 applies, there should have been a trial *de novo* as applicant had demanded it at the

proper time before Mr. Smellie and the refusal on the ground that the accused had waived his right was illegal. In my opinion the view taken of the applicability of S. 350, Criminal P. C., in the rulings of this Court referred to above is the correct one. The general rule is that the decision as to the innocence or guilt of an accused person must be by the Judge who has heard all the evidence: see *Ladha v. Emperor* (3) and *Emperor v. Ramprasad* (4). S. 350, Criminal P. C., introduces an exception to this general rule, and I do not think that the exception should receive a more extended interpretation than its actual words clearly justify. I am not inclined to agree with the more recent view taken in *Mohd. Ghous v. Sultan v. Emperor* (5), *Kudratullah v. Emperor* (6), *Pasarkundh Ghanmer v. Emperor* (7) and *Tom Dass v. Emperor* (8).

If therefore S. 350 has no application in this case, it is unnecessary for me to discuss the points involved in the alternative argument, but assuming that the section applies and there are no other valid reasons for refusing the applicant's demand for a trial *de novo*, it seems to me that the lower Courts were not justified in refusing it on the ground of waiver in anticipation before this Court at the hearing of the application for transfer. The circumstances of the case reported as *Kudratullah v. Emperor* (6) were different. Not only was there no demand for a trial *de novo* made; but the transfer had been made to suit the convenience of the accused which would not have been served by a trial *de novo*. In the present case there was a demand made at the proper time, and the only question was whether the applicant's counsel's previous statement as to the applicant's intention operated as an estoppel as the learned Magistrate seemed to think, and justified him in ignoring it. I do not think that it did. The learned Sessions Judge in discussing the case of *Gomer Sirda v. Queen-Empress* (9) says: "In that case the accused had never expressly waived his right to a trial" implying that in this

(1) [1902] 15 C. P. L. R. 66.

(2) [1901] 17 C. P. L. R. 150.

(3) [1905] 1 N. L. R. 187.

(4) [1916] 12 N. L. R. 116=36 I. C. 667=18

Cr. L. J. 35.

(5) [1908] 25 Cal. 437=7 Cr. L. J. 220.

(6) [1912] 29 Cal. 781=14 I. C. 134=13 Cr.

L. J. 218.

(7) [1900] 32 Mad. 218=1 I. C. 51=9 Cr. L. J.

145.

(8) [1913] 44 I. C. 682=19 Cr. L. J. 378.

(9) [1898] 25 Cal. 863.

case the accused had done so. The only record of the statement of the applicant's counsel in this Court is in the last sentence of this Court's order for transfer, which runs thus:

"The applicant's counsel tells me that he does not intend to apply for a rehearing of the case."

These words do not, in my opinion, amount to an express waiver. In *Ram Dass v. Emperor* (8) the transfer was made on the express undertaking that the accused would not ask for the rehearing of the entire evidence and no demand for a trial *de novo* had been made; yet it was held that if the accused had repudiated the undertaking and offered some explanation of his conduct in doing so, it would have been the Magistrate's duty to consider the application and give such effect to it as he thought just and lawful. Here the application has not been considered on the merits at all.

The second point raised under this ground is that the charges did not give the accused the necessary notice of the matter charged that he was entitled to under the provisions of Ss. 232 and 223, Criminal P. C. It is said that the charge did not contain any particulars of the manner in which the applicant cheated, whether by act or illegal omission, and if so what; that the Magistrate's record apart from his judgment does not anywhere specify any act or words by which the accused deceived the men who parted with money or the men who carried it to the accused, or of the illegal omission or dishonest concealment by which the deception was brought about. Reliance is placed on *Ilus. (b)* and *(c)* to S. 225 in this connexion. It would, no doubt, have been better to have set out in the charge the manner in which the cheating was effected, but the omission cannot be regarded as material as it is not alleged, and does not appear to me, that the accused was in fact misled by such error: S. 225, Criminal P. C. The chalan and the evidence in the case must have sufficiently indicated to the accused the manner in which he was said to have cheated the villagers. There is evidence on the record which, if true, goes to show that the applicant by his words and conduct induced a belief that the villagers would have to pay the amounts entered against their names, unless they were reduced or cut off altogether by him.

I agree with the Sessions Judge's view on this point expressed in para. 11 of his judgment.

It is further urged* that the charges of cheating and bribery were based on inconsistent facts, and the trial of those charges together, apart from its not being justified under S. 236, Criminal P. C., has been the cause of prejudice to the applicant. It is said that at the stage of argument the Magistrate himself stated to the pleader for the applicant that no case of cheating had been made out and he confined his argument to the charges of bribery. I cannot decide the question of prejudice to the accused under this head of objection without further inquiry, and as I find that the trial is bad on other grounds I think it unnecessary to go any further into this objection. On the record as it is the charge of bribery was rightly dropped by the Magistrate.

The third point argued on this ground is that the charges framed are in contravention of the provisions of Ss. 233 and 234, Criminal P. C. It is argued that assuming there was cheating, the number of individuals cheated was 15, i. e., 13 from Mauza Bhotidhi and 2 from Mauza Puran, that 15 offences were thus committed, that the Magistrate wrongly combined 15 charges in respect of them in one trial, and that the proceedings are irremediably bad in law on account of this error, and the convictions cannot stand: *Subrahmanya Ayyar v. Emperor* (10). It is admitted by the learned counsel for the applicant as well as the Crown that according to the evidence on the record all or most of the persons from Bhotidhi who parted with money were present at the first interview with the applicant outside the village and heard the terms he proposed. There are witnesses whom the lower Courts have relied on: see para. 2, p. 6 of the Magistrate's judgment and para. 30 of the Sessions Judge's judgment, who give evidence to the effect that Karia shouted out to the villagers, who were sitting apart, whether they had heard the terms and that they agreed. If this is so, then it appears to me that the representation made and the inducement, offered by the applicant were made and offered to each of the villagers collected there, and when the applicant took the money

(10) [1903] 25 Mad. 61=28 I. A. 257 (P.C.).

paid by each villager he committed a distinct offence.

Reliance is placed by the Sessions Judge on *Johan Sabarna v. Emperor* (11) and *Girwardhari Lal v. Emperor* (12), for holding that there was only one offence in respect of each hundi supplied by Hira, Karia and Chiraidas. I am not prepared to accept the view taken in *Johan Sabarna v. Emperor* (11). The attempt complained of in that case was, in my opinion, nonetheless an attempt to deceive each individual separately, because it was made simultaneously. The last paragraph on p. 1063 (of 13 C. W. N.) in *Girwardhari Lal v. Emperor* (12) seems to me to go against the view of the Sessions Judge rather than to support it. It is not the case here that the applicant treated the transaction as a single one and was unwilling to reduce or cut off the subscription of any one unless all of them combined and made a combined payment. It is difficult to reconcile the view taken in *Girwardhari Lal v. Emperor* (12) with the one taken in *Johan Sabarna v. Emperor* (11), unless we assume that the Judge overlooked the former circumstance, the facts in the latter case to be somewhat different from those stated therein. I hold that the trial in this case is not on account of misdirection of charges. Under S. 231 the applicant could not have been legally tried for more than three charges.

The fourth point urged under this ground is that there was a failure to comply with the provisions of S. 342 Criminal P. C., which has resulted in prejudice to the accused. The Sessions Judge in para. 50 of his judgment has found that the applicant paid to his auditor Bhagirathi, P. W. 10, Rs. 1,600 on 3rd or 4th May 1917 on account of a debt owed on a hundi, which had been running for three years without any repayment. He refers to this as a damning piece of evidence against the accused (para. 51 of his judgment says, "this evidence has much value as corroborating the prosecution story"). It is urged that when this evidence was tendered the applicant by cross-examination elicited that he had been accompanied by another man when the money was borrowed and also that he had offered to pay off the hundi in February 1917. It is said that the object

of this cross-examination was to prove that the money was borrowed on the personal security of the accused for a relation who was unknown to the lender, and the borrower had sent the money for payment in February 1917 to the applicant. It is urged that any inference arising from this payment of the applicant at the moment it was found that the applicant had money to pay off the hundi in his possession before the cross-examination was set on foot. It is said that the admissions elicited from Bhagirathi in his cross-examination were not questioned or explained away by cross-examination, nor did the Magistrate ask the witnesses any further question on the point of the February tender, and wholly omitted to question the auditors about it. Under these circumstances it is urged that the facts stated were a case of misleading against the applicant, this piece of evidence.

I think there is much force in this contention of the applicant. In the circumstances stated above, the applicant could be justified in concluding that the Magistrate did not accept the payment of Rs. 1,600 as a circumstance against the applicant. There was no reason for the Magistrate to suppose that the statement as to the February tender, couched as it was in a witness produced by the prosecution, could be disbelieved, as the Sessions Judge seems to have done. If circumstances against or against a person are depicted by a prosecution witness, it is necessary that the Magistrate should be the better known, by questions put to him in his examination, which of them tell against the accused in his mind, and it is more particularly necessary where the witness has deposed to other circumstances favourable to the accused which nullify the value of the circumstances against the accused. The failure to comply with the provisions of S. 342 in this connexion may well have prejudiced the applicant by leading him to conclude as above and to ignore the evidence of Bhagirathi so far as his defence was concerned.

The third and the last of the main grounds of appeal urges that neither the facts charged, nor the variation of them introduced by the Sessions Judge, viz., that the cheating was practised on Karia and Chiraidas as the representatives of collections of villagers, nor the prosecution evidence, if believed, established a

(11) [1906] 10 C. W. N. 520=3 Cr. L. J. 111.

(12) [1909] 10 Cr. L. J. 163=4 I. C. 13.

case under S. 420, I. P. C. As regards this contention I think it advisable at this stage to do no more than refer to what I have already said in the latter part of para. 4, p. 26, *surpara*.

Holding as I do that the trial is bad for the reasons stated above, I do not think it is open to me to go into the merits as I have been asked to do. I do not see how I can decide on evidence on which it is not open to the lower Courts to decide on account of the contravention of the provisions of the Criminal Procedure Code referred to above. I set aside the applicant's conviction and sentence and order that he be re-tried in accordance with law.

The applicant has been released on bail by an order of this Court passed on 22nd February 1918. He will surrender before the District Magistrate, Drug, on or before 22nd April 1918. It will be open to the District Magistrate to make such further order as to bail as he deems proper.

P.N./R.K.

Retrial ordered.

A. I. R. 1918 Nagpur 28

MITTRA, A. J. C.

Paramsukh and another—Defendants—Appellants.

v.
Yadoji and another—Plaintiffs—Respondents.

Second Appeal No. 554 of 1915, Decided on 24th October 1916, against decree of Divl. Judge., Nagpur, Divn. in C. A. No. 175 of 1914, D/- 26th June 1915.

(a) Mortgage — Usufructuary — Right of mortgagee—Right to possession determined by terms of contract—Mortgagee can be ejected by mortgagor.

A mortgagee whose right to possession is unconditionally and automatically determined by the terms of the contract cannot claim to remain in possession thereafter in spite of demand by the mortgagor. In such a case the mortgagor can maintain a suit for ejectment against the mortgagee. (P 29 C 2)

(b) Mortgage — Usufructuary — Rights of mortgagee—Suit for ejectment by mortgagor on determination of right to possession—Subsequent suit for mesne profits is not barred—Mesne profits.

In 1885 plaintiffs' father mortgaged certain land to the defendant. For the satisfaction of the balance due on the mortgage, he executed, in 1891, a lease for 14 years. In 1898 for a fresh advance he granted a further term of three years to come into force after the expiration of the previous lease. The lease expired in 1907-08, but the defendant refused to give up possession, and the plaintiff brought a suit to eject the defendant in 1908. In that suit it was held that the docu-

ments of 1891 and 1898 were usufructuary mortgages and the suit was decreed. The plaintiff then brought a suit to recover mesne profits accruing after the date of the previous suit:

Held: that the previous suit being a suit for ejectment and not a suit for redemption, the present suit for mesne profits was not barred. (P 29 C 2)

P. R. Naidu—for Appellants.

S. K. Barlingey—for Respondents.

Judgment.—In 1885 the plaintiffs' deceased father mortgaged khudkast field No. 95. For the satisfaction of the balance due on the mortgage he executed in 1891 a lease for fourteen years. In 1898 for a fresh advance of Rs. 60 he granted a further term of three years to come into force after the expiration of the previous lease. The lease expired in 1907-08. The defendants having refused to deliver possession, the plaintiffs brought a suit for its recovery in 1908. The suit was ultimately decreed by this Court in Second Appeal No. 309 of 1911. The present suit was instituted on 28th October 1912 for mesne profits accruing after the date of the previous suit. The Courts below have partially decreed the plaintiffs' claim and the defendants have filed this second appeal, and the plaintiffs have filed a cross-objection. The question for decision is whether the present suit is barred, either under S. 11, or under O. 2, R. 2, Civil P. C. The former suit was in the form of a suit for ejectment, and the present suit is one for mesne profits. If this is the true character of the suit, then in view of the provisions of O. 2, R. 4, which merely permits the joinder of a suit for recovery of immovable property with one for mesne profits, the present suit will lie; *Lessor Babui v. Janki Bibi* (1). Moreover, this is a suit for mesne profits subsequent to the former suit, and there will be no bar to the institution of such a suit. The argument on behalf of the appellants however is that whatever be the form of the former suit, it must be regarded as a suit for redemption, and the present claim one for surplus profits recovered by the mortgagees. The appellants point out rightly that upon the view suggested of the true nature of the suit, the present claim is not tenable. Their learned counsel cites the cases of *Satyabadi Behara v. Harabati* (2), *Rukhminibai v. Venkatesh* (3) and *Ram Din v. Bhup*

(1) [1892] 19 Cal. 615.

(2) [1907] 34 Cal. 223.

(3) [1907] 31 Bom. 527.

Singh (4). The respondents rely upon the provisions of S. 62, T. P. Act, as authorizing a suit for ejectment. They cite some of the observations made by this Court in *Kalu v. Laljee* (5).

To appreciate the arguments before me it is necessary to state that in the former suit the contention on behalf of the plaintiffs was that the instruments of 1891 and 1898 were mortgages, whilst the defendants contended that they were leases, and that they had become ordinary tenants of *khudkasht* land, and were therefore protected from ejectment except for nonpayment of rent. This Court held that the documents in question created a mortgage, and upon this finding the plaintiffs' suit for possession was decreed. It must be therefore taken as conclusively decided between the parties that the documents of 1891 and 1898 were usufructuary mortgages. The respondents therefore cannot now be allowed to say that they were leases. Under the terms of the documents, there was to be no accounting between the parties, and the amount advanced was to be deemed to have been satisfied on the expiration of the lease.

The dicta in *Kalu v. Laljee* (5) may require to be carefully reconsidered, but I think the present case can be disposed of without my expressing any opinion on them. The *Calcutta* and *Bombay* cases cited for the appellants establish that, under the scheme of the Transfer of Property Act, a mortgagee after tender remains a mortgagee with somewhat onerous obligations. As pointed out by their Lordships of the *Calcutta* High Court, the provisions of S. 75 (1) and S. 81 show that, notwithstanding a valid tender or deposit in Court, the relationship of mortgagor and mortgagee does not come to an end. But here we are concerned with the case of a payment and not merely a tender. The *Allahabad* case cited however is more in point. There the mortgage money had been paid off out of the usufruct, but the case may be distinguished on the ground that the mortgagor, by bringing a suit for redemption, admitted the subsistence of the relationship of mortgagor and mortgagee. At p. 230 (of 30 *ALL.*) *Karamat Husein, J.*, cites the following passage from *Ashburner on Equity*:

"The possession of the mortgage before redemption is possession for the mortgagor and he becomes a trustee for the mortgagee after he has been paid."

I have not been able to find the book referred to, but it seems to me that the English law is somewhat different. If the passage refers to a legal mortgage, then we must not forget that, under such a mortgage, the legal estate is vested in the mortgagee subject to an equity in favour of the mortgagor. In India however the mortgagor remains in possession, and the mortgagee has merely an interest in the property. If he becomes a trustee in India, this is an obligation in the nature of a trust, within the meaning of Ch. 9, Trusts Act. It does not follow that, in such a case, a mortgagee, after a demand for possession, cannot be treated as a trespasser by the person in whom the ownership is vested. There are no limitations, so far as I am aware, in the Transfer of Property Act that a mortgagee, whose right to possession is unconditionally and automatically determined by the terms of the contract, can claim to remain in possession thereafter in spite of demand by the mortgagor. Under S. 56, Trusts Act, a beneficiary may compel the trustee to transfer the trust property to him. It seems to me that a trustee and a mortgagor a quasi trustee, after demand of possession by the beneficiary is in the position of a wrongdoer. In *Yates v. Hamley* (6), Lord Hardwick compares the position of a mortgagee to whom an estate is conveyed until he shall have received principal and interest out of the rents and profits, to a tenant by *eligit* so that as soon as the principal and interest were satisfied the estate ceased and the mortgagor might maintain ejectment. I cannot therefore agree with the appellant that a mortgagor can under no circumstances sue the mortgagee in ejectment.

The plaint in the suit of 1908 is based upon the allegation of a demand for possession of field No. 95 and a wrongful withholding of the same by the defendants. I have therefore come to the conclusion that the plaintiffs had a right in the circumstances of the case to bring a suit in ejectment, and, as I have already noted, their suit was in form one in ejectment. Therefore it follows that the present claim for mesne profits is not

(4) [1908] 30 *ALL.* 225.

(5) [1908] 11 C. P. L. R. 103.

(6) [1712] 2 *Atk.* 360.

barred. The third ground of appeal cannot be entertained, as the appellants did not file an appeal from the previous order of remand in Civil Appeal No. 89 of 1913. The appeal is therefore dismissed with costs.

The respondents question the amount of damages decreed. The Courts below have given their findings upon such evidence as they considered reliable, and no good grounds have been shown for interference in second appeal. There is an objection also to the award of costs. I see no reason to interfere with the actual order, but if, as suggested, there is an arithmetical mistake in the calculation of costs, it will be rectified by my decree, if the respondents satisfy me, before the decree is signed, that there is any such error. The cross-objection subject to this reservation is also dismissed with costs.

P.N./R.K.

Appeal dismissed.

A. I. R. 1918 Nagpur 30

PRIDEAUX, A. J. C.

Ghunari Kurmi — Plaintiff — Appellant.

v,

Purushottam — Defendant — Respondent.

Second Appeal No. 19 of 1915, Decided on 21st September 1916, from decree of Dist. Judge, Bilaspur, D/- 23rd March 1915, in Civil Appeal No. 18 of 1915.

Civil P. C. (1908), Sch. 2—Matter in dispute referred during pendency of suit, to arbitration with intervention of Court—Reference does not fall under Sch. 2—Award may be regarded as agreement compromising suit—Civil P. C. O., 22, R. 3.

If the matter in dispute in a suit is, during the pendency of the suit, referred to arbitration without the intervention of the Court, the reference does not fall within the provisions of Sch. 2, Civil P. C., but the award may be recorded as an agreement adjusting or compromising the suit and a decree may be passed in the terms of the award: 19 I. C. 786 and 26 Bom. 76, *Foll.*

[P 30 C 2]

M. R. Bobde—for Appellant.

J. C. Ghosh—for Respondent.

Judgment.—The parties to the suit and one Dukbram Kurmi are cosharers malguzars of 9 annas $\frac{1}{75}$ pies share of mauza Tanda, tahsil Bilaspur. Plaintiff sues for possession of field No. $\frac{1}{2}$, area $\frac{1}{9}$ acres, of the village. During the pendency of the suit the parties referred the question in dispute to arbitration without the intervention of the Court.

The reference to the arbitration was in writing and the arbitrators gave their award on 5th October 1914.

They gave the field in suit to the defendant and gave the field No. 1/3 belonging to the defendant to the plaintiff. But the plaintiff refused to accept this award on the ground that a plot not in dispute had been awarded to him. The trial Court treated the matter as one falling within Sch. 2, Civil P. C., and finding under para. 21 of that schedule that as no grounds mentioned in paras. 14 and 15 were proved, ordered the award to be filed and dismissed the suit. On appeal the District Judge, Bilaspur, came to the conclusion that the case did not fall under Sch. 2 and that the submission to arbitration and the award might be recorded as an agreement or adjustment compromising a suit; and that submission to arbitration and a valid award constitute a proper adjustment, and the only question for determination was whether the award was valid. He held that it was necessary to remand the case for a fresh trial on the ground that it had to be determined whether the parties had referred the question of plot No. 1/3 to arbitration and that if this matter was not referred to arbitration, a further question would arise whether the decision of the arbitrators with respect to plot No. 1/3 could be treated as null and void without affecting the rest of the award. Against that order of remand the present appeal has been filed.

It seems to me very clear that the reference to arbitration admittedly made by the parties in this suit with regard to plot No. $\frac{1}{2}$ does not fall within the provisions of Sch. 2. Paras. 1 to 16 of that schedule plainly apply to arbitrations in a suit and paras. 17 to 21 to arbitrations initiated by the parties. Here, though the arbitration took place during the pendency of the suit, yet it was not referred through the Court. It must therefore be held that as a reference to arbitration was made without the intervention of the Court the award may, if the Court thinks fit, be recorded as an agreement adjusting or compromising the suit, and a decree may be passed in terms of such award, the Court having power to inquire into the disputed compromise and to record it, if satisfied that the compromise was properly arrived at: *Harakh.*

bai v. Jhmnabai (1) and *Pragdas v. Girdhardas* (2).

It is pressed that even in this view of the case there is sufficient material on the record to enable this Court to come to a final decision in the matter. It is said that as the award was only objected to on the ground that because a plot not in dispute was awarded to the plaintiff and the solitary witness examined proved that the plaintiff accepted the award, it should be held that he is bound by the terms thereof. But whether the plaintiff did or did not accept the award was not put into issue and that question cannot be decided until the parties have been examined as regards it. The record as it stands does not enable me to give any decision on the question as to what matters beyond the question of plot No. 1 were referred to the arbitrators for disposal. If they were given a free hand in the matter and were empowered to dispose of plot No. 1/3 in arbitration, then their decision must hold good. In cases where the parties have had a dozen separate matters in dispute, only one of which is pending before a Court, there is nothing to prevent them in referring every matter, including that in the Court, to a single arbitration; the decision in which would bind them as regards not only the matter in Court but the other matters as well. In the present case the parties must be questioned as to what disputes were actually referred to the arbitration and until this is done the case cannot be satisfactorily disposed of. If the defendant alleges, as he seems to do, the plaintiff immediately accepted the award made and that point is disputed by the plaintiff, an issue on it will be necessary. In dealing with the question as to whether plot No. 1/3 was included in the reference to the arbitrators I would direct the first Court's attention to para. 6 of the defendant's written statement filed on 7th October 1914. It seems to me that the order of remand appealed from is correct. I therefore dismiss this appeal with costs.

P.N./R.K.

Appeal dismissed.

(1) [1913] 37 Bom. 532=19 I. C. 786.

(2) [1902] 26 Bom. 76.

A. I. R. 1918 Nagpur 31

PRIDEAUX, A. J. C.

Emperor

Seth Jiwandas—Respondent—Non-Appl-
licant.

Criminal Revn. No. 68 of 1917. The-
sided on 14th May 1917. From report by
Sess. Judge, Indulapur.

Criminal P. C. 11898, S. 439—Interlocu-
tory order—High Court can interfere only
in exceptional cases.

The High Court can interfere in a case with
interlocutory order, but the power is to be
exercised with great care and only in cases of
exceptional cases. 22 Cal. 134; 26 Cal. 134; 27
I. C. 107; 20 Bom. 514; 7 L. C. 517 and 2 Cal. 134.
67% Revd. 10221 T.

It is held only to interfere in a case where
there is some manifest and proven in-
justice against the face of the proceedings
and unless the proper order is made. 10221 T.

R. K. D. H. Gupta and M. K. Gop-
lahar—for Non-Appl-licant.

Order.—This case has been reported
by the Sessions Judge, Indulapur, under
S. 138 Criminal P. C. and the applicant
has been allowed to appear in support of
the reference. The accused, Rao Bahadur
Seth Jiwandas, is under trial on a
complaint filed under the sanction of the
Municipal President by one Hobbilax,
Sanitary Sub-Inspector. He is accused of
contravening a bye-law framed under
S. 105 (j), Municipal Act. The particu-
lar bye-law said to have been broken is
No. 2 of those contained by the Hon'ble
the Chief Commissioner in his Notifica-
tion No. 3145 of 10th March 1905.
Jiwandas is accused of allowing some
60 persons to occupy the servants quar-
ter in bungalow No. 31, now being re-
built, in contravention of the bye-law that

"such quarters shall only be occupied by bona
fide servants of the occupier of the bungalow
and the families of such servants."

Objections were taken in the Magis-
trate's Court that the Sanitary Sub-Ins-
pector had no power under the Municipal
law to lodge the complaint and that the
bye-law in question was ultra vires. On
these being disallowed, Jiwandas applied
to the Sessions Judge for revision with
the result that the case has been report-
ed on the ground that the proceedings
are bad because instituted by a person
without authority. The Sessions Judge
also holds that the bye-law is ultra vires
if passed under S. 105 (j), Municipal
Act, though possibly it might have been
framed under S. 105 (s) of that Act.

There is no doubt that this Court can interfere with interlocutory orders; see *Chandi Pershad v. Abdur Rahman* (1), *Jagat Chandra Mozumdar v. Queen-Empress* (2), *Kuppusami Aiyar, In re* (3), *Queen-Empress v. Nageshappa Pai* (4) and *Hari Charan Gorai v. Srish Chandra Sadhukhan* (5). But the powers to be exercised with great care and only in most exceptional cases: *Inamulla v. King-Emperor* (6), and it is inadvisable to interfere:

"in a pending case unless there is some manifest and patent injustice apparent from the face of the proceedings and calling for prompt redress: *Jagat Chandra Mozumdar v. Queen-Empress* (2)."

It seems to me that the present is not a case for interference at an intermediate stage. The applicant has, beside the two legal questions, raised other defences, namely, that the bye law, which is supposed to have been infringed and under which the complaint is lodged, has no application to the facts and circumstances of the case and that as there is no bungalow now in existence to which the buildings mentioned in the complaint could be said to have been attached as servant's houses, they are not servant's quarters. He denies that the buildings were crowded and states that they had only been occupied by the Sub-Registrar with his family and his own servants. It is further contended that the prosecution is not bona fide but in retaliation for the accused having complained against the misuse of the Raja Gokuldas Dharamsala by Municipal servants. The defence evidence is yet to be recorded and until that is recorded, it is impossible to say whether the case will result in a conviction. The accused has been allowed to appear by pleader except on the day on which he was examined. He is therefore being put to no personal inconvenience and as the punishment for the offence he is accused of is but a fine of Rs. 50, it is not as if there is any danger of his going to jail in place of paying it. It cannot be said that in the present case delay will be injurious. Whether the Sanitary Sub-Inspector had

not power to file the complaint is a matter that can well await the conclusion of the trial and though the question whether the bye-law is ultra vires, is doubtless one of great importance, I do not see why the Municipal Committee should be put to the expense of showing in this Court that it is valid until the question is raised by a person who has been convicted under it. The case is one which, in my opinion should not have been reported and I decline to interfere at this stage of the trial. The record to be returned.

P.N./R.K.

Record returned.

A. I. R. 1918 Nagpur 32

STANYON, A. J. C.

Zakirali and another — Defendants—Appellants.

v.

Sagrabi — Plaintiff—Respondent.

First Appeal No. 30 of 1916, Decided on 12th September 1916, from decree of Dist. Judge, Raipur, D/- 29th November 1915, in Civil Suit No. 30 of 1914.

(a) *Mahomedan Law—Acknowledgment—Father acknowledging child—Presumption is of legitimacy—Burden of proof is on person denying paternity and legitimacy.*

Where a child has been acknowledged by a Mahomedan father, the burden of disproving the paternity and legitimacy of such child lies heavily on the person who denies them. The evidence necessary to disprove the paternity and legitimacy must be extremely cogent to displace the presumption of legitimacy, which is not an ordinary presumption of evidence but a strong rule of the Mahomedan law. The mere oral testimony of partisan witnesses is quite insufficient.

[P 41 C 1, 2]

The effect of acknowledgment by a father of his son is such that, even if it cannot legitimize a bastard, it raises so strong a presumption of legitimacy as to throw a heavy onus on the person denying it to establish his allegation, and in order to succeed such person must show either that lawful marriage between the acknowledging father and his son's mother was impossible, or that such marriage did not take place before the child was born: *Case law discussed.*

[P 34 C 1]

(b) *Mahomedan Law—Legitimacy—Child by zina is not legitimate by subsequent marriage—Evidence Act (1872), S. 112.*

Neither paternity nor legitimacy can be obtained by adoption and a child begotten by zina cannot be made legitimate by the subsequent marriage of its parent before its birth, S. 112, Evidence Act, being inapplicable to Mahomedans.

[P 41 C 1, 2]

(c) *Mahomedan Law—Legitimacy—Children of marriage with non-Muslim are legitimate.*

The marriage of a Mahomedan with a non-Muslim woman, who is not the lawful wife of another man, is merely irregular (*fasiq*) and not

(1) [1895] 22 Cal. 131.

(2) [1899] 26 Cal. 786.

(3) [1915] 39 Mad. 561=29 I. C. 109=16 Cr. L. J. 477.

(4) [1896] 20 Bom. 543.

(5) [1910] 38 Cal. 68=7 I. C. 747=11 Cr. L. J. 525.

(6) [1905] 2 A. L. J. 673=2 Cr. L. J. 790.

altogether void (batil) and the children of such a union are legitimate. (P 41-C 1)

(d) **Precedents**—Decision on admission of parties have no value to constitute case law.

A decision which follows an admission or agreement of the parties on a point of personal law cannot be interpreted to represent the judicial opinion of the tribunal on that point so as to constitute case-law. [P 35 C 2]

H. S. Gour—for Appellants.

F. W. Dillon—for Respondent.

Judgment.—The following genealogical tree is evolved from the record of the suit out of which this appeal has arisen.

WAJID ALI=ASABI (defendant 2.)

|
Mt. Ramotin=Abbas Ali Sograbi (plaintiff).

|
Zakir Ali (defendant 1).

Wajid Ali was the proprietor of the two villages named Sirnabhata and Dagania in the Revenue Tahsil and District of Deeg, which is a part of the civil District of Raipur. He was a Mussalman of the Sunni sect. He died in 1889, and was succeeded by his son Abbas Ali, who died in 1894. On the death of Abbas Ali, mutation of names in respect of the villages took place in favour of Zakir Ali and Asabi. The plaintiff Sograbi instituted this suit in the Court of the District Judge of Raipur on 15th March 1915, claiming possession of a 10 annas 10 $\frac{3}{4}$ pies share of the above villages, as being her alleged inheritance (a) as the daughter of Wajid Ali, and (b) as the sister of Abbas Ali. The defendants admitted that the plaintiff was entitled to a 4 annas 8 pies share of the villages, as an heir of her father Wajid Ali; but pleaded that she was entitled to no share in the estate of her brother Abbas Ali, being excluded by his son Zakir Ali. The plaintiff, however, replicated that though Zakir Ali was the son of Abbas Ali, he was the illegitimate offspring of one Ramotin, a married Gond woman, with whom Abbas Ali had formed an adulterous intercourse. The defendants rejoined that Abbas Ali was legally married to Ramotin before Zakir Ali was borne and that Abbas Ali had so acknowledged Zakir Ali as his son, as to give him a legitimate status under the Mahomedan law. The following issues were framed and tried:

1. Was Ramotin converted to Islam, and if so when?
2. Was she married to the deceased Abbas Ali, and if so where?
3. Is defendant 1 the legitimate son of

Abbas Ali? 4. Had Abbas Ali recognized defendant 1 as his legitimate son? And was defendant 1 treated and brought up as a son in the family as pleaded? 5. Is the defendant entitled to inherit the properties left by Abbas Ali as his son? 6. What share is the plaintiff entitled to get in the properties in suit?

The learned District Judge found upon a careful consideration of the evidence

(1) that Abbas Ali, formed an illicit intercourse with Ramotin, while she was a Gond living with her people, and that Zakir Ali was the offspring of that intercourse; (2) that Abbas Ali married Ramotin by nikah ceremony after the birth of Zakir Ali, and that he acknowledged Zakir Ali as his son and treated him as if he were legitimate; (3) that such acknowledgment could not legitimatise Zakir Ali, who was in fact a bastard and as such could not inherit any part of his father's estate.

Upon these findings the learned Judge gave the plaintiff a decree as claimed by her. From this decree the defendants have made the present appeal, and I have had the advantage of hearing both sides of the case extremely well argued. Having regard to the fact that the litigation represents a purely family dispute I throw out a suggestion that the case was a fit subject for amicable settlement, but this proposal was not seriously taken up, and it is necessary to adjudicate upon the legal rights of the parties, at least so far as is now possible.

Though the arguments before me occupied some time the substance of them can be stated in a few words. On behalf of the appellants the contention was this: that under Mahomedan law, as interpreted by a series of decisions by the High Courts in India and their Lordships of the Privy Council, an acknowledgment of a son by his father is conclusive as to the legitimacy of the former and in the presence of it, no evidence of birth in wedlock is necessary. It was also urged that such evidence as had been given in this case, assisted by the acknowledgment of the father, was sufficient to prove that Abbas Ali married Ramotin before Zakir Ali was born. On behalf of the respondent it was argued that the finding of the lower Court, that the marriage of Abbas Ali and Ramotin was not proved, displaced any presumption arising from the acknowledgment of Zakir Ali by his father;

that acknowledgment could not legitimatise a bastard and that in face of the positive finding on the evidence there was no room left for any presumption. It is manifest that a material error has been committed in the trial of the case in respect of the onus of proof. The learned Judge of the Court below first placed on the defendant Zakir Ali the burden of proving that his parents had been married before he was born: and then, finding the marriage unproved, he went on to hold that the father's acknowledgment could not prevail in the fact of that finding. The learned Judge seems to have assumed that a failure to prove the marriage was the same thing as a disproof of it, much in the same way as our subordinate Courts sometimes declare an unproved document to be a forgery. This error in the present case started with the framing of the issues, in which the learned District Judge was guided, somewhat naturally, by the normal rules of pleading and proof, overlooking the bearing thereon of the Mahomedan law. In my opinion the proper issues would have been the following:

1. Did Abbas Ali acknowledge the defendant Zakir Ali as his son? If so,
2. Is not Zakir Ali the legitimate son of Abbas Ali?

As will presently be made apparent, the effect of acknowledgment by a father of his son is such that, even if it cannot legitimatise a bastard, it raises so strong a presumption of legitimacy as to throw a heavy onus on the person denying it to establish his allegation: and, in order to succeed, the evidence must show either that lawful marriage between the acknowledging father and his son's mother was impossible, or did not in fact take place before the child was born. It would not be just to decide the question here without giving the plaintiff an opportunity of discharging this onus. Therefore if the presumption of legitimacy raised by the acknowledgment is not conclusive but is rebuttable, then the case must go back for a trial from the proper standpoint.

I may say that the acknowledgment of Zakir Ali by Abbas Ali was not disputed before me. It is most clearly established by the evidence on both sides that from the time of his birth Abbas Ali treated Zakir Ali as his son; and, if not before birth—a controversial point on which I

refrain from expressing any opinion—at any rate shortly after, Abbas Ali installed mother and child in his own house as his wife and son, and thereafter gave them all the domestic status and overt recognition due to a wedded wife and lawful son. And we have seen that Zakir Ali succeeded as the heir of his father in 1904 without any objection by his grandmother, the defendant Asabi, who was apparently then also the guardian of her minor daughter, the plaintiff, though this fact has not been made clear. It is not disputed that Zakir Ali is the son of Abbas Ali. There is no question of any ascription of the son to some other person. There is no controversy whatever on the point of filiation. The issues between the parties are merely as to his legitimacy in fact, and his legitimatization by law; and I must deal first with the latter; because, if acknowledgment is conclusive for the purpose of making Zakir Ali the heir of his father, then it will not be necessary to direct a further trial for a decision of the question whether, in fact, this defendant was born or begotten out of wedlock.

The question of law is one of considerable difficulty, and there is unquestionably some variation of opinions upon it in the published decisions and the textbooks. It seems expedient to examine some of the more important cases bearing upon it. In *Ashruffoodowlah Ahmed Hossein v. Hyder Hossein Khan* (1) it was laid down that mere continued cohabitation, without proof of marriage or of acknowledgment, is not sufficient to raise such a legal presumption of marriage as to legitimatise the offspring. Marriage and acknowledgment may be presumed, but the presumption must be one of fact, and, as such, subject to the application of the ordinary rules of evidence. A subsequent marriage, so far from furnishing a ground for presuming a prior marriage, *prima facie* at least, excludes that presumption. In this case their Lordships regarded acknowledgment of paternity under Mahomedan law as being "a recognition, not merely of sonship but of legitimacy as a son." Their Lordships further remarked that though the general rules of evidence of the Mahomedan law did not prevail in the British Indian Courts, still, in relation to this particular subject of establishment of paternity and legitimacy, so intimately

(1) [1867] 7 W. R. 1=11 M. I. A. 94 (P. C.).

connected with family feelings and usages deference to those rules was recommended if not enjoined : and in this connexion, they quoted a passage from their own decision in *Khajah Hidayut Oollah v. Rai Jan Khanum* (2) as follows:

"We apprehend that in considering this question of Mahomedan law we must at least to a certain extent, be governed by the same principle of evidence which the Mussalman lawyers themselves would apply to the consideration of such a question."

In the case last quoted, which was decided in 1884 A. D., it was held that under the Mahomedan law continual cohabitation and acknowledgment of parentage is presumptive evidence of marriage and legitimacy; and that view, at least, is now so firmly established that there can be no question that the lower Court, in this case, wrongly called for proof, when it should have demanded disproof of the legitimacy of Zakir Ali. The same rule was affirmed in *Khajooroonissa v. Rowshan Jehan* (3), another decision by the Supreme Tribunal. In *Mahomed Azmat Ali Khan v. Lalli Begum* (4) the Judicial Committee laid down that:

"the acknowledgment and recognition of children by a Mahomedan as his sons, giving them the status of sons capable of inheriting as being of legitimate birth may without proof of his express acknowledgment of them be inferred from his treatment of such children, provided that certain conditions negating this relationship are absent."

In the course of a comprehensive judgment their Lordships ruled that in the face of a proved acknowledgment of his two sons by the father it was not necessary to pronounce a distinct opinion upon the question whether the marriage in fact took place, as the sons were entitled to succeed upon the ground that acknowledgments of them by their father had been proved. But the case does not lay down that an acknowledgment is conclusive on the point of legitimacy. Their Lordships said at p. 432:

"The only question which remains on this part of the case is as to the effect of these acknowledgments. Both the Judges of the Chief Court, who have given learned and careful judgments, have gone very fully into the authorities upon this question. Their Lordships however are relieved from a discussion of those authorities, inasmuch as the rule of Mahomedan law has not been disputed at the Bar, viz., that the acknowledgment and recognition of children by a Mahomedan as his sons gives them the status of sons capable of inheriting as legitimate sons,

unless certain conditions exist, which do not occur in this case. That rule of the Mahomedan law has not been questioned at the Bar."

As will appear hereafter there has been some diversity of opinion in this country as to the proper interpretation of this ruling; but Mr. Ameer Ali, in his standard work on the Mahomedan Law, Edn. 3, Vol. 2, at p. 258, following the opinion of Mahmood, J., in a case to be presently noticed, considered that their Lordships

"never intended to imply that an acknowledgment by a man of his natural-born children—of his offspring by a woman between whom and himself there could not be any valid union, or notoriously there was none—would give the children the status of legitimacy, though the Courts in India have to some extent understood the decision in that sense."

My opinion is that the Judicial Committee left the question undecided because, as they expressly stated, the admission at the Bar relieved them from the necessity of deciding it. A decision which follows an admission or agreement of the parties on a point of personal law cannot be interpreted to represent the judicial opinion of the tribunal on that point, so as to constitute case-law. The uncertainty was however somewhat enhanced by the decision of the Judicial Committee in *Sadakat Hossein v. Mahomed Yusuf* (5). The placitum in this case reads thus:

"The acknowledgment and recognition of a natural son by a Mahomedan as his son gives him the status of a son capable of inheriting as a legitimate son, unless certain conditions exist. Whether the offspring of an adulterous intercourse can be legitimated by any acknowledgment is an open question."

The High Court had found that the boy concerned had been begotten by his father upon a woman who had been in an inferior station in his household, and was born out of wedlock; but they relied upon the decision of the Supreme Tribunal in *Ashraffoodowlah Ahmed Hossein v. Hyder Hossein Khan* (1) in ruling that he had been legitimated by his father's acknowledgment, and was entitled to inherit as a legitimate son. The Calcutta Court had further declared that it was not necessary to decide whether the parents had or had not been married. In disposing of the appeal before them their Lordships of the Privy Council said:

"The real issue in this case, and the only issue upon which their Lordships feel it necessary to decide, is whether Selim—who was beyond question the actual son of Amir Hossein

(2) [1841-46] 3 M.L.A. 295=6 W. R. 52 (P. C.).

(3) [1876-77] 2 Cal. 184=13 I. A. 291 (P. C.).

(4) [1882] 8 Cal. 422=9 I. A. 8 (P. C.).

(5) [1884] 10 Cal. 663=11 I. A. 31 (P. C.).

by a woman known as Domni—had been so recognized by Amir Hossein as to give him the status of a son capable of inheriting. The suit relates to the property of Amir Hossein. * * * A question of importance was raised by the counsel for the appellant. He contended that Selim could not be treated as having acquired the status of a son capable of inheriting, because he alleged that the intercourse between Amir Hossein and Domni was an adulterous intercourse as she had been previously married to a person then and still living, and that consequently whether her connexion with Amir Hossein was preceded by a marriage ceremony with him or not, yet still the intercourse was adulterous and that according to Mahomedan law, the issue of that adulterous intercourse could not inherit as heir or acquire the status of a son by recognition. It therefore becomes necessary to consider in the first instance whether the alleged marriage of Domni to a man named Jummun has been established by satisfactory proof."

The evidence and probabilities for and against this alleged marriage having been considered, the judgment proceeds:

"Their Lordships have then come to the conclusion that the parties fail to establish this marriage between Jummun and Domni. That relieves them from offering an opinion upon the very important question of law which was raised by the counsel for the appellant, namely whether, if there had been this marriage, the offspring of an adulterous intercourse could be legitimated by any acknowledgment. The absence of reliable proof, such as their Lordships could act upon, of the marriage of Domni and Jummun, appears to their Lordships to relieve the case from further difficulty. They do not intend in the least to depart from the statement of the law upon an appeal to the Privy Council in the case of *Mahammad Asmat Ali Khan v. Lalli Begum* (4)."

Their Lordships then cited the rule of Mahomedan law already set out herein, which was admitted by the parties and adopted by the Board in that case, and then proceeded:

"Their Lordships do not intend at all to depart from that rule, or to throw any doubt upon it. The Judge of the primary court who saw and who heard the witnesses, and the Judges of the Supreme Court who examined into the evidence afterwards, concur in opinion that there was sufficient evidence of the acknowledgment by Amir Hossein of Selim as his son, from which an inference is fairly to be deduced that the father intended to recognize him and give him the status of a son capable of inheriting. Upon that point both the Courts come to one conclusion; and that conclusion their Lordships adopt. They think that the status of Selim as son has been sufficiently established by recognition so as to enable him to claim as heir."

It seems clear from this decision that while the question whether an offspring of an adulterous intercourse—by which is meant offspring begotten on the lawful wife of another man—could be made an heir of the natural father by acknow-

ledgment was left an open question, their Lordships favoured the view that a son begotten on a maid or widow, though born out of wedlock, could be legitimated by such acknowledgment. But the efforts of Mussalman lawyers in India have consistently and successfully opposed that view, as will hereafter be made apparent.

In *Abdul Razak v. Aga Mahomed Joffer Bindanim* (6) their Lordships of the Privy Council ruled that under the Mahomedan law the legitimation of a son born out of legal wedlock, may be effected by the force of his being of legitimate birth, but that a mere recognition of sonship is insufficient to effect it. Acknowledgment, in the sense meant by that law, is required, viz., of antecedent right and not a mere recognition of paternity. This decision purports to explain certain passages in *Ashruffoodowlah Ahmed Hossein v. Hyder Hossein Khan* (1) already cited above but makes no reference to any of the other cases, though they were all put forward at the Bar. It is undoubtedly difficult to reconcile the later of these two rulings with the clear and correct enunciation of the Mahomedan law contained in the earlier of them that an acknowledgment of sonship is also an acknowledgment of legitimacy. *Abdul Razak v. Aga Mahomed Joffer Bindanim* (6) was the case of a child born of a union between a Mussalman and a Burmese woman who had not been converted to Islam. With all respect and due submission, it seems clear that an incontrovertible principle of the Mahomedan law was overlooked, namely that the status of legitimacy is not confined to the offspring of a valid marriage but extends to the offspring of all unions which are not wilfully incestuous, adulterous, or otherwise within the definition of zina.

As pointed out by Mr. Ameer Ali in his *Mahomedan Law*, Edn. 3, Vol. 2, p. 234, et seq., the presumption of legitimacy is so strong that only the offspring of a connexion where the man has no right or semblance of right in the woman either by marriage or by the relationship of master and bondswoman, is a 'walad uz zina' or child of fornication. The learned author also mentions the great difference between a marriage which is void ab initio (batil) and one which is

merely invalid (fasid) but capable of being validated; and shows that while even the issue of an involuntary batil marriage, i. e., one contracted in error or ignorance of the facts, may be legitimate, the offspring of a fasid union is always legitimate. The marriage of a Mussalman with a heathen woman would only be fasid, for she might at any time adopt Islam or any other revealed faith, and thus remove the cause of invalidity. Therefore the children of such a marriage would be legitimate. In this connexion the following commentary of Mr. Ameer Ali on *Abdul Razak v. Aga Mahomet Jaffer Hindanum* (6) appears in a note under p. 235:

"In view of this recognized principle, it seems to me that * * * the real question was raised * * * before the Judicial Committee. For if there was a de facto marriage, the prior conversion of the woman, so far as the legitimacy of the child was concerned was immaterial."

Again a Mussalman may not marry two sisters by the same contract, or one after another whilst the previous marriage with one of them is subsisting. But if he should do so in fact, the later marriage is fasid and not batil, because the prior marriage may become dissolved at any time by death or divorce and automatically validate the second union. Accordingly, although the Qazi may separate the parties on the ground of invalidity of the marriage, and the woman can acquire no right of inheritance thereby unless and until it is validated, nevertheless if it is consummated while fasid the issue would be legitimate: Ameer Ali's *Mahomedan Law*, Vol. 2, p. 319; Wilson's *Digest of Anglo Mahomedan Law*, Eln. 4 pp. 118 and 120. It is true that in *dizunnissa Khatoon v. Karimunnissa Khatoon* (7) such a union was held to be batil, and the issue illegitimate. The error of this view is clearly pointed out by Mr. Ameer Ali at pp. 236 and 368 of his above volume, and with due respect for the Calcutta High Court I think that the learned commentator rightly says that some confusion appears to have arisen in that case between the title of the second wife to inheritance and the status of the children born of her; and at p. 387, of his above volume Mr. Ameer Ali gives good reasons for the view that a passage from the *Rudd-ul-Muhtar* which refers only to the particular case of a union between a non-Moslem man and a Moslem

woman was misapprehended by the learned Judges as being applicable to a contemporaneous marriages with two sisters where all the parties were Moslems. Sir R. K. Wilson in his above Digest has not appreciated these points in discussing the same decision at p. 118, and according to a note at the foot of that page, he was puzzled by an apparent conflict of authority which has no real existence in Mahomedan law. I now turn to the Indian decisions. In *Qomla Beebee v. Syud Shah Jonab Ali* (8) it was held that according to Mahomedan law, the acknowledgment of a father renders a son or daughter a legitimate child or an heir, unless it is impossible for the son or daughter to be so. This decision was given by so eminent an authority as Sir Barnes Peacock. In an earlier case, *Rooh Begum v. Shahzadun Walagachur Shoh* (9), it was ruled, under the same law, by Lock and Glower, J.J., that a public acknowledgment of paternity will of itself raise a presumption of marriage between the person who makes it and the mother of the child, without the father specifically connecting his paternity with any particular woman. To rebut this presumption, the onus of proving the impossibility of the marriage is on the other side.

In *Najmooddeen Ahmed v. Beebee Zuhoorun* (10) Macpherson, J., raised the presumption from the position of one that is rebuttable to that of one that is conclusive and absolute, by holding that the acknowledgment of the father renders the son a legitimate son and heir, whether the mother was or was not lawfully married to the father. This decision was influenced by certain observations of the Privy Council in the case of *Ashruffoodollah Ahmed Hossein v. Hyder Hossein Khan* (1) above quoted. The rule, as to the onus of proof being on the party disputing the legitimacy of an acknowledged son, was again enunciated in *Zulfekar Khan v. Golam Murteza Khan* (11). In *Nubo Kant Roy v. Mahatab Bibee* (12) Jackson and Mitter, J.J., described an acknowledgment of sonship made by the father to a third party as "conclusive against all parties," and

(8) [1865] 5 W. R. 132.

(9) [1865] 3 W. R. 187.

(10) [1838] 10 W. R. 45.

(11) [1872] 18 W. R. 250.

(12) [1873] 20 W. R. 164.

(7) [1896] 23 Cal. 130.

claimed authority for that proposition from the decision in *Bibi Najibunnissa*, *In the matter of the Petition of* (13), a case in which Mr. Ameer Ali thinks the Mahomedan law was misapprehended: see p. 255n of the above volume of his Commentary. In *Mt. Butoolun v. Mt. Koolsoom* (14) Garth, C. J., and Ainslie, J., replaced the presumption from acknowledgment upon its proper footing as one which may be rebutted, and found ample authority for that view in *Mahomed Bauker Hoossain Khan v. Shurfoon-nissa Begum* (15).

The latest decisions of the Privy Council had however left an impression that, in some cases, a child born of an illicit intercourse, which was not incestuous or adulterous, could be legitimatised by the acknowledgment of his sonship by the father, and the Allahabad High Court were called upon to deal with the question in a case which has since become a leading authority on the point. *Mohamed Allahadad Khan v. Mahomed Ismail Khan* (16) first came before a Division Bench (Petheram, C. J., and Brodhurst, J.), in which the learned Judges were divided in opinion as to the legal effect of an acknowledgment of sonship by the father. In appeal, the case went before a Bench of three Judges, namely, Edge, C. J., Straight and Mahmood, JJ. The dictum of Edge, C. J., and Straight, J., was as follows:

"The rules of the Mahomedan law relating to acknowledgment by a Mahomedan of another as his son are rules of the substantive law of inheritance. Such an acknowledgment, unless certain impediments exist, confers upon the person acknowledged the status of a legitimate son capable of inheriting. Where there is no proof of legitimate birth or of illegitimate birth, and the paternity of a child is unknown in the sense that no specific person is shown to be the father, then the acknowledgment of him by another who claims him as a son affords a conclusive presumption that he is the legitimate child of the acknowledger, and places him in that category. Such a status once conferred cannot be destroyed by any subsequent act of the acknowledger or of any one claiming through him."

In the same case Mahmood, J., decided as follows:

"Acknowledgments of parentage and other matters of personal status stand upon a higher footing than matters of evidence and form a part of the substantive Mahomedan law. So far as inheritance through males is concerned * legitimate descent depends upon the existence of a valid marriage between the parents.

Where legitimacy cannot be established by direct proof of such a marriage acknowledgment is recognized by the Mahomedan law as a means whereby the marriage of the parents or legitimate descent may be established as a matter of substantive law. Such acknowledgment always proceeds upon the hypothesis of a lawful union between the parents and the legitimate descent of the acknowledged person from the acknowledger and there is nothing in the Mahomedan law similar to adoption as recognized by the Roman and Hindu systems or admitting of an affiliation which has no reference to consanguinity or legitimate descent.

A child whose illegitimacy is proved beyond doubt by reason of the marriage of its parents being either disproved or found to be unlawful, cannot be legitimatised by acknowledgment. Acknowledgment has only the effect of legitimization where either the fact of the marriage or its exact time with reference to the legitimacy of the child's birth is a matter of uncertainty."

Now there can be no doubt that so much of the above view as I have underlined (italics) is in apparent disregard of the two Privy Council cases *Mahammad Asmat Ali Khan v. Lalli Begum* (4) and *Sadakat Hussein v. Mahomed Yusuf* (5), wherein some observations of their Lordships seem to imply that legitimation might be effected by acknowledgment in spite of proof that the mother of the acknowledgee was not the wife of the father at the time of the acknowledgment. But in both these cases Mahmood, J., argued that marriage had been alleged and had simply been held not to be proved (though it is difficult to justify this as a correct interpretation of the later case) and he felt himself still at liberty therefore to maintain p. 337 (of 10 All.) that

"there is no warrant in the principles of the Mahomedan law to justify the view that a child proved to be the offspring of fornication adultery or incest could be made legitimate by an act of acknowledgment."

Whatever may be the value of the learned Judge's interpretation of the Privy Council view in *Sadakat Hossein v. Mahomed Yusuf* (5), I am of opinion that his enunciation of the Mahomedan law is unquestionably sound. With all respect to their Lordships of the Privy Council if they intended to lay down that a child born of an intercourse which though amounting to fornication is neither incestuous nor adulterous can be made legitimate by acknowledgment it is impossible to find in any known authority on Mahomedan law, any support for the suggested distinction between the son of a mere fornicatress and the son of

(13) [1869] 4 B. L. R. A. C. 55=12 W. R. 497.

(14) [1876] 25 W. R. 444.

(15) [1865] 3 W. R. 37=S. M. I. A. 136 (P. C.).

(16) [1886] 8 All. 234.

an adulteress. As pointed out by Wilson, at p. 172 of his above Digest, such a distinction is wholly foreign to that law which includes all forms of intercourse not legalised by marriage—whether valid or capable of validation—or by proprietorship under the one appellation of zina and subjects all alike to the ban of the criminal law. The dictum of Mahmood, J., on this point though obiter has been consistently acknowledged as correct in several subsequent decisions by the High Courts in India. In *Liaquat Ali v. Karimunnissa* (17) it was followed. Edge, C. J., and Burkitt, J., held that a Mahomedan cannot by acknowledging him as his son render legitimate a child whose mother at the time of his birth he could not have married by reason of her being the wife of another man. This ruling however was not even in apparent conflict with the Privy Council view in *Sadat Hossein v. Mahomed Yusuf* (5) because it dealt with the offspring of adultery; and their Lordships had expressly left undecided the question whether the fruit of an adulterous intercourse could be legitimatised by acknowledgment. The Allahabad Bench decided that question against the alleged acknowledgee. But that does not touch the question of the position of an acknowledgee who is the issue of non-adulterous and non-incestuous fornication.

In *Aizunnissa Khatoon v. Karimunnissa Khatoon* (7), already cited above in connexion with the legitimacy of a child born of a union with the sister of an existing wife—a point with which we are not concerned in this case—the Calcutta High Court expressly followed the above dictum of Mahmood, J., and held that the doctrine of acknowledgment is not applicable to a case in which the paternity of the child is known, and it cannot therefore be called in to legitimatise a child which is illegitimate by reason of the unlawfulness of the marriage of its parents. But, here again, the decision is of no value on the particular question whether the issue of simple fornication cannot be legitimatised by acknowledgment. For if the marriage with the sister was *batal*—as held by the Calcutta Court—then there was a condition present which rendered legitimacy impossible, namely the impossibility of a lawful union between the parents; while, if the marriage

was *fasid*, there was no need of acknowledgment, the child of such a union being recognized as legitimate by the law.

However, in *Dhan Bibi v. Lalon Bibi* (18) we have a case directly in point, because the child concerned was neither the child of adultery, as in *Liaquat Ali v. Karimunnissa* (17), nor of incest, as he was considered to be in *Aizunnissa Khatoon v. Karimunnissa Khatoon* (7), but the offspring of simple fornication. The Privy Council cases above mentioned were fully considered, and it was held that, under the Mahomedan law, where a child is begotten by a Mahomedan father on a Hindu prostitute living with him, no acknowledgment by the father can confer on the child the status of legitimacy. This view was subsequently distinguished but not dissented from, by three Judges of the same High Court, who decided in *Bilee Fazilatunnissa v. Hibeet Kamrunnessa* (19), that unless there is an absolute bar or impediment to a valid marriage, acknowledgment has the effect of legitimation according to Mahomedan law, where either the fact of the marriage, or its exact time with reference to the legitimacy of the child's birth, is a matter of uncertainty. It was further held in this case that the doctrine of acknowledgment is an integral portion of the Mahomedan family law, and the conditions under which it will take effect must be determined with reference to Mahomedan jurisprudence, rather than to the Evidence Act. It will thus be seen that the dictum of Mahmood, J., in the leading Allahabad case was again substantially approved and followed. That was also the course adopted by the Bombay High Court in the very recent case of *Mardansaheb v. Rajasaheb* (20), where it was ruled that under Mahomedan law a person can acknowledge a child as a son, when there is no proof of the latter's legitimate or illegitimate birth, and his paternity is unknown in the sense that no specific person is shown to have been his father. It is not permissible to acknowledge a child born of zina (i. e., fornication, adultery, or incest). In this case the learned Judges had before them all the previous decisions above examined, but they confined themselves to an unconditional adoption of the law as laid down

(18) [1900] 27 Cal. 801.

(19) [1905] 9 C.W.N. 352.

(20) [1909] 34 Bom. 111=4 I. C. 254.

(17) [1898] 15 All. 396.

by Mahmood, J., in the case of *Muhammed Allahdad v. Muhammad Ismail Khan* (16).

In *Sundari Letani v. Pitambari Letani* (21), where a Hindu married woman, undivorced from her Hindu husband, embraced Islam and married a Mahomedan according to the forms of Mahomedan law, and had sons by him during the lifetime of her Hindu husband, it was held that the sons were illegitimate; and *Dhan Bibi v. Lalun Bibi* (18) was relied upon as an authority for that view. But the case was decided from the Hindu point of view, and should not, I think, be regarded as laying down what would have been the position of the sons with reference to their right of inheritance from their Mahomedan father, either by virtue of the nikah, or by his acknowledgment of them, if any. There does not appear to be any published decision of this Court upon the legal effect of an acknowledgment of sonship under the Mahomedan law, though the question must frequently have arisen. I have therefore made a full examination of the authorities in this case. I have been unable to find any ruling of the Madras High Court, but it seems to me that there is sufficient case-law available for my guidance. Before summing up the matter, it seems expedient to mention one or two other points which have some bearing on the question.

The decision of Mahmood, J., above cited lays down the proof or presumption of a valid marriage as a condition precedent to the legitimacy of a son under Mahomedan law. It is somewhat difficult to reconcile this with the very clear enunciation of that law by Mr. Ameer Ali in his above treatise according to which illegitimacy is confined to the offspring of zina, in which is included a union, albeit obtained by going through the ceremony prescribed for lawful marriage, between persons whose lawful marriage is impossible by reason of some absolute and insurmountable barrier so that the attempted marriage is batil. But even where a void marriage of that kind is entered into in error or ignorance as to facts the issue thereof conceived before discovery of the error and nullification of the union by the Judge is held legitimate and in every case the issue of a fasid marriage even though the woman fails

to acquire thereby all the status of a wife is declared to be legitimate without acknowledgment and despite subsequent severance of the parents. I must take this to be the law notwithstanding that the dictum of Mahmood, J., suggests that the issue of an invalid marriage is, ipso facto illegitimate.

Again, in considering the absolute bars to legitimacy, we must bear in mind that there can be no legitimate "per subsequens matrimonium" under the Mahomedan law. That law requires that the child should be born not less than six months after the date of marriage proved or presumed; but acknowledgment will secure legitimacy to an earlier child by certain fictions in favour of legitimacy, to which Mr. Ameer Ali refers at pp. 232 and 323 of his said volume. Legitimacy is also presumed in the case of a birth within two years of the termination of a valid marriage. These presumptions being a part of the substantive law of the Mahomedans will not be affected it seems by the rule laid down in S. 112, Evidence Act. Wilson's Digest, p. 169, Ameer Ali's Mahomedan law, Vol. 2, p. 234. It is not enough that the child should be born in wedlock. It must be conceived as the result of a union which is not zina, i. e., an act of fornication.

So far then as the present case is concerned the Mahomedan law applicable may be summarized thus: (1) In all cases in which marriage may be presumed from cohabitation combined with other circumstances for the purpose of conferring upon the woman the status of a wife, it may also be presumed for the purpose of establishing paternity and legitimacy. (2) Paternity is established in the person said to be the father by proof or legal presumption that the child was begotten by him on a woman who was at the time of conception his lawful wife or was in good faith or reasonably believed by him to be such, or whose marriage being merely irregular (fasid) and not void (ab initio batil) had not at that time been terminated by actual separation. In all such cases the offspring of the union is legitimate. (3) Paternity and legitimacy may also be presumed from acknowledgment by the putative father in every case where it is humanly and legally possible that he might have been the father in the fact, and there might have been a valid mar-

riage between him and the mother of the acknowledged child. (4) This presumption of paternity and legitimacy can be rebutted by—(a) disclaimer on the part of the acknowledgee, he or she being of an age to understand the transactions; (b) such proximity between the ages of acknowledgee and acknowledgee as would under the alleged relationship be physically impossible; (c) proof that the acknowledgee is in fact the child of some other person; or (d) proof that the mother of the acknowledgee could not possibly have been the lawful wife of the acknowledgee at any time when the acknowledgee could have been begotten, and that such child is therefore *waladuz-zina*. (5) A marriage by a Mahomedan with a non-Moslem woman unconverted to Islam, who is not at the time the lawful wife of another man is merely irregular (*fasiq*) and the child born of such a union is legitimate. (6) Where a child has been acknowledged by a Mahomedan father the burden of disproving the paternity and legitimacy of such child lies heavily on the person who denies them. (7) Neither paternity nor legitimacy can be obtained by adoption and a child begotten by *zina* cannot be made legitimate by the subsequent marriage of its parents before its birth, S. 112, Evidence Act, being inapplicable to Mahomedans.

In this view of the law it seems obvious that the case must go back for retrial. I do not think it would suffice to refer back an issue as to the legitimacy of the defendant Zakar Ali. It is necessary to have a full examination of the parties so as to ascertain their allegations as to the circumstances under which Ramotin became the mother of Zakar Ali. Such vague allegations as the following, made by the defendant's pleader, cannot be accepted:

"Abbas Ali married Ramotin by *nikah* after converting her into Islam, but when this *nikah* took place my clients cannot say."

It is the business of Zakar Ali's guardian and advisers to ascertain the facts from Ramotin who is said to be alive; and that lady should certainly be examined as a witness on the point. Their general allegations of marriage or of illegitimacy, are quite insufficient. The plaintiff must prove according to definite allegations, that there was an insurmountable barrier to a lawful marriage

between Ramotin and Abbas Ali. Failing that the presumption of marriage will be all but conclusive, and though marriage can be disproved the evidence must be extremely cogent to displace the presumption which is not an ordinary presumption of evidence but a strong rule of the Mahomedan law. The mere oral testimony of partisan witnesses would be quite insufficient. The appeal is allowed; the decree of the lower Court is reversed and the case is remanded for a fresh trial and decision with advantage to the above remarks. There will be no refund of court-fees. Costs here and thither will abide the result.

P.N./R.S.

Appeal allowed.

A. I. R. 1918 Nagpur 41

METTA, A. J. C.

Dileshwar Ram Brahman—Plaintiff
—Appellant.

v.

Nohar Singh and another—Defendants
—Respondents.

First Appeal No. 70 of 1917, Decided on 15th August 1918, from decree of Addl. Dist. Judge, Raipur, in Civil Suit No. 33 of 1916, D- 14th July 1917.

(a) Evidence Act (1872), S. 18—Admission of one of several persons jointly interested is admissible if made in character of person jointly interested.

Where several persons are jointly interested in the subject-matter of a suit, the general rule is that the admissions of any one of those persons are receivable against himself and his fellows, whether they be all jointly suing or sued, provided the admissions relate to the subject-matter in dispute and were made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered: 11 Cal. 288 and 41 I. C. 116, *Foll.*

[P 42 C 2]

Where there is an admission by a party, he must show that the admission is untrue in fact: 29 All. 194 (P.C.), *Foll.*

[P 43 C 1]

(b) Hindu Law—Alienation—Antecedent debt must be incurred apart from ownership of joint estate.

An antecedent debt justifying the father or manager of a joint Hindu family in charging the family property must be an obligation not only antecedently incurred, but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate: A.I.R. 1917, P. C. 61 and 39 I. C. 280, *Foll.*

[P 43 C 2]

(c) Civil P. C. (1908), S. 152—Appellate Court can correct accidental slips in judgment and decree—Civil P. C., O. 41, R. 33.

An appellate Court has, under O. 41, R. 33, Civil P. C., power to correct accidental slips in the judgment and decrees of the lower Court, although no application has been made to it under S. 152 of the Code.

[P 44 C 1]

H. S. Gour—for Appellant.

Bepin Krishna Bose—for Respondents.

Judgment.—This is an appeal from a suit to enforce a mortgage deed, dated 28th October 1912, executed by the deceased Ruprai for himself and for his minor uncle Narayansingh. The suit is against Noharsingh, minor son of Ruprai, and Narayansingh who has since attained majority. Out of the consideration of Rs. 5,500 secured by the mortgage, Rs. 3,500 was for the redemption of a prior mortgage dated 11th March 1909 also executed by Ruprai in favour of one Amritrao for Rs. 2,700. The plaintiff claims to have redeemed this prior mortgage and produced the original mortgage-deed (Ex. P.5), which contains an endorsement of satisfaction purporting to be in the handwriting of Amritrao. The plaintiff has been given a decree against the four annas share of Ruprai and the suit has been dismissed as against the shares of Narayansingh and Noharsingh, the lower Court holding that no legal necessity has been proved. The first point for decision is whether the plaintiffs has proved legal necessity for either of the mortgages. Both the documents contain the usual recitals which would make out a case for necessity. The transactions however are so recent that little weight can be attached to these recitals. The plaintiff who is the original mortgagee of the deed in suit, has not gone into the witness-box to depose to the representations made to him, nor is there any evidence that he made any inquiries, and was satisfied about the necessity for the loan. There is no oral evidence of any kind to prove that the loans were necessary. The prior mortgage, it will be noted, was also by Ruprai and not by any ancestor of Narayansingh. It may be conceded, as argued for the appellant, that Ruprai was the manager though the lower Court was disposed to think otherwise, but this concession does not carry the plaintiff's case any further.

Reliance however is placed upon certain statements made by Narayansingh and contained in Exs. P.2, P.4, and P.6. In these statements the plaintiff's mortgage debt is admitted as an existing debt. Narayansingh applied to the Deputy Commissioner under S. 45, Tenancy Act, for sanction to transfer sir

land without reservation of expropriatory occupancy rights. He had to establish that the debts could not be met except by such a transfer. This statement is made by Narayansingh as representing himself and the minor Noharsingh. It is to the following effect:

"We owe Rs. 5,500 to Dilesar (plaintiff) under a mortgage-deed and our 12 annas of Babarhod is mortgaged for this debt."

The lower Court has attached no importance to this statement as, in its opinion, Narayansingh had just attained majority; but it is pointed out that Narayansingh's age as given in the deposition (Ex. P.6) was 22. It is urged that this statement amounts to an admission which shifts the burden of proof as against both him and the minor Noharsingh. I agree with the contention of the appellant that the statement is relevant also against Noharsingh. The following statement of the law from Taylor on Evidence has been held by Garth, C. J., in *Kowsulliah Sundari Dasi v. Mukta Sundari Dasi* (1) to be applicable to India under S. 18, Evidence Act:

"When several persons are jointly interested in the subject-matter of the suit, the general rule is that the admissions of any one of those persons are receivable against himself and his fellows, whether they be all jointly suing or sued, provided the admission relates to the subject-matter in dispute and be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered."

To the same effect is the recent judgment of Mookerjee, J., in *Ambar Ali v. Lutfe Ali* (2), where other authorities have been collected. It is urged that the statement of Narayansingh amounts also to an admission on the part of Noharsingh under S. 18, Evidence Act, and this admission has the effect of shifting the burden of proof on both of them. In support of this the appellant cites the Privy Council case of *Chandra Kunwar v. Chaudhuri Narpot Singh* (3). The case in the Privy Council was concerned with the admission of a party himself and it was also upon a question of fact regarding his adoption. Although I have held that the statement of Narayansingh is receivable in evidence against Noharsingh, it is only an admission by construction of law. I doubt whether such a constructive admission has the

(1) [1885] 11 Cal. 588.

(2) [1917] 45 Cal. 159=41 I. C. 116.

(3) [1907] 29 All. 184 (P.C.).

effect of shifting the burden of proof as against Noharsingh.

The Privy Council laid down that where there is an admission by a party, he has to show that the admission was untrue in fact vide p. 195 (of 29 All. of the report). Their Lordships quote the following passage from the judgment of Baron Parke: "What a party himself admits to be true may reasonably be presumed to be so." The statement above referred to (Ex. P. 6) makes no allegation regarding the purpose for which the loan was taken from the plaintiff. It merely states the existence of a debt. Its binding character is only to be inferred. According to the view hitherto taken by the Court in such cases, it is binding to the extent of Ruprai's share in the family property. The mortgage is one by conditional sale in which there is no personal covenant to pay. It is not likely that Narayansingh would know whether he could repudiate Ruprai's mortgages until he went to a lawyer, so far as his share was concerned. The allegation so far as it relates to the existence of the debt, is not disputed now. The plaintiff was no party to those proceedings and there was no occasion for making a statement as to whether the debt was binding on Ruprai's share alone or on the whole family property. The utmost that can be contended is that Narayansingh at the time probably believed that the mortgage was binding. This is a mixed question of law and fact regarding which Narayansingh's belief may be well founded or ill founded. The plaintiff is now seeking to draw some far-fetched inferences from that admission. The Privy Council case, in my opinion, is no authority for drawing such inferences from the statement contained in Ex. P. 6. The same observation applies to Exs. P. 2 and P. 4. I hold that the burden of proof is not shifted by those statements.

On the whole I agree with the lower Court that legal necessity for either of the mortgages has not been proved. This disposes of the case so far as Narayansingh is concerned and also the case against Noharsingh, except as regards the item of Rs. 3,500. As against Noharsingh it is argued that there was an antecedent debt of the father which the mortgagee had paid off. To prove the endorsement of Amritrao on the back of

his mortgage the plaintiff called one witness P. W. 7. The witness says:

"The endorsement on the back of Ex. P. 5 appears to be in Amritrao's handwriting. I cannot say for certain if the handwriting is Amritrao's. I have some doubts, I cannot say it is a forgery."

This was all said in examination-in-chief. I agree with the lower Court that the evidence of this witness is insufficient to prove the endorsement. There is no other witness on the point. It is however rightly pointed out that the plaintiff has produced the original mortgage deed from Amritrao. Some presumption, no doubt, arises from this fact but it is still impossible to hold on this presumption that the plaintiff had paid Rs. 3,500 to Amritrao; and without a finding regarding the amount paid by the plaintiff it is impossible to give a decree. I am asked to give the plaintiff a further opportunity of proving the endorsement. This I am not prepared to do, especially as no application to this effect was made to the lower Court after the examination of P. W. 7 or at any later stage. In *Sahu Ram Chandra v. Bhup Singh* (4) Lord Shaw lays down what sort of antecedent debt will justify the father in charging the family property. His Lordship says:

"It must be an obligation not only antecedently incurred, but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate."

The father's power in the absence of necessity to deal with the joint family property is treated in the judgment as an exception to the general principle of Hindu law. This judgment then proceeds:

"The exception being allowed, as in the state of the authorities it must be, it appears to their Lordships to apply, and to apply to the case where the father's debts have been incurred irrespective of the credit obtainable from immovable assets which do not personally belong to him but are joint family property. In their view of the rights of a father and his creditors, if the principle were extended further, then the exception would be made so wide as in effect to extinguish the sound and wholesome principle itself, viz. that no manager, guardian, or trustee can be entitled for his own purposes to dispose of the estate which is under his charge. In short, it may be said that the rule of this part of the Mitakshara law is that the joint family estate is in this position: under his management he can neither obtain money for his own purposes for it nor can he obtain money for his own purposes upon it. To permit him to do so would

(4) A. I. R. 1917 P. C. 61=39 All. 437=44 I. A. 126=39 I. C. 280 (P. C.).

enable him to sacrifice those rights which he was bound to conserve. This would be equivalent to sanctioning a plain and, it might be, a deliberate breach of trust. The Mitakhsara law does not warrant or legalize any such transaction. The limits of the principle of the exception have been thus set forth, because in their Lordships' opinion they form a guide to the settlement of the conflict of authority in India on the subject of antecedent debt."

The previous debt, having been secured upon the credit of the joint immovable property, was not such an antecedent debt for which Ruprai could have charged his son's share in the joint family property. The decree of the lower Court has awarded the plaintiff the mortgagor's share in the mortgaged property. There is no appeal from this decree by the defendants. There appears to be an accidental slip in the judgment and decree which requires correction. Although no application has been made to me under S. 152, Civil P. C., I have the power to correct the decree, especially in view of the new section, O. 41, R. 33. Ruprai's share in the family property was four annas. The lower Court says that the mortgage is binding on the defendants in respect of Ruprai's four annas. It then proceeds to add that the plaintiff is entitled to foreclose Ruprai's four annas share of the village. The family however owned only twelve annas in the village, as correctly pointed out in an earlier part of the judgment. The plaintiff is therefore entitled to foreclose one-fourth of twelve annas, that is three annas of the village. This was a mistake due to inadvertence, and the decree will therefore have to be modified by showing three annas share of Mouza Baharhod as the property to be foreclosed under the decree. The appeal fails and is dismissed with costs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1918 Nagpur 44

PRIDEAUX, A. J. C.

Madho Prasad and another—Applicants.

v.

Jaggansi—Non-Applicant.

Criminal Revn. No. 53 of 1917, Decided on 10th May 1917, from order of Addl. Commr. and Sub-divl. Magistrate, Ramtek, in Criminal Misc. Case No. 2 of 1917, D/- 15th February 1917.

(a) Criminal P. C. (1898), S. 145—Order under S. 145 will not be ordinarily interfered

with in revision. but if such orders are in excess of powers High Court will interfere especially where party is prejudiced.

Ordinarily orders passed under S. 145 will not be interfered with under S. 435 of the Code, but where an order purporting to be under the former section exceeds the powers given by it, the High Court will 'interfere, especially where there has been material irregularity which has prejudiced a party to the proceedings.

[P 45 C 1]

(b) Criminal P. C. (1898), S. 145—Proceedings under—Procedure in S. 145 must be strictly followed—Party not given opportunity to appear—High Court can interfere in revision.

Proceedings under S. 145 are not within jurisdiction unless the procedure prescribed therein is strictly adhered to. Where it appears that a party to the dispute has had no opportunity of appearing and putting in his written statement, the proceedings will be set aside. [P 45 C 2]

G. V. Deshmukh—for Applicants.

P. R. Naidu—for Non-Applicant.

Order.—On 5th February 1917 information was laid under S. 145, Criminal P. C. by the Sub-Inspector of Police, Deolapar, in the Court of the Sub-divisional Magistrate, Ramtek, to the effect that there was a dispute regarding three fields situated at Mauza Karwahi between Madho Prasad and Ramnarayanlal on the one hand and Jagansi Gond on the other and that the said dispute was likely to cause a breach of the peace. The Sub-Divisional Magistrate directed the parties to appear before him on 15th February 1917 at Deolapar and to put in written statements of their respective claims as to actual possession of the property in dispute and as the case appeared to be one of some emergency, the Magistrate attached the three fields pending decision of the case. On 15th February 1917 the case was taken up, not at Deolapar, but at Chorbaoli, a village some nine miles from Deolapar. It was called at 3 p. m. The Sub-Divisional Magistrate in his order states that he had issued orders to the Sub-Inspector the previous day that case would be heard at Chorbaoli and as Madho Prasad and Ramnarayanlal were absent when the case was called, the Magistrate proceeded ex parte and passed an order stating that finding Jagansi was in possession of the property in dispute, he should retain possession until evicted therefrom in due course of law.

Against that order, the present application for revision is filed by Madho Prasad and Ramnarayanlal. I am satisfied that the Magistrate's order which is not on

record said to have been issued on 14th to the Sub-Inspector telling him to inform the present applicants that they should attend at Chorbaoli in place of Daolapar, was not served on them in time to allow them to be present. They had engaged Mr. Parakh, Pleader, to represent them in the case. Mr. Parakh, who is present in the Court, tells me that he reached Daolapar with his clients at 8 or 9 a. m. on the morning of 15th February. He put up with the Sub-Inspector there, but was told nothing as regards the change in the place of hearing until about 4 o'clock in the afternoon when apparently on a chit received from the Sub-Divisional Magistrate's reader the Sub-Inspector told the pleader that the Court was at Chorbaoli that day. Mr. Parakh, pleader, states that on his way back he inquired at Chorbaoli and was told that the case had been disposed of. The Sub-Divisional Magistrate at that time was absent from the bungalow. This was on the evening of the 15th. There is no reason to doubt Mr. Parakh's word.

Whether it is the fault of the Sub-Divisional Magistrate's clerk or of the Sub-Inspector that information did not reach the applicants in time, it is not my business to decide, but I am clearly of opinion that it was not possible for the two applicants to attend the Court at Chorbaoli at the time the case was called. Therefore if the Sub-Divisional Magistrate's order is open to revision, I have no hesitation in setting it aside. Counsel for Jagansi argues that this Court cannot interfere with the order in revision. I am referred to S. 435, Criminal P. C., and to *Murat Singh v. Paika Bai* (1) in support of this proposition. It seems to me that this Court cannot under S. 435 ordinarily interfere with orders passed under Ch. 12, Criminal P. C., but where an order purporting to be under S. 145 exceeds the powers given by the section, this Court can interfere. Irregular and illegal proceedings under Ch. 12 are subject to the revisional jurisdiction of this Court. See *Pandurang Govind, In re* (2), *Pandurang Govind Pujari, In re* (3), *Dewan Chand v. Queen Empress* (4), *Dhani Ram v. Bhola Nath* (5) and *Ab-*

dulla Khan v. Gunda (6). I hold the proceedings under S. 145, Criminal P. C. are not within jurisdiction unless the procedure prescribed there is strictly adhered to and therefore when a party to the dispute has had no opportunity of appearing and putting in his written statement, this Court can set the proceedings aside.

This Court is not entitled to interfere merely because there has been an irregularity in the proceedings or an erroneous decision on a question of fact or law, but it can and will interfere when there has been a material irregularity which has prejudiced a party to the proceedings: *Parmessar Singh v. Kailaspati* (7). The irregularity here has prevented the applicants from having a fair trial. I do not question the Magistrate's power to proceed *ex parte* against a party in proceedings under S. 145, Criminal P. C., when that party having due notice of the date fixed for hearing fails to attend in person or by pleader to put in a written statement of his claim, but in the present case the applicants were not given notice in time that the case would be heard at Chorbaoli and they are entitled to be heard and must be heard before the final order under S. 145 is passed. I set aside the order of the Sub-Divisional Magistrate, dated 15th February 1917 and direct that the case be proceeded with and dealt with according to law. It is pressed here that the case should not be returned to the Court of the Sub-Divisional Magistrate, Ramtek, for disposal. Mr. Bourne, as seems clear from para. 4 of the District Magistrate's reply to the notice calling upon him to show cause why the order should not be set aside, has since the disposal of the case made a local inquiry into the question of possession, an inquiry made on the application of Jagansi, the non-applicants, for making a false report in this case to the police. Under these circumstances as the Sub-Divisional Magistrate, Ramtek, must have made up his mind on the question of possession, the case will be now disposed of by such other Magistrate as the District Magistrate may direct.

P.N./R.K.

Order set aside.

(6) [1907] 7 P. R. 1907 Cr.=6 Cr. L. J. 113.

(7) [1916] 17 Cr. L. J. 369=35 I. C. 801.

(1) [1904] 17 G. P. L. R. 133=1 Cr. L. J. 877.

(2) [1900] 24 Bom. 527.

(3) [1901] 25 Bom. 179.

(4) [1899] 2 P. R. 1899 Cr. (F. B.).

(5) [1902] 23 P. R. 1902 Cr.

A. I. R. 1918 Nagpur 46 (1)

BATTEN, A. J. C.

Tukaram Kunbi—Applicant.

v.

Punjabrao as Ganpatrao—Non-Appl-
cant.

Criminal Revn. No. 71 of 1917, Decided on 13th June 1917, from order of Subdivil. Magistrate, Katol, under S. 145, Criminal P. C., D/- 5th February 1917.

(a) Criminal Trial—Summons—Procedure is same as in civil cases.

The law for service of a summons in criminal cases is on the same lines as the rules for the service of a summons in a civil case. [P 46 C 1]

(b) Criminal P. C. (1893), S. 145—Proceedings under — One party not served with notice—There is defect of jurisdiction and High Court can set aside order in revision.

In an inquiry under S. 145, Criminal P. C., both sides must be heard; consequently, if one of the parties to the inquiry is not served and the Magistrate proceeds with the case, there is a defect of jurisdiction, and his order is liable to be set aside in revision by the High Court: *A. I. R. 1919 Nag, 44 Foll.* [P 46 C 1]

Gangadhar Sitaram and D. W. Kathole—for Applicant.

P. R. Naidu—for Non-Applcant.

Order.—In this case one of the parties to an inquiry under S. 145, Criminal P. C., was not served. The summons was attached to his house in his absence in Nagpur. No "due diligence" was used to effect personal service within the meaning of S. 71, Criminal P. C. The law for the service of a summons in criminal cases is on the same lines as the rules for the service of a summons in a civil case, and the remarks in *Dwarkabax v. Macleod* (1) are applicable here. The elementary rule of law that both sides must be heard has been disregarded, and there has been a defect of jurisdiction similar to that in *Madho Prasad v. Jaggansi* (2). As to this Court's jurisdiction to interfere in revision, I entirely agree with the remarks of Priedeaux, A. J. C., in the case last cited. It is also to be observed that the remarks as to the jurisdiction of this Court in revision when the Magistrate has acted without jurisdiction, contained in *Murat Singh v. Paika Bai* (3), are obiter dicta. As agreed to by the District Magistrate, I set aside the Magistrate's order, and direct that proceedings be taken up de

novo and proceeded with according to law

P.N./R.K

Order set aside.

A. I. R. 1918 Nagpur 46 (2)

STANYON, A. J. C.

Haji Begum—Piaintiff—Appellant.

v.

Shankar Rao Parbat Rao Deshmukh.
—Defendant—Respondent.

Second Appeal No. 30-B of 1916, Decided on 16th February 1917, against decree of Addl. Dist. Judge, Akola, in Civil Appeal No. 121 of 1915, D/- 20th September 1915.

(a) Landlord and Tenant — Agricultural holding is not transferable in Berar.

An agricultural holding is a personal right not transferable unless expressly declared to be so by contract or by statute. In Berar there is no law which permits an annual tenant of an agricultural holding to transfer his right.

[P 47 C 1]

(b) Landlord and Tenant — Under Berar Land Revenue Code tenant right is transferable—In absence of fresh contract with landlord transferee obtains merely transferor's right title and interest—If transfer is from woman with limited interest right ceases on her death.

Under the Berar Land Revenue Code a tenant right is heritable and transferable as "property" but a transferee of a tenant right by contract who does not make any fresh contract with the landlord obtains only the right title and interest of the transferor and if the transfer is from a woman with a limited interest his right to occupy the land would come to an end on her death or remarriage.

[P 48 C 1]

Bipin Krishna Bose and Lal Mohan Vivian Bose—for Appellant.

Judgment.—The plaintiff is the owner of a jagir in Berar. The defendant is in possession of land which was formerly occupied by a tenant named Ananda. This tenant died a few years ago and on 29th May 1912 his widow, Mt. Lakshmi executed a document whereby she purported to sell the tenant right to the defendant. The plaintiff brought the suit out of which this appeal has arisen to evict the defendant as a trespasser. The defendant pleaded that Ananda was the holder of a hereditary and permanent tenant right which his widow had inherited from him and transferred to the defendant who therefore claimed to be a permanent tenant and as such not liable to be evicted. This original pleading was further evolved into the plea that Ananda was an ante-ijara tenant. The Courts below found that an ante-ijara tenancy was not proved but that by reason of the antiquity of the tenancy no

(1) [1906] 2 N. L. R. 63.

(2) A. I. R. 1919 Nag. 44=53 I. C. 615=20 C. R. L. J. 775.

(3) [1904] 17 C. P. L. R. 133=1 Cr. L. J. 877.

satisfactory evidence of its commencement and term is forthcoming. They ruled therefore that the tenancy was permanent by which I understand them to have applied S. 78 (2), Berar Land Revenue Code, and to have held that the term of the tenancy is co-extensive with the duration of the plaintiff's jagir as such. The Courts below have further found that the tenant right is alienable and declaring the defendant to be a permanent tenant have dismissed the suit. The plaintiff has therefore made this second appeal. Two main grounds are put forward on her behalf, namely: (1) that the tenant right was not liable; and (2) that in any case the defendant has only purchased the limited interest of Mt. Lakshmi.

The learned advocate for the appellant felt himself unable to press the first of these grounds in the face of the decision of *Mitra, A. J. C. in Ishwari v. Tukaram* (1), in which the same learned advocate had successfully sustained an opposite contention. For that reason I abstain from deciding the point in this case. I must confess to feeling considerable doubt with all due respect to the correctness of the assumption that because there is no law in Berar which expressly forbids an annual tenant from transferring his rights therefore such rights are transferable. There is abundant authority for the view that an agricultural holding is a personal right not transferable unless expressly declared to be so by contract or by statute. Therefore it seems to me that it would be more correct to say that there is no law in Berar which permits an annual tenant of an agricultural holding to transfer his rights. Under the Bengal Tenancy Act, 1859, which was the predecessor of the Central Provinces Tenancy Act of 1883, *inter alia*, it was generally held that an agricultural tenancy was not transferable. No doubt S. 6, T. P. Act, 1882, which was applied to Berar in 1907, enacts that property of any kind may be transferred. But the Act avoids any definition of the important word "property" and as pointed out by Dr. Gour at p. 12, Edn. 4 of his work on the Transfer of Property, it is necessary to construe the word with circumspection. A wife is the property of her husband in the eye of the law, but she is not ordinarily transferable. However there is

a good deal to be said on the other side, and as the contention is not pressed before me I see no reason to come to any finding which might possibly be in conflict with the published ruling.

For the purposes of this appeal, therefore I will assume, without any decision of my own on the point, that the tenant right of the late Ananda was heritable and transferable in the ordinary way. The provisions of the Berar Code are not very clear in their applicability to tenancies in alienated land as compared with tenancies and other forms of holdings in unalienated land. No doubt some attempt is made in S. 222 to set out a general rule; but S. 224 provides exceptions thereto which are rendered somewhat vague by use of the words "as far as may be." Moreover, is a tenant in an alienated village included in the category of "holders of alienated land", or is he a tenant from a holder of such land? For if Ss. 72 and 73, which applying to the alienee from Government, do not apply to his tenants, then the heritability and alienability of an ijara tenancy becomes extremely doubtful. S. 223 contains express provisions for the protection of an auto-alienation tenant; and that suggests that post-alienation tenants are left to make their own terms with their landlords and receive no statutory protection independently of their contracts. But I am inclined to hold that Ch. 7 of the above Code is one of general applicability, and that S. 78, with which that chapter opens, applies as much to tenants in alienated villages as to tenants in unalienated lands. Therefore I accept the finding of the Courts below that the tenant right of Ananda was of the kind provided for by S. 78 (2) of the Berar Code.

We have it, then, that Ananda held a tenant right which was heritable and transferable, for a term co-existent with the duration of the plaintiff's jagir as such. But S. 72, which deals with the devolution and transfer of occupancy of unalienated land, can only apply, as far as may be, to a tenant from a holder of alienated land like the plaintiff. The Deputy Commissioner can "recognize" heirs and transferees of occupancies held directly from Government. But, obviously, he cannot take that course in regard to the tenants of private proprietor. Therefore we can only apply

S. 72 to such cases as the present by holding that the tenant right is heritable and transferable as "property." The difference is very substantial. Each transferee of an occupancy who is recognized by the Deputy Commissioner becomes a fresh occupant, and holds with all the rights of an original occupant. It does not matter in his case that the occupant for whom he has been substituted was a woman with a limited interest, or the last of a line of holders, on whose death the occupancy would have lapsed. The new occupant becomes the first of a fresh line of devolution until another transfer again starts yet another line of proprietor and successors. But a transferee of a tenant right by contract who does not make any fresh contract with the landlord, obtains only the right, title and interest of his transferor. In the present case, following the assumption already made as to the tenant right of Ananda being heritable, it was inherited by his widow Lakshmi Bai. The defendant bought the right, title and interest of Lakshmi Bai, and nothing more. He stands in the shoes of his vendor, and his right to occupy the land comes to an end on her death or remarriage. I therefore modify the decrees of the Courts dismissing the suit by adding the words

"became the defendant as the transferee of the right, title and interest of the tenant Lakshmi Bai, widow of Ananda, is entitled to occupy the land as a tenant of the plaintiff until the death or remarriage of his vendor, the said Lakshmi Bai."

I make no order as to the costs of this appeal. In the Courts below costs will be paid as ordered by the lower appellate Court.

P.N./R.K.

Decree modified.

A. I. R. 1918 Nagpur 48

MITTRA, A. J. C.

Bhaosingh and others—Defendants—Appellants.

Y.

Mahipat and others—Plaintiffs and Defendants—Respondents.

Second Appeal No. 353 of 1917, Decided on 28th August 1918, from decree of Third Addl. Dist. Judge, Buldana, D/- 4th July 1917, in Civil Appeal No. 7 of 1917.

Tort—Trespass—Suit against joint trespassers acting in concert—One defendant can rely on title of another.

A defendant who is sued as a trespasser can

rely upon the title of his co-defendant if both are alleged to have been acting in concert, even though his own derivative title is not proved. [P 49 C 2]

M. V. Joshi—for Appellants.

K. K. Gandhe—for Respondents.

Judgment.—The plaint alleges that defendants 1 to 4 illegally dispossessed the plaintiffs of the eastern half of survey No. 29, which belonged to the latter and was in their possession till 1915. Para. 2 of the plaint further states the cause of action against the remaining defendants in the following terms:

"Before the Record of Rights the khata of the field stood in the name of Dhurpati, defendant 5. As she and defendants 1 to 4 have given the field in suit in mortgage to Narayan Sah, defendant 6, in the year 1912, she and Narayan Sah have been impleaded as defendants 5 and 6. Defendant 7 is joined because he helped in removing the crops."

The plaintiffs' prayer was that they be put in possession of the eastern half which defendants 1 to 4 have taken possession of and that the defendants be directed to pay Rs. 97 as mesne profits. Defendants 1 to 4 pleaded that they were in possession under a mortgage of 1888 executed by one Gopai, the predecessor-in-title of defendant 5, who was according to these defendants owner of a half share in the survey number. The case proceeded ex parte against the remaining defendants. The Munsif held that the plaintiffs were the owners of the whole field and were in possession till 1915, that Gopai's title to the half share was not proved, and that defendant 7 did not help defendants 1 to 4 in taking away the crops. Dismissing the suit against defendant 7, the Munsif passed a decree in favour of the plaintiffs against all the other defendants directing them to deliver back possession and to pay Rs. 40 as mesne profits. Against this decree defendants 1 to 4 appealed. The Additional District Judge held that the plaintiffs were in possession till 1915, that Gopai the predecessor-in-title of defendant 5, had an interest in the field but that the interest was lost by lapse of time. The lower appellate Court further held that the mortgage by defendants 1 to 4 was not proved. On these findings the appeal was dismissed.

This second appeal has been filed by defendants 1 to 4. It is contended on behalf of the plaintiffs-respondents that the findings of the lower appellate Court regarding the appellants' mortgage is

fatal to the appeal and that no question of title on the part of defendant 5 can be raised by the present appellants by way of *jus tertii*. It is also urged that O. 41, R. 4, does not apply to the case, as the appellants are bound to fail upon the findings that their mortgage is not proved. It is contended that R. 4 applies only when the Court is competent to interfere with the decree in favour of the appellants without reference to the merits of the case so far as the non-appealing defendants are concerned and that the non-appealing defendants can only be given the benefit of a decision so arrived at in favour of the appellants. On behalf of the appellants reliance is placed upon O. 41, R. 33, and it is further contended that the decree of the lower Courts proceeds upon a common finding applicable to all the defendants that the plaintiffs have proved their title. I have come to the conclusion that the appeal must succeed even if the scope of O. 41, R. 4, is limited in the manner contended for by the plaintiffs-respondents and apart from a resort to the provisions of O. 41, R. 33.

The plaint is not very clear as to the cause of action against the defendants other than the four defendants. Although the actual dispossession was by the first four defendants, yet mesne profits have been claimed against all and the Court has decreed both ejection and mesne profits against all defendants except defendant 7. In other words the decree has been passed against the representatives of Gopal under whom the appellants claimed. This could only have been passed upon the view that all the defendants acted in concert in dispossessing the plaintiffs, and this appears to be the suggestion made in para. 2 of the plaint. Upon any other interpretation of the plaint it is difficult to see how the plaintiffs were entitled to anything but a declaratory relief against defendants 5 and 6. The decree of the Courts below proceeds then upon the ground that although ejection was by defendants 1 to 4, all the defendants against whom the suit has been decreed were acting in concert. To act in concert with another person is to act under his authority and hence the trespass may be justified by showing title in that person.

The appellants admit that they have failed to prove their derivative title as

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based upon their mortgage-deed of 1888, but I think they are entitled to say that as the plaint proceeds upon an allegation of joint trespass, they are entitled to defeat the plaintiffs' claim by showing title in one of the co-defendants. The plaintiffs cannot maintain a suit based merely upon their previous possession against defendant 5 if the latter has a title to the land. Under these circumstances the argument that defendants 5 and 6 have not appealed does not carry much force. A defendant who is sued as a trespasser can rely upon the title of his co-defendant if both are alleged to have been acting in concert, even though his own derivative title is not proved. There is nothing in this view which militates against the view adopted in *Nand Ram Patel v. Narbad Patel* (1), which is strongly relied upon by the plaintiffs-respondents. I think that notwithstanding the adverse finding on their mortgage the appellants are entitled to show that defendant 5 has a title to the land in dispute. The plaintiffs denied that Gopal ever had any interest in land. There was therefore no plea or issue about Gopal losing her rights by lapse of time. This can only be decided after taking proper pleadings and framing proper issues. The decree of the lower appellate Court is set aside as against defendants 1 to 6 under O. 41, R. 4, and the appeal is remanded to the lower appellate Court for a fresh decision with advantage to the above remarks. Costs will follow the result. There will be no order for refund of court fees.

P.N./R.K. *Appeal remanded.*

(1) [1899] 12 C. P. L. R. 59.

A. I. R. 1918 Nagpur 49

MITTRA, A. J. C.

Bashir Ahmed—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 96-B of 1918, Decided on 5th October 1918, against judgment and finding given by Magistrate, First Class, Nagpur, in Criminal Case No. 43 of 1918, D/ 28th June 1918.

Railways Act (9 of 1899), S. 122—Entry originally lawful—Subsequent unlawful act does not render entry unlawful—Accused not refusing to leave on being asked, cannot be convicted under S. 122 (2).

Accused, a dalal, entered the railway goods shed line to take delivery of a consignment on behalf of the consignee and without the permis-

sion of the goods clerk broke the seal of a wagon. It was found that dalals were allowed to enter the goods shed without express permission from a railway servant:

Held: (1) that the accused could not be convicted under S. 122 (1) as the original entry being lawful, the subsequent unlawful act did not relate back and render the entry unlawful;

(2) that as the accused never refused to leave the railway on being requested to do so, he could not be committed under sub-S. (2), S. 122;

(3) sub-section (1), S. 122, makes an unlawful entry punishable and sub-S. (2) provides for cases where original entry was lawful as well as unlawful. [P 50 C 1, 2]

M. T. Shareef—for Applicant.

G. K. Dick—for the Crown.

Order.—The applicant has been convicted under S. 122, sub S. (1), Railways Act. The charge against him is that he unlawfully entered the goods shed line and without the permission of the goods clerk or the unloading foreman broke the seal of wagon No. 563 containing 527 bundles of jaggery.

The accused is a dalal and came to take delivery of the consignment of jaggery on behalf of one Haji Yusuf Gani. It is in evidence that dalals are allowed to enter the goods shed without an express permission from a railway servant. The Railway Sub-Inspector (P. W. 3) says that he advised the goods clerk and the accused that the accused should not enter the goods office without the permission of the railway authorities. This however was not a prohibition but only advice and it is doubtful whether the witness had any authority to pass an order. On behalf of the prosecution the entry of the dalal is not complained of. It is the subsequent act of breaking the seal of the wagon which is urged as unlawful. S. 122 runs thus:

(1) If a person unlawfully enters upon a railway, he shall be punished with fine which may extend to twenty rupees.

(2) If a person so entering refuses to leave the railway on being requested to do so by any railway servant, or by any other person on behalf of the railway administration, he shall be punished with fine which may extend to fifty rupees, and may be removed from the railway by such servant or other person."

The case does not come under the second class, as the accused never refused to leave the railway on being requested to do so. Now the original entry being lawful, it is difficult to hold that the subsequent unlawful act related back and rendered the entry unlawful. It seems to me that sub-S. (1) makes an unlawful entry punishable and sub-S. (2) provides for cases where the original entry was

lawful as well as unlawful. The argument that the applicant should be deemed to have entered with the intention of breaking the seal of the wagon is far-fetched and cannot be accepted, nor do I find that the Magistrate has come to any such finding. The result is that the order of the lower Court is set aside and the applicant is acquitted. The fine if paid is ordered to be refunded.

P.N./R.K.

Order set aside.

A. I. R. 1918 Nagpur 50

PRIDEAUX, A. J. C.

Local Government—Petitioner.

v.

Pyarelal—Accused.

Criminal Revn. No. 75 of 1917, Decided on 27th June 1917, against order of Sessions Judge, Nerbudda Division, D/- 2nd April 1917.

Penal Code (1860), S. 376—Fact that family of injured girl condoned offence on being paid sum of money should not be taken into consideration in determining punishment to be inflicted.

The measure of punishment for an offence of rape, under S. 376, should be proportioned to the greater or less atrocity of the crime, to the conduct of the criminal and to the defenceless and unprotected state of the injured female. The fact that the family of the injured girl have condoned the offence on being paid a sum of money should not be taken into consideration in determining the heinousness of the offence, or of the punishment to be inflicted: 6 W. R. Cr. 59, Foll. [P 51 C 1]

G. P. Dick—for the Crown.

Order.—Pyarelal, son of Mukandlal a Bania boy, 18 years of age, has been convicted by the District Magistrate, Betul, of raping one Rasi, a Rajput girl aged 13 or 14 years of age, and sentenced under S. 376, I. P. C., to six months' rigorous imprisonment. The conviction and the sentence have been confirmed in appeal. The Local Government applies in revision for enhancement of the sentence on the ground that the sentence awarded is grossly inadequate. The accused, though noticed, is not represented in this Court. The District Magistrate, replying to the Rule calling upon him to show cause why the sentence should not be enhanced, states that in view of the accused's youth and position he is of opinion that the sentence awarded is sufficient and that to protract this sentence to a term of years is merely to habituate the prisoner at an impressionable age to the companionship of criminals without enhancing the deterrent

effects of the punishment. The offence of which Pyarelal has been found guilty, and there is no question as to his guilt, is one of a particularly atrocious kind. The offence was premeditated and the medical evidence shows that considerable injury was done to the girl. That her family may have condoned the offence on being paid Rs. 20 is not a fact that should be taken into account in determining the heinousness of the offence or the punishment to be inflicted. It has been held that in these cases the measure of punishment should be proportioned to the greater or less atrocity of the crime, to the conduct of the criminal and to the defenceless and unprotected state of the injured female: see *Queen v. Jhantha Noshyo* (1). The accused is a young man but he is old enough to know the seriousness and consequences of the offence he has committed. The sentence is clearly inadequate. I enhance it to three years' rigorous imprisonment.

P.N./R.K. *Sentence enhanced.*

(1) [1866] G.W.R. Cr. 59.

A. I. R. 1918 Nagpur 51 (1)

BATTEN, A. J. C.

Kisan Gopal Tejmal—Applicant.

v.

Italiram—Non-Applicant.

Civil Revn. No. 82-B of 1917, Decided on 24th October 1917, from the order of Munsif, Khamgaon, in Civil Misc. Case No. 36 of 1916, D. 25th January 1917.

Civil P. C. (1908), S. 115—Remedy by way of appeal open—Court will not interfere in revision—Practice.

It is not the practice of the Judicial Commissioner's Court, to interfere in revision when the applicant for revision has the remedy of appeal open to him.

[P 51 C 1]

Order.—As observed by the Judicial Commissioner in Civil Revision No. 75 of 1912, it is not the practice of this Court to interfere in revision when the applicant for revision has the remedy of an appeal. In this case a final decree for redemption has already been passed before the date of the application for revision and an appeal lay against the decree, and in appeal against the decree it could certainly be urged that the decree for redemption was improper as the final decree for foreclosure should not have been set aside. The order before me is an interlocutory order necessarily to be followed by a decree. In these circumstances I do not consider that this Court

should interfere in revision with the order. The application is dismissed. No order as to costs.

P.N./R.K. *Application dismissed.*

A. I. R. 1918 Nagpur 51 (2)

* *DRAKE-BROCKMAN, J. C. AND PRIDEAUX, A. J. C.*

Shankar Kunbi—Appellant.

v.

Mt. Sawitri and others—Respondents.

First Appeal No. 17-B of 1915, Decided on 16th October 1916.

(a) *Hindu Law—Adoption—Sudras—No religious ceremonies are necessary—But giving and taking accompanied by actual delivery is necessary.*

No religious ceremonies of adoption are necessary in the case of Sudras. Even the dattahomam is a mere matter of unessential ceremonial: 5 *Mad.* 358 and 5 *Cal.* 370 (P. C.), *Foll.*

[P 56 C 2]

But giving and taking accompanied by actual delivery of the child are absolutely necessary to transfer the boy from one family to another.

The gift and acceptance in adoption must be effected by the corporeal delivery of the boy.

[P 56 C 2]

(b) *Hindu Law—Adoption—Authority to adopt specifying particular child—Child dying or refused—Authority warrants adoption of another boy.*

Except in a case governed by the Bombay School of law, an authority to adopt a specified boy cannot be exercised with respect to any other boy. But the Maharashtra School, which permits an adoption without the express consent of the husband, holds that where a husband authorising an adoption specifies the child he wishes to be taken and the child dies or is refused by his parents, the authority given warrants the adoption of another child, the presumption being that the husband desired an adoption and by specifying the object merely indicated a preference: 22 *Bom.* 995, *Foll.*

[P 57 C 2]

(c) *Hindu Law—Adoption—Authority given to widows—Senior refusing—Junior can adopt.*

When permission to adopt is given to widows severally, the elder widow and on her refusal the younger one can adopt: 14 *I. C.* 17 and 18 *Cal.* 69, *Foll.*

[P 59 C 1]

(d) *Evidence Act (1872), S. 118—Insolvency does not affect competency of witness.*

The fact that a witness has gone through insolvency does not furnish adequate reason for disbelieving him. There is no presumption that bankrupt is necessarily untruthful. P 57 C 2

W. A. Forbes, S. K. Barlinge and R. N. Mudholkar—for Respondents.

P. S. Kotwal, M. Bhawanishankar and G. N. Ghate—for Appellant.

Judgment.—One Shrivani, son of Chandrabhanji of Saor in the Amraoti Taluk, died about 28th December 1912, leaving the large estate now in dispute. His widow Savitri Bai and Jana Bai are the first two defendants in the present

case. The plaintiff Shankar sues contending that on 11th February 1913, Savitri Bai, the senior widow, who alone had the right to adopt a son to her husband, adopted him and that he is therefore entitled to Shravanji's estate. Jana Bai is stated to have adopted defendant 3 Shamrao on 9th February 1913 and the two widows are said to have partitioned between themselves the whole of Shravanji's property in the month of May 1913. The plaint asks that Shankar be declared the proper and legally adopted son of the deceased Shravanji and that it be held that the property described in the three schedules attached to the plaint belongs to the plaintiff and that it be put into his possession. The further prayers in the plaint are that it be declared that Jana Bai having no right to adopt, her adoption of Shamrao be cancelled and that the partition effected between the two widows be held not to bind the plaintiff. Mesne profits of the immovable property in dispute and the appointment of a receiver pending the decision of the case were also asked for. Ganoba, defendant 4, was joined as the father of Shamrao and because he claimed as owner, three of the disputed fields.

Defendants 5 and 6 were joined as persons who had been meddling with the estate. The case proceeded *ex parte* against the senior widow. The other defendants denied that the plaintiff was adopted by Savitri Bai and contended that even if adopted, the adoption was invalid in law. The genuineness of Ex. P-1, the deed of adoption, executed in favour of the plaintiff by Savitri Bai, was not denied. The defence is that Shravanji shortly before his death adopted defendant 3 Shamrao, and as owing to his weakness the necessary religious and social ceremonies could not be performed he directed his widows to perform them should he not live to do so. As the senior widow refused to observe her husband's directions, the junior widow Jana Bai did so. Shravanji is said to have stated in distinct terms that he wanted the boy Shamrao and no other to be his adopted son, and defendants 2 and 3 submit that even if it be assumed that what took place in the lifetime of Shravanji was not sufficient in law to constitute the boy Shamrao his adopted son and further, even if there had been no directions by Shravanji, the rites and

ceremonies performed by Jana Bai constituted Shamrao the validly adopted son of Shravan from the date of these ceremonies. The senior widow had thus no right to take the second boy in adoption.

It was further pleaded that the adoption of the plaintiff by defendant 1 was invalid as it was made by the widow maliciously and capriciously and not in the bona fide performance of religious duty. In any case as it is clear from the documents on which the plaintiff based his claim that his adoption was conditional and that defendants 1 and 2 were entitled to remain in possession of the property as long as they were alive and to exercise over such property the rights of Hindu widows succeeding as heirs to their husband, the plaintiff had no present right to claim possession.

These defendants also pleaded that the plaintiff having agreed to the partition of the estate between the two widows he was now estopped from questioning the same although Shamrao was in no way bound by that agreement. Jana Bai in a schedule attached to her written statement mentioned the property she was in possession of and contended that the ornaments mentioned therein were her stridhan and that the pots, pans and other moveable property were necessary for her personal use and maintenance. Ganoba supported the case of his son and stated that Shravanji as a near relation gifted to him orally a quarter-share in field Surveys Nos. 28, 29 and 30 of Mauza Kalamgavan before his death, since when he has been in possession of them as owner. He admitted that he realized Rs. 500, which amount he made over to defendant 2. Defendant 5 denied managing the estate or having any interest therein and defendant 6 admitted that he cultivated jointly with the deceased a 1/5th share of field Survey No. 10 of Rajegaon and that he was ready to make over, to whomsoever the Court ordered, the proportionate produce of this share if he was paid Rs. 75 as his cultivating expenses. He denied that he had any interest in the rest of Shravanji's property.

The plaintiff in his replies contended that he had been actually adopted by Savitri Bai, all necessary ceremonies being performed. He denied any giving and taking of Shamrao by Shravanji and also the alleged directions said to have

been given to the widows with regard to that boy. He also denied that Shra-
vanji had expressed the wish that Sham-
rao and no other person should be ad-
opted, and contended that even if the
adoption rites and ceremonies were
performed by Jana Bai in connexion with
the adoption of defendant 3, they were not
performed before his own adoption and
that Shamrao's adoption if any is illegal.
The plaintiff denied that his adoption was
conditional and pleaded that the condi-
tions in the adoption deed detrimental to
his rights as an adopted son were invalid
in law. He also denied being a party to
the partition of the property between
the widows and stated that he was en-
titled to possession of all the property
he claimed. He also stated that defen-
dants 4 and 5 were in possession of the
amounts shown in Sch. C attached to the
plaint and that defendant 6 was in posses-
sion of Shra-
vanji's share of field Survey
No. 10 of Rajegaon and also the crops
for 1913-14. He denied that Rs. 75 were
due to this defendant on account of
cultivating expenses.

The Judge who decided the case did not
take it over until it had been closed for
argument. He finds it clearly proved
that the plaintiff was adopted by Savitri
Bai on 11th February 1913 and that in
pursuance thereof she executed the deed
of adoption Ex. P-1. Dealing with the
question of Shamrao's adoption the Judge
finds that the evidence is conclusive and
shows that on Thursday, 26th December
1912, two days before his death, Shra-
vanji sent for respectable residents of
his own and neighbouring villages and in
their presence expressed a desire to adopt
a son. Ganoba was asked if he would
give Shamrao in adoption, and on his
agreeing the boy was sent for and given
to Shra-
vanji. Though the boy could not
be actually placed on his new father's lap
owing to the latter's weakness he was
made to sit near Shra-
vanji, who accepted
him as his son and put kunku on the boy's
forehead in token of his acceptance.
Sweets and pan supari were then dis-
tributed and the two wives were directed
to get the remaining religious and social
ceremonies performed in the event of
Shra-
vanji not living to do these himself.
He also directed that in the event of his
senior wife refusing to perform these
ceremonies, they should be undertaken
by Jana Bai. The lower Court holds it

satisfactorily proved that when Savitri
refused to follow her deceased husband's
directions with respect to Shamrao, Jana
Bai did so on 9th February at Saor in
the family house, the deed of adoption
being executed the following day. He
writes:

"The adoption of Shamrao having taken place
in consonance with the direction and authority
of Shra-
vanji on 9th February 1913 the sub-
sequent adoption by defendant 1 in direct opposi-
tion to that authority was invalid and would not
divest the estate invested in Shamrao."

The Judge also finds Savitri Bai's ad-
option of the plaintiff malicious. It is
unnecessary for the purpose of this ap-
peal to enter into other matters decided
by the learned Additional District Judge.
He dismissed the plaintiff's case on the
ground that Shamrao having been validly
adopted, the senior widow had not the
power to adopt the plaintiff. Against
that dismissal the present appeal has
been filed. It was stated at the hear-
ing in this Court that the plaintiff would
be satisfied with a declaration that he is
the adopted son of the deceased Shra-
van and that defendant 3 is not. Possession
is not here asked for and grounds Nos. 5
and 6 of the memorandum of appeal are
not pressed. We agree with the learned
Additional District Judge that there is
ample evidence to establish that the
plaintiff was adopted by Savitri Bai on
11th February 1913 at Aroraoti. The
evidence of Savitri Bai and the plaintiff,
corroborated as it is by the statements
of P. Ws. 4, 5, 6, 7, 8, 9 and 10,
proves beyond doubt that this adoption
took place and that defendant 1 executed
the adoption deed (Ex. P-1) in the plain-
tiff's favour. There is a large amount
of evidence to support the story of Jana
Bai and Shamrao.

Before entering upon the grounds upon
which that evidence is attacked, we will
briefly state what the evidence itself is.
The first witness for the defendants,
Motiram, gives a long and detailed ac-
count of what happened on Thursday 22nd
December 1912, at the Shra-
vanji's house
at Saor. He states that many persons
having been sent for, Shra-
vanji told them
that as he did not expect to survive, he
intended to adopt a son and said that he
wished to adopt Ganoba's son Shamrao,
a boy 7 or years of age. Ganoba, who
was present, consented and went and
fetched his son, who was made to sit near
Shra-
vanji. Shra-
vanji then called for

kunku and water and applied the red powder to the boy's forehead. He then had sugar and pan supari distributed and declared that he had adopted the boy. He was very ill at the time and his weakness prevented him from actually taking the boy on his lap. He then said that if he survived he would perform the adoption ceremony himself, but should he die, his elder wife Savitri Bai should do so. Should she not do so, then Jana Bai was to get this ceremony performed.

He stated that if the elder widow completed the adoption, then Jana Bai was entitled to receive 12 tiphans of land; but if Jana Bai and not the elder widow did so, then Savitri Bai was to be given the same area of land. He is said to have further stated that as he was obliged to Ganoba, he gave him 18 acres of land and also directed that a thousand rupees should be spent in a village feast and gave an acre of land at Rajgaon to the temple of Maroti, an acre at Saor to the gol iatta and one acre of the same village to the temple of Pandharinath. This witness states that after Shravan's death the co-widows commenced to quarrel and that Jana Bai proposed to Savitri Bai that as directed by their husband, the necessary ceremonies should take place and was told in reply that there was no hurry about the matter. Some time later Jana Bai sent for Balabhau Balaji who was asked to fix an auspicious day for the adoption ceremony. He did so. Others were sent for and Savitri Bai was asked as regards the matter. She was unwilling, so Jana Bai adopted the boy on Sunday 9th February 1913. Balabhau Brahmin who officiated asked Ganoba to put the boy on Savitri's lap. She however refused to take him and her co-widow then did. He states that there was a talk about a will, Shravanji having proposed it, but Savitri Bai told him that this was unnecessary as she was willing to adopt as directed.

D. W. No. 2 is an old Marwari aged 75 years. He says that he and others were called to Shravan's place, where Shravan told his wives that they should adopt Ganoba's son. Shravan was at the time lying on his cot and Shamrao was some six feet distant. He states that Shravan did not adopt the boy in his presence. He merely stated that he wanted to do so. This witness says that he was at the place for only a quarter

of an hour and that great confusion prevailed. Witnesses 6, 7 and 8 are three other Marwari residents of the same village. No. 8, Ramdhan, states that all the Marwaris went together about one o'clock and stayed there for half an hour, returning home together. He says that plaintiff gave 3 acres of land to three different gods, 18 acres to Ganoba, Rs. 1,000 in charity and told them that he adopted Ganoba Patel's son Shamrao. The witness states that there was no talk of reducing the matter to writing and that he knew nothing of the actual adoption.

Asram, D. W. 6, states that Shamrao was sent for and made to sit near Shravan. Ganoba then said that he gave his son in adoption to Shravan and Shravan told those present that if he recovered he would adopt the boy and go through the ceremony and should he not recover he wished his widows to adopt him. He states he was present at the place for two or three hours leaving about 5 p. m. There was no talk of reducing Shravan's wishes to writing. He states that Shravan declared that he "had, as it were, adopted Ganu Patel's son Shamrao." The remaining Marwari witness Ramrakh, D. W. 7 says, that on their arrival at the house, Shravan told them that he adopted Shamrao who was sitting there and that he had given 50 acres of land to each of his wives for maintenance, 18 acres to Ganoba, and 3 acres to three gods. He further directed that Rs. 1,000 should be spent in charity in his name. He states that Shravan did not say who was to perform the adoption ceremony. He also states that the Marwaris were there for about 20 minutes and went and returned together. Ganoba owes this witness money.

D. W. 3 is Narayan, the father of Jana Bai, and therefore a very interested witness. He says that on the day in question Shravan stated that he intended to adopt Shamrao. Ganoba then brought the boy who was made to sit in front of Shravan, who said that the boy was to be adopted by his wives if he did not survive. If the elder wife would not adopt, the younger was to do so, in which case Savitri was to retain her ornaments and to be given 12 tiphans of land. If Jana Bai did not pull on well with her co-widow, she was to be given the same and that during the minority of the boy the

widows should have control of the property. He says that after her husband's death Savitri Bai was asked to adopt Shamrao, but she refused to do so and said that Jana Bai should do so if she liked and this was done, the adoption deed being executed and registered at Asegaon on 11th February 1913. It is noteworthy that this witness makes no mention of Shravan's applying the kunku to the boy's forehead.

Rajaram D. W. 4 states that he was present and his account of what took place was that Shravan asked Ganoba if he was willing to give his son Shamrao in adoption. Ganoba brought the boy and said he was. Red powder was then applied to his forehead and the boy was made to sit near Shravan. He then directed that after his death his elder wife should adopt Shamrao and that if she failed, Jana Bai was to do so; and further left instructions that 12 tiphans of land was to be given to each wife if they did not pull on with the adopted son. The witness mentions the bequests to the three gods and the thousand rupees to charity. This witness also attended the adoption ceremony of Shamrao by Jana Bai. The boy was first offered to Savitri Bai and when she refused to allow him to be placed on her lap, he was taken and placed on the lap of the older widow. The sister of this witness is married to Ganoba's cousin. D. W. 5, who admits that Narayanji the father of Jana Bai is his maternal uncle, and D. W. 9 make similar statements. P. W. 10 is a hostile witness and states that in his presence nothing was said by Shravan about adopting any particular person, though he admits that three or four days before his death Shravan gave 3 acres of land to three gods and directed that a thousand rupees should be spent in a feast and charity. This witness has attested the deed whereby Jana Bai adopted defendant 3. He is apparently on bad terms with Ganoba. Considering the deed itself, he states that Shravan took Shamrao in adoption and that he attested the deed knowing its contents. It seems to us that his statement that Shravan never said anything about adoption cannot be relied upon. Amritrao, D. W. 11, speaks to Shravan a month or one and a half months before his death stating that he adopted Ganoba's son; this apparently is a mistake, for his deposition undoubtedly refers to

the incident of the 24th December. He says that Shravan stated that if he survived he would adopt Shamrao, and if he died his wife was to do so and if his senior wife refused to do so, his junior wife was to adopt the boy. He says nothing about any actual adoption having taken place and gives the place where the talk took place as the diwan-khana, while the other witnesses state it as the chowk. D. W. 12, Venkatesh, says that he was there on that Thursday for an hour from 8 a. m. and that in his presence Shravan gave 3 acres of land to the 3 gods and a thousand rupees to Datta and 50 acres of land to each of his wives. But when he was asked about the adoption by those present Shravan said that he would speak about it the next day. Shamrao, D. W. 13, supports the defence story as to the adoption of the boy and states that Shravan told his wives that if he survived, he would perform the adoption ceremony, but, if he died, the elder wife was to perform it and if she failed to do so, the younger widow was to adopt the boy. The witness also speaks to Jana Bai's adoption of the boy on Savitri Bai's refusal to accept him and was present when the adoption deed was registered.

Chandrabhan, D. W. 14, who lives at Saor, speaks to Shravanji having settled to adopt Shamrao on that Thursday. Ganoba was asked about it and he agreed. The boy was then brought in and Ganoba took him near Shravan. He made him sit in front of Shravan and red powder was applied by Shravan to the boy's forehead and sugar and pan supari were distributed. This witness also speaks to 18 acres of land being given to Ganoba and 3 acres of land to gods and a thousand rupees to charity. He says nothing about any land being given to the wives, although he states that Shravan said that if he was unable to perform the adoption ceremony, his elder wife should do so and in the event of her refusal Jana Bai should perform the adoption ceremony. He also speaks to the adoption of the boy by Jana Bai. He says that Shravan said that the boy should be named Vishwanath, thus contradicting D. W. 4, who says that at that time no new name had been given to the boy. It is somewhat remarkable that this witness and witness 15, who were both examined on the same day, are alone in using special words to describe the adoption, that

Ganoba said that the boy was "his son" before but had become "Shravan's son". D. W. 15 speaks to the adoption by Shravan and to the boy being formally adopted by Jana Bai. D. W. 16, Gopalji, is defendant 5, in the case. He mentions that Shravan asked Ganoba to give him his son Shamrao, and Ganoba agreed. Whereupon the boy was called up and made to sit in front of Shravan, who then gave directions to his wives to perform all the adoption ceremonies in the event of his being unable to do so himself. This witness is an interested one, as he is related to Shravanji. As this witness is also blind, he might have heard what took place but could not have seen what actually happened. D. W. 17 belong to the same family as the deceased. He states that the boy was sent for and Shravan applied red powder to his forehead and distributed sugar and said that he would perform the adoption ceremony himself if he survived, otherwise his older wife should do so and if she refused to, Jana Bai should get it done. He also speaks to the ceremony of 9th February 1913 and to the execution of the adoption deed by Jana Bai. He also speaks to gifts made by Shravanji. D. W. 18 identified Jana Bai before the Sub-Registrar when the adoption deed was registered. D. W. 19 is Ganoba, the last witness in the case. He supports the story of the adoption of his son by Shravan and speaks to the gift of 18 acres of land to himself and to the adoption by Jana Bai.

The plaintiff's evidence is mostly directed towards proving his own adoption and the realization of money by Ganoba. He has produced little evidence to refute that called to show that Shamrao was taken by Shravan as his son and that adoption ceremonies were performed by Jana Bai. Savitri, as P. W. 1, denies that Shravan stated anything about adopting a boy or that the widows were directed to do so. She denies she was pressed by Jana Bai to adopt Shamrao and says she knows nothing of that adoption. She pretends that she does not remember if she was at Saor on Sunday, the 9th February 1913. She admits the division between the two co-widows. Jana Bai, witness 2, is the defendant and naturally supports her pleadings and Shamrao's story. She admits Savitri's relations were not present when Shravanji stated Shamrao was to be adopted. She admits adopting

Shamrao on 9th February 1913 on Savitri's refusing to do so. Savitri's relations were again not present at this ceremony. She states Savitri was at Saor at the time and left the village the same day, to return on Wednesday or Thursday with the boy she said she had adopted. Witness 3 is the plaintiff himself. His witnesses 4 to 10 speak to his own adoption, and witnesses 11 to 16 are in regard to the cultivation and payment of lease money of certain fields. Witness 18, a Brahmin priest called Balabhat alias Ramachandra Joshi of Saor, says he knows nothing of the alleged adoption of Shamrao by Shravan or his widow. This is the priest said to have officiated at Shamrao's adoption by Jana Bai. He is a village priest who denies having done so and says it was not his turn to work as Joshi of the village that year. Mahadeo, P. W. 19, states that he visited Shravan on the Monday in question, but denies that any people had collected at the house or that any adoption took place.

It is settled law that no religious ceremonies of adoption are necessary in the case of Sudras. Even the Dattahoma is a mere matter of unessential ceremonial: *Thangathanni v. Ramu Mudali* (1). The same view is held in Bengal: *Indromoni Chowdhurani v. Beharilal Mullick* (2). But giving and taking accompanied by actual delivery of the child are absolutely necessary to transfer the boy from one family to another. The gift and acceptance in adoption are to be made by the corporeal delivery of the boy. In the present case if the evidence on record as to the giving of Shamrao by his father and the acceptance by Shravan can be depended on, it is clear that the adoption is valid. This is not disputed by the appellant's learned counsel. It is however contended that the evidence on which the finding of the lower Court is based is vague, discrepant, and insufficient to prove that Shravan himself adopted the boy or gave his widows directions to perform the social and religious ceremonies or that he said that Shamrao alone should be adopted. It is argued that though the pleadings state that defendant 3 alone was to be adopted, no evidence has been adduced to show that the adoption of any other boy was prohibited. In para. 3 of their written statement of

(1) [1882] 5 Mad. 358.

(2) [1880] 5 Cal. 770=7 I. A. 24 (P. O.).

26th November 1913, defendants 2 and 3 said that

"Shravan stated in distinct terms that he wanted the boy Shamrao and no other to be his adopted son."

The same is stated in Shravan's deed of adoption, Ex. 2, D-1. Their advocate's statement of 16th February 1914 shows what was really meant by this plea, viz.

"that the mere expression of his wishes by Shravan that Shamrao should be adopted by his widows was such a specific authority to adopt as could permit the adoption of defendant 3 only and debarred defendant 1 from adopting the plaintiff."

If the evidence of the defendants can be believed, and it is not held that Shravan himself actually took the boy in adoption, it is clear that he specified the boy to be adopted. It seems the husband's directions in such a case must be followed and that except in a case governed by the Bombay School of law an authority to adopt a specified boy cannot be exercised with respect to any other boy. The Maharashtra School, which permits an adoption without the express consent of the husband, holds that where a husband authorizing an adoption specifies the child he wishes to be taken and that child dies or is refused by his parents, the authority given warrants the adoption of another child; the presumption being that the husband desired an adoption and by specifying the object merely indicated a preference: *Lakshmi-bai v. Kajari* (3). The question whether the junior widow may adopt without the consent of the senior if the latter refused to adopt will be discussed later. The fact that the exact date of Shamrao's adoption was not given in the pleadings nor yet in his adoption deed shows, it is argued, that the date the witnesses now depose to was determined during the trial. There is little weight in this contention. If it was essential for the appellant to get the exact date before framing of the issues, the matter should have been pressed and the Court would doubtless have seen that it was brought on record. The omission to give the exact date in the pleadings does not really justify a conclusion that the evidence as to the incidents of 24th December 1912 is false. The plaintiff was given an opportunity on 5th October 1914 of calling rebutting evidence. The time of the alleged adoption by Shravan

had then been disclosed by defendants' witnesses and plaintiff did in fact examine one witness (P. W. 19) to show that no people had assembled at Shravan's house that Thursday. It seems to us obvious that the appellant has in no way been prejudiced by the failure of the defendants to state in their pleading the exact date of Shamrao's adoption.

The evidence of D. W. 1, Jodram, is objected to on the ground that he has gone through the insolvency Court, but this fact alone seems to us to furnish no adequate reason for disbelieving him. There is no presumption that a bankrupt is necessarily untruthful. We cannot disregard his evidence on this ground alone. His statement that Ganoba went to fetch the boy is contradicted by the testimony of D. W. 14, who states that the boy was brought there by Chintaman. D. Ws. 3, 4, 9 and 13 however confirm Motiram's story. Ganoba himself merely says that the boy was sent for D. W. 7, Ramrakh and D. W. 8, Ramdhan speak to the four Marwari witnesses going to and coming back from Shravan's house together. One of them, D. W. 6, however says he got thereafter the other three. D. W. 2, Sheolal, one of these witnesses, says he was there for a quarter of an hour. D. W. 6, Asaram, states that he remained there for two or three hours. D. W. 7 puts the time at 20 minutes and D. W. 8, at half an hour. There is also some variance in their statements. Sheolal states that Shravan did not adopt anybody, but said that he wanted to adopt Ganoba's son and also says that Shravan did not mention which of his two wives was to adopt him. D. W. 6, Asaram, says that Shravan declared that he, as it were, adopted Ganoo Patel's son Shamrao. Ganoba gave the boy to Shravan and Shravan said that if he recovered, he would adopt him and go through the ceremony and if he did not recover, he wished his widows to adopt him. Ganoba in their presence said that he gave his son in adoption to Shravan and the boy was sent for and made to sit near him. Ramrakh D. W. 7 testifies to Shravan's telling them that he had adopted Shamrao, though the witness does not know if any actual adoption ceremony took place. He says that when Shravan said that he adopted Shamrao, Ganoba replied that he gave the boy in adoption. The last Marwari witness

Ramdhani, D. W. 8, speaks to Shravan saying that he adopted Ganoo Patel's son Shamrao and Ganoo accepted it. He admits that he knows nothing of the actual adoption.

It is noticeable that none of these Marwari witnesses speaks in clear terms to the actual giving and taking and it seems to us that their testimony only shows an expressed intention on Shravan's part to adopt the boy. Sheolal, according to D. W. 7, is Ganoba's banker. Yet the old man clearly states that Shravan did not adopt anybody but told his wives that they should adopt Ganoba's son. The statement of D. W. 6, Asaram, shows that Shravan said that if he recovered he would adopt Shamrao and go through the ceremony or in the event of his death he wished his widows to adopt him. These witnesses seem to us, as outsiders, to be more reliable than the others who are called to prove the actual giving and taking of the boy. The following witnesses who speak to the boy being actually given to Shravanji are related to, or are interested in, the defendants' case viz. D. W. 3, the father of Jana Bai, D. W. 4 whose sister is married to Ganoba's cousin, D. W. 5 who admits that D. W. 3 is his paternal uncle, D. W. 16 the defendant, D. W. 17 a relative of the family, and D. W. 19 Ganoba.

It seems to us that all defendants' evidence can really be held to prove is that Shravan on the day in question expressed his intention to adopt Shamrao, should he survive and that he told his widows in the event of his death they should adopt him. We are unable to find that there was any actual giving and taking in Shravan's lifetime. The fact that Shravan expressed his desire that a son should be adopted to him can be inferred from the recital in plaintiff's adoption deed (Ex. P. 1), where Savitri says :

"I have approved you as my adopted son and have taken you in adoption as directed by my husband."

It is remarkable that witness after witness for the defence stated that Shravan said that if he lived he would adopt the boy but that if he died his widows should do so. This seems to us to show fairly clearly that Shravan himself, though the boy may have been sent for, did not think that any adoption had taken place. Among these people it is customary for both the secular and religious ceremonies of adop-

tion to be performed on the same day, the adoption then being evidenced by a registered deed.

The fact that after Shamrao's adoption by Jana Bai and plaintiff's adoption by Savitri, the two widows agreed to partition their husband's estate points strongly to no adoption having taken place during Shravan's lifetime; for if, as alleged, it had taken place and Shamrao was at Shravan's death his adopted son, it is not likely that Jana Bai would have agreed to half of the estate going to her co-widow. Her doing so later may well be due to doubts if an adoption by the junior widow was valid. We think that defendants have taken advantage of the fact that though Savitri herself was present on 24th December, yet she had none of her relatives or friends there to support her, and knowing that it would be difficult for Savitri to obtain evidence as to the happenings on that day, have exaggerated what did occur and tried to show that Shravan's directions as to the adoption of the boy by his widows were preceded by the actual giving and taking of the boy.

Though for the reasons we have stated we are unable to accept the defence story in its entirety, we think that the evidence adduced does show that people were sent for and that in their presence Shravan told his widows that if he lived he intended to adopt Shamrao and that if he died the senior widow should do so; and in the event of her failing, the junior widow should carry out his wishes. It is noticeable that none of the four Marwari witnesses state that the deceased said that in the event of the senior widow failing to adopt Shamrao, Jana Bai should do so. D. W. 2, Sheolal, says that Shravan told his wife that he wanted to adopt Shamrao but said nothing as to which of the two widows was to adopt him. D. W. 6 Asaram states that Shravan expressed his wish that his widows should adopt that boy. D. Ws. 7 and 8 say that nothing was said as to who was to perform the actual ceremony. On the other hand the following witnesses, D. Ws. 1, 3, 4, 5, 9, 11, 13, 14, 15, 16, 17 and 19, are unanimous in stating that Shravan's directions to his wives were that the elder was to adopt Shamrao and that on failing to do so Jana Bai, the junior widow, should adopt the boy.

We have held it proved that Shraman did as a matter of fact direct that Shamrao should be adopted. It is possible that he anticipated that there might be opposition to his wishes from the senior wife as to the adoption of the boy; in which case it is not unnatural that he gave the directions deposed to. If he had made up his mind that this boy was to be adopted, his directions would naturally be such as to ensure obedience to his wishes. We are prepared to accept this volume of evidence as proving that Shraman did say that if Savitri Bai did not adopt the boy, Jana Bai was to do so. His further directions that in case either of the widows did not pull on with the boy each was to be given 12 tipthans of land are, in our opinion, also proved. We have no hesitation in finding that the boy was adopted by Jana Bai on 9th February 1913. D. W. 1, 3, 4, 5, 9, 11, 13, 14, 15, 16 & 19 prove this to our satisfaction. They show that Jana Bai was determined, doubtless under the influence of her father and Ganoba, to go through the ceremony of adoption after the elder widow refused to. The evidence shows that she was present, that she was asked to adopt Shamrao, and that on her refusal the boy was put on the lap of Jana Bai who adopted him to her late husband. It is clear that immediately after this Savitri left the house and proceeded to Amraoti, where on the 11th the ceremony of plaintiff's adoption was gone through. It has been proved that Shamrao's adoption deed was then executed and presented for registration at Asegon on 11th February.

We have now to consider the legality of Jana Bai's adoption of Shamrao. It has been held that when permission to adopt is given to widows severally, the elder woman and on her refusal, the younger can adopt: *Ranjit Lal Karmarkar v. Dejoy Krishna Karmarkar* (4) and *Mondarkini Dasi v. Adinath Dey* (5). Following these cases, we think that on the refusal of Savitri to adopt Shamrao, the younger widow was entitled to do so and that the adoption divested the estate that was in the elder widow, whose subsequent adoption of the plaintiff is invalid. A power must be strictly construed and we find that Jana Bai did act strictly in accordance with the power given by her husband.

(4) [1912] 39 Cal. 582 = 14 I. C. 17.

(5) [1891] 18 Cal. 69.

It is no part of the appellant's case in this Court that Jana Bai was a minor on the 9th February 1913. We, therefore, do not enter into that question, nor is it necessary for the purposes of this appeal to discuss the other matters decided by the lower Court. The result is that this appeal fails and is dismissed with costs.

P.N.R.F.

Appeal dismissed.

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PRIDEAUX, A. J. C.

Nanakram—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 92 of 1917, Decided on 15th August 1917 from revision of Sessions Judge, Nerbudda, Division D. 12th May 1917, in criminal Appeal No. 64 of 1917.

(a) Criminal P. C. (1898), S. 476 — Order under, is not complaint.

An order under S. 476 is not a complaint.

[P 60 C 2]

(b) Criminal P. C. (1898), Ss. 476 and 195 — Case sent to Magistrate under S. 476 — S. 195 cannot apply for order under S. 476 is not sanction.

The provisions of S. 195 (5), Criminal P. C., only apply when a Court has, on the application of some person, sanctioned the trial of any of the offences named in S. 195 and cannot apply to a case sent to a Magistrate under S. 476, Criminal P. C., for an order under the latter section is not a sanction.

[P 60 C 2]

(c) Criminal P. C. (1898), S. 195 — Want of sanction does not vitiate trial— But want of complaint under S. 195 is fatal.

Though want of sanction under S. 195 may not vitiate a trial, yet where there has been no complaint under S. 195 as regards the offence of which the applicant has been found guilty, the absence of a complaint is not a mere irregularity but is fatal to the trial.

[P 61 C 1]

M. Gupta and Gangadhar Sitaram — for Applicant.

G. P. Dick — for the Crown.

Order.—One Seth Kunjal Deochand whose munim the present applicant Nanakram is, filed Suit No. 71 of 1915 in the Court of the Sub-Judge, Khandwa, against Sandoo and others for the recovery of Rs. 2,000 on a mortgage deed, dated 23rd February 1903, said to have been executed by Sandoo. The original mortgage deed was said to be lost, but was subsequently found to have been filed in the record of Suit No. 813 of 1905 filed by the same plaintiff against Sandoo in the Court of the Munsif, Burhanpur. Nanakram, who had been examined as a witness, stated in it that no payment was made towards the debt

of the suit; but when shown the bond, Ex. P-10, was forced to admit that Rs. 154 had been paid towards the debt. Nanakram had also stated that there was no separate khata of the mortgage-debt in the account-books kept by him; but it is shown that for the years Samvat 1959 to 1962 there was such a separate khata. The result of the proceedings instituted under S. 476 was that the Sub-Judge considered that Nanakram had committed offences under Ss. 193 and 463, I. P. C., and he laid complaint in the Court of the First Class Magistrate. The concluding portion of his order runs:

"I hence order the prosecution of the accused Nanakram for offences under Ss. 193 and 463, I. P. C."

Nanakram thereupon applied to this Court to get that order quashed. It was dealt with as Criminal Revision No. 227 of 1916 and the application was dismissed by me on 17th October 1916. The case was tried and Nanakram was charged by the Magistrate as follows:

"That you abetted the fraudulent and dishonest filing of a plaint for Rs. 2,000 claim in the Court of the Sub-Judge, Khandwa, knowing that the claim was false in Suit 71 of 1915 and thereby committed an offence punishable under S. 209-109, I. P. C., and that in the said case you made the following statements: There is no separate khata in our account-books for the mortgage-debts in suit and that no payments had been made towards the debt in suit knowing these statements to be false."

He was charged separately under S. 193, I. P. C., in respect of each statement. The Magistrate considered that he was justified in proceeding against the accused under S. 209/109, I. P. C., and under S. 195, sub-S. (5), Criminal P. C. The trial resulted in Nanakram being acquitted on the two charges of perjury on the technical ground that the Sub-Judge has failed to read over to him his depositions and in his conviction of the offences under S. 209/109 he was awarded one year's rigorous imprisonment. In appeal the learned Sessions Judge has confirmed the conviction and sentence. Against that decision the present application for revision has been filed. The first question raised here is that as the Sub-Judge in his proceedings under S. 476 did not lay a complaint against the applicant for an offence falling under S. 209, I. P. C., the Magistrate under the provisions of S. 195, Criminal P. C., had no power to entertain it, it being one of those offences of which no

Court can take cognizance except with the previous sanction or complaint of the Court concerned or of a Court to which that Court is subordinate. There is nothing to prevent a Court fulfilling the provisions of S. 195 by making an ordinary complaint in any of the forms open to a private individual; but as a rule it should proceed, as in the present case, under S. 476 to avoid the necessity of supporting the complaint like a private individual by a statement on oath in accordance with S. 200, Criminal P. C. It seems to me that an order properly passed under S. 476 is both a complaint and more than a complaint. It is a judicial proceeding and an order of the Court, but it is not in my opinion a sanction "within the meaning of S. 195, Criminal P. C." The question before me is whether in this case there should have been a complaint with reference to the particular offence the applicant has been convicted of. The matter of the offence under this section was before the Sub-Judge as disclosed by the proceedings under S. 476, but he preferred to proceed under Ss. 193 and 463, I. P. C., against the applicant.

It is argued by the learned Standing Counsel for the Government that even if there is no complaint from the Sub-Judge as regards the offence of which the applicant has been convicted, and there is clearly no complaint as regards an offence under S. 209/109, I. P. C., yet under the provisions of S. 195 (5), Criminal P. C., the Magistrate was entitled to frame a charge under S. 209/109, I. P. C., as that offence was disclosed in the inquiry under S. 476, Criminal P. C. I am unable to accede to this proposition. In my opinion the provisions of S. 195 (5) only apply when a Court has, on the application of some person, sanctioned the trial of any of the offences named under S. 195 and cannot apply to a case sent to a Magistrate under S. 476, Criminal P. C., for an order under the latter section is not a sanction. The reason why the law apparently allows a Magistrate taking cognizance of a case started on complaint with previous sanction to frame a charge of any other offence disclosed by the facts, as long as it refers it to the offence for which the sanction was given, seems to me to be that in these cases it is difficult for the sanctioning Court to

always ascertain the exact facts or to determine exactly all the offences which may be disclosed at the trial; but when a complaint is made under S. 476 the Judge or Magistrate must move and should definitely know what offence or offences he committed. The matter becomes a public prosecution and it is the duty of the prosecution to prove the exact offence of which complaint has been made of. I must hold that in the present case no complaint was made by the Sub-Judge as regards an offence under S. 209, that no sanction for the prosecution of the applicant under that section has been obtained, and that as the matter reached the Magistrate in the form of a complaint and not as a sanction, S. 195 (5) is not applicable and under these circumstances the trial is bad in law. S. 193 distinctly states that no Court shall take cognizance of an offence under S. 209, I. P. C., when such offence is committed in or in relation to any proceedings in any Court, except with the previous sanction or on the complaint of such a Court or of some other Court to which such Court is subordinate. It is argued that allowing this to be the case, S. 537 (b) saves the conviction but as already stated there is no question of sanction in this case; the case was on a complaint.

Though want of sanction under S. 195 may not vitiate a trial, yet where there has been no complaint under S. 195 as regards the offence of which the applicant has been found guilty, the absence of a complaint is not a mere irregularity. For these reasons I must set aside the conviction and sentence passed on the applicant. I do so and cancel his bailbond.

P.N./R.K.

*Conviction set aside.***A. I. R. 1918 Nagpur 61**

PRIDEAUX, A. J. C.

Puran Singh and another—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 176 of 1917. Decided on 22nd October 1917, from order of Sess. Judge, Jabulpore, Divn. D/4th November 1916.

Criminal P. C. (5 of 1898), S. 476—Proceedings under—Notice to accused is not necessary but it should be given.

In order to validate proceedings under S. 476 notice is not legally necessary to the accused,

but it is desirable that such notice should be given more especially where the matter has not been already judicially dealt with.

(P 62 C 1)

*H. S. Gour—for Applicant.**C. B. Parakh and V. V. Chitale—for Non-Applicant.**G. P. Dick—for the Crown.*

Order.—In Civil Revision No. 316 of 1916, Stanton, A. J. C., in his order, dated 24th February 1917, held that Sheikh Abdul Rahiman, the plaintiff in the case he was dealing with, had made a false claim. He held that the receipt, dated 11th September 1914, filed by the plaintiff was a forgery and the suit that was based on it a false suit. The concluding paragraph of his judgment runs:

"I leave to the discretion of the lower Court to decide whether any action is necessary under S. 476, Criminal P. C., 1898."

On the return of the case, the Small Cause Court Judge proceeded under S. 476, Criminal P. C., and finding there was a *prima facie* case against Abdul Rahiman, Imamali, Hemnath and Puransingh, decided that they should be prosecuted and directed a complaint to be laid before the First Class Magistrate. Puransingh and Hemnath filed this application for revision against that order. After they had filed their application, Abdul Rahiman and Imamali have filed similar applications. Criminal Revisions Nos. 187 and 188 of 1917. This order will dispose of all three applications. As regards the applications of Hemnath, Imamali and Abdul Rahiman there seems to me no ground to disturb the order of the Small Cause Court Judge laying a complaint to the First Class Magistrate. This Court has found the receipt to be a forgery and the Small Cause Court Judge, on a reconsideration of the evidence before him in the case, as he explains in his answer to the Rule issued in Puransingh's case, has in his discretion determined that there is a *prima facie* case against all four applicants. There are obviously no valid grounds on which his decision to bring three out of the four applicants to trial can be challenged. I have no hesitation in dismissing the application of Hemnath and rejecting summarily the applications of Abdul Rahiman and Imamali.

In Puransingh's case it is however urged that notice was not given to him to appear and show cause before the Small Cause Court Judge passed the order

impeached in these revisions. That is so. Two attempts were made to serve Puransingh at Raipur. They failed because he is said not to live at that place, though the summons in the Small Cause Court suit was served on him there. The Small Cause Court Judge, in place of waiting and issuing a fresh notice, wrote that Puransingh's whereabouts were not correctly known and proceeded to pass his order. It is argued for Puransingh that want of notice vitiates the order. It has been held, I have no doubt correctly, that notice is on the face of the section not legally necessary: see *Ram Piari Rai v. Emperor* (1), *Baperam v. Gouri Nath Dutt* (2) and *Queen-Empress v. Matabadal* (3). But notice, although not legally necessary, is desirable, more especially where the matter has not been already judicially dealt with: *Empress v. Narotam Das* (4). Here the question, of the receipt being genuine or a forgery, had been judicially dealt with and therefore I do not think that want of notice in Puransingh's case invalidates the proceedings against him. I therefore also dismiss his application.

P.N./R.K. Application dismissed.

(1) [1912] 13 Cr. L. J. 707=16 I. C. 515.

(2) [1893] 20 Cal. 474.

(3) [1893] 15 All. 392.

(4) [1883] 6 All. 98.

A. I. R. 1918 Nagpur 62

MITTRA, A. J. C.

Govind—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 9 of 1917, Decided on 12th March 1917, against order of Sub-Div. Magistrate, Chhindwara.

(a) Police Act (1861), S. 34—"Causes" means "allows to exist"

The word "causes," as used in S. 34, is not a word of art but a word used in ordinary English meaning "allows to exist." [P 62 C 2]

(b) Police Act (1861), S. 34—Conviction for offence punishable under S. 34 is not illegal because it is also punishable under C. P. Municipal Act (1903), S. 110.

A conviction for an offence under S. 34, Police Act is not illegal merely because the act complained of also constitutes a breach of S 110, C.P. Municipal Act, and as such is punishable under that Act as well. [P 63 C 1]

(c) Criminal P. C. (1898), S. 439—Court of revision is not concerned with policy underlying enactment (*obiter*).

Obiter—A Court of revision is not concerned with the policy underlying a legislative enactment, it is only concerned with the legality of the proceedings sought to be revised. [P 62 C 2]

Atmaram Bhagwant and D. W. Kathale—for Applicant.

Order—The applicant has been convicted of an offence under S. 34, Police Act and fined Rs. 20. S. 34, Police Act Cl. 5, runs as follows :

"Any person who throws or lays down any dirt, filth, rubbish or any stones or building materials; or who constructs any cow-shed, stable, or the like; or who causes any offensive matter to run from any house, factory, dung-heap, or the like."

The Civil Surgeon noticed in the course of his inspection filth from the applicant's latrine flowing on the road. What was the cause of this has not been clearly stated in the judgment, nor anywhere on the record. From a note sent by the trying Magistrate through the District Magistrate it would appear that the cause of the offensive matter running out of the house was a bad state of repairs of the outlet, which has since been put in proper order. It is contended before me that there should have been a prosecution not under the Police Act, but under the C. P. Municipal Act, the terms of which are said to be much wider than those of the Police Act. S. 110, Municipal Act says:

"Whoever, without the written permission of the committee, causes or allows the water of any sink, sewer or cess-pool, or any other offensive matter, to flow, drain or be put upon any street or public place or into any sewer or drain not set apart for the purpose, shall be punishable with fine which may extend to twenty rupees."

It is also rightly pointed out that such a prosecution could only have been at the instance of an officer authorized by the municipal committee, and such an offence would have been compoundable. Reference has also been made to certain questions and answers in the local legislative council regarding the policy of prosecutions being left in the hands of the municipal committee, but as a Judge I am not concerned with any question of policy, but only with the legality of the proceedings sought to be revised. If the Municipal Act had been a contemporaneous Act instead of being an Act passed nearly half a century afterwards, I should have been inclined to accept the applicant's suggestion that there is a difference between "causes" and "allows". In ordinary English, a man is said to cause a thing if he allows it to exist. The word "causes" is not a term of art. S. 268, I. P. C., shows that a person may be guilty of a public nuisance by

reason of an act or an illegal omission. The offence in this case is one of public nuisance provided for by the Police Act. On this ground I can see no reason for interference. The conviction does not appear to have been based upon anything observed at the local inspection, but upon the evidence given in the case. The local inspection, on the contrary, disclosed that proper repairs had been made to the outlet of the latrine, in other words, that the nuisance had ceased, a fact so far favourable to the accused. This does not, however discredit the evidence that the nuisance did exist on a previous date.

Ground 3 does not seem to have been urged in the Court below. The applicant does not say that he reported to the municipality about the dereliction of duty on the part of the municipal scavengers. If he had done so, it might have been taken by the lower Court in mitigation of punishment. I see no reason to interfere with the sentence. The application is therefore dismissed.

P.N./R.K. Application dismissed.

A. I. R. 1918 Nagpur 63

DRAKE-BROCKMAN, J. C.

Vinayakrao Krishnarao—Defendant—
Judgment-Debtor—Appellant.

v.

Baijanath Saligram—Plaintiff—Decree-holder—Respondent.

First Appeal No. 51 of 1918, Decided on 5th December 1918, from final decree of Addl. Dist. Judge, Saugor, D/- 2nd March 1918, in Mortgage Suit No. 19 of 1910.

(a) Limitation Act (1908), S. 6—Applicability—Application to make decree absolute—Section does not apply.

Section 6 applies solely to the time for the institution of a suit or the time for an application for an execution of a decree. It does not apply to an application to make a decree absolute: 43 I. C. 870, *Foll.* [P 63 C 2]

(b) Civil P. C. (1908), O. 34, R. 6 (2)—Application for final decree is governed by Limitation Act (1908), Art. 181.

A mortgage suit remains pending until a final decree is passed. An application for a final decree in a mortgage suit is governed by the Code of Civil Procedure and is therefore subject to the limitation prescribed by Art. 181: 33 I. C. 496, and 29 I. C. 142, *Foll.* [P 63 C 2; P 61 C 1]

D. T. Mangalmoorthy—for Appellant.

G. L. Subhedar—for Respondent.

Judgment.—The facts of the case out of which this appeal arises may be briefly stated. The plaintiff, who was then

a minor, obtained on 19th October 1910 a preliminary decree for sale of immovable property on foot of a mortgage. On 1st October 1917 he applied under R. 5(2), O. 34, Sch. 1, Civil P. C., for a final decree for sale alleging that he had reached the age of 18 on 30th September 1917. The 30th September 1917 was a Sunday. The mortgagor did not oppose the application but the present appellant, who purchased the mortgaged property pendente lite, contended that the plaintiff attained majority in June 1914 and that in any case the application was time barred, S. 6, Lim. Act, 1908, having no application. The lower Court found on the evidence adduced by the plaintiff that he was born on 1st October 1896, and this conclusion is now accepted by the appellant though impeached in one of the grounds of appeal. The learned Additional District Judge held also that S. 6, Lim. Act, which he wrongly cited as S. 7, applies to applications generally and is not confined to applications for execution of decrees. From the fact that *Maharaj Kumar Guneshwar Singh v. Jogadhatri Pershad Narain Singh* (1), a case decided in 1898, was cited in support of this conclusion as well as from the citation of S. 7, it appears that the Judge had not before him a copy of the Limitation Act (9 of 1908) now in force.

The plaintiff having obtained a final decree for sale, the purchaser of the mortgaged property has preferred this appeal. That S. 6, Lim. Act, will not help the plaintiff-respondent is conceded on his behalf by his learned advocate and there is clear authority against the view taken by the lower Court in *Nizam-ud-din Shah v. Bohra Bhim Sen* (2), where it was pointed out that the section applies solely to the time for the institution of a suit or the time for an application for the execution of a decree. The appellant contends on the authority of *Digamber v. Ganpat* (3), *Nizam-ud-din Shah v. Bohra Bhim Sen* (2), above cited, and *Lakshmi Achi v. Subbarama Aiyar* (4) that a mortgage suit remains pending until a final decree is passed and that the application for a final decree, being governed by the Code of Civil

(1) [1899] 3 C. W. N. 23.

(2) [1918] 40 All. 203=43 I. C. 870.

(3) [1916] 12 N. L. R. 50=33 I. C. 496.

(4) [1915] 39 Mad. 488=29 I. C. 142.

Procedure, is subject to the limitation prescribed by Art. 181, Limitation Schedule now in force. For the respondent reliance is placed upon *Madhab Moni Dasi v. Pamela Lambert* (5), where it was held that Art. 181 does not govern an application for an order absolute under R. 3, O. 34. The case however must be distinguished on the ground that the preliminary decree for foreclosure was obtained before the present Code of Civil Procedure came into operation. As pointed out by Jenkins, C. J., in *Amolak Chand v. Sharat Chandra* (6), the Judges expressly refrained from deciding that the present Code applied and in fact treated the case as not falling under that Code by directing that an order absolute should be made.

Before the Code of 1908 came into force, the Calcutta High Court had long held that there was no period of limitation within which a mortgagee was bound to apply for an order absolute for sale in a suit brought for sale of the mortgaged property. The ratio decidendi was that the application was one to obtain a supplementary decree, that the general Art. (178 now 181) was the only article that could possibly be applied and that the said article applied only to applications under the Code of Civil Procedure. A similar view prevailed in this Court: see *Tallappa v. Dattu* (7) and *Jaka v. Jamna* (8). This view however is no longer tenable after the decisions of the Privy Council in *Batuk Nath v. Munni Dei* (9), *Abdul Majid v. Jawahir Lal* (10) and *Munna Lal Parruck v. Sarat Chunder Mukerji* (11). Their Lordships of the Judicial Committee have plainly approved of the position taken by the Allahabad High Court that an application for an order absolute for foreclosure or sale under the Transfer of Property Act was an application to execute or enforce the conditional decree and that the period of limitation was therefore three years from the date of the decree. The conflict of decisions above men-

tioned has now been removed by transferring to the Civil Procedure Code the provisions relating to mortgage decrees and by laying down that what follows the first decree is not an order for sale or foreclosure but a decree for sale or foreclosure. Such an application as that in the present case is therefore not one for execution of the first decree and consequently neither Art. 182 of the Limitation Schedule nor S. 6, Lim. Act. applies. That Art. 181 is applicable was held in *Madho Ram v. Nihal Singh* (12) and *Ramji Lal v. Karan Singh* (13).

The view I have taken is in accord with that of a Bench of this Court in *Chunnilal v. Tikamdas* (14), where it is held that the limitation for an application under R. 6, O. 34, is that prescribed by Art. 181. The appeal succeeds, the final decree for sale passed by the lower Court is set aside and the application for such a decree is dismissed. The appellant will pay the costs incurred by the respondent for translating documents, as the translations were required in connexion with the ground of appeal, which contest the finding that the respondent did not attain majority till 1st October 1914. The other costs in this Court will be borne by the respondent. The appellant will pay the costs incurred by the respondent for witnesses in the lower Court, but all the other costs in that Court will be paid by the respondent.

P.N./R.K.

Appeal accepted.

(12) [1915] 39 All. 21=30 I. C. 491.

(13) [1917] 39 All. 532=40 I. C. 424.

(14) [1917] 13 N. L. R. 76=39 I. C. 854.

A. I. R. 1918 Nagpur 64

MITTRA, A. J. C.

Maharaj Singh—Accused—Applicant.
v.

Emperor—Opposite Party.

Criminal Revn. No. 54 of 1917, Decided on 3rd May 1917, against judgment of Sess. Judge, Raipur, D/- 10th March 1917.

(a) Penal Code (1860), S. 147—Rioting—Charge not specifying common object of unlawful assembly—Accused not prejudiced—Irregularity is cured by Criminal P. C. (1898), S. 537.

An accused person is entitled to know what he is being charged with. Where a person is constructively made liable for the acts of another under S. 147, it is especially necessary to set out in the charge the common object of the assembly. But if the absence of particulars regarding the common object does not prejudice the accused in their defence the irregularity would be cured by

(5) [1910] 37 Cal. 796=6 I. C. 537.

(6) [1911] 33 Cal. 913=11 I. C. 943.

(7) [1892] 5 C. P. L. R. 61.

(8) [1903] 16 C. P. L. R. 114.

(9) A. I. R. 1914 P. C. 65=23 I. C. 644=41 I. A. 104=36 All. 234 (P. C.).

(10) A. I. R. 1914 P. C. 66=23 I. C. 649=36 All. 350.

(11) [1915] 42 Cal. 776=27 I. C. 633=42 I. A. 83 (P. C.).

S. 537, and the High Court will not interfere: 11 Cal. 106, *Rel. on.* [P 65 C 1]

(b) Penal Code (1860), S. 147—Case under S. 147—Order requiring security to keep peace is not enhancement of sentence—Criminal P. C. (1898), Ss. 423 (1) (b) and 106 (3).

In dealing with a case under S. 147, I. P. C., an appellate Court is expressly empowered to pass an order under S. 106 (3) requiring security to keep the peace from the appellants. The making of such an order does not amount to enhancing the sentence. [P 65 C 2]

S. Y. Deshmukh—for Applicant.

Order.—This is an application by Maharaj Singh for revision of a sentence passed under S. 147, I. P. C., and upheld on appeal by the Sessions Judge, Chhat-tisgarh Division. The first point urged before me is that the conviction is bad inasmuch as the charge did not set out the common object of the unlawful assembly. According to the findings arrived at by the Courts below, the common object was to assault the complainant Baliram for reasons which are given in those judgments. The learned Sessions Judge has rightly held that the absence of particulars regarding the common object did not prejudice the accused in their defence. In other words they knew from the prosecution evidence what was being made out against them. The finding is that Maharaj Singh was the ring-leader of the party opposed to the complainant and took an actual part in the riot by ordering the accused to beat the complainant. There are three other petitions before me, and I may mention that none of these people have been in any way prejudiced in their defence. They also seem to be active participants in the assault and not merely persons present at an unlawful assembly.

The cases cited before me can be distinguished easily. *Behari Mahton v. Queen-Emress* (1) lays down a sound rule that an accused person is entitled to know clearly what he is being charged with and where a person is constructively made liable for the acts of another it is especially necessary to set out in the charge the common object of the assembly. I am prepared to concede that there are cases and there may be cases where an accused person is seriously prejudiced if the charge is defective. In the present case however nothing of the kind has happened. *Sabir v. Queen-Emress* (2)

is a case of a trial by jury, and it was held that where a Sessions Judge in his charge to the jury referred to two possible common objects of an unlawful assembly, one of which only had been set out in the charge, it was impossible to say which view had been accepted by the jury. The case cannot apply here where there was no trial by jury. Lastly *Poresh Nath Sinar v. Emperor* (3) is relied upon for the applicant. The facts of the case were somewhat peculiar. The petitioners before the High Court had been already put in possession of some land in certain proceedings under S. 145, Criminal P. C., and it was not clear whether the dispute related according to the charge to the land so put in possession or to the land excluded from the order of the Magistrate. I held that S. 537 cures the irregularity. It is urged that the accused should not have been called upon to pay costs for recalling prosecution witnesses for examination. This is admitted by the learned Sessions Judge to be correct, but he points out the reason for giving up *Dabalu* was not the demand for costs, but the fact that several attempts were made to have him summoned and he could not be got. This is a complete answer to this ground.

It is urged that the learned Sessions Judge has practically enhanced the sentence by passing an order under S. 106 (3), Criminal P. C., requiring security to keep the peace from the applicants. No authority in support of this view has been cited nor do I know of any. It is a power expressly conferred on an appellate Court. On the merits of the order, I can find no ground for interference, especially as the security has been furnished as I understand. On the merits of the case the learned Sessions Judge has very carefully gone into the evidence and has arrived at conclusions which are unassailable in revision. The application is therefore dismissed.

P. N. R. K. *Application dismissed.*

(3) [1906] 33 Cal. 295=2 Cr. L. J. 153.

A. I. R. 1918 Nagpur 65

DRAKE-BROCKMAN, J. C.

Rajaram—Applicant.

v.

Kunjilal—Non-Applicant.

Criminal Revu. No. 19 of 1917, Decided on 6th March 1917.

(1) [1885] 11 Cal. 106.

(2) [1895] 22 Cal. 276.

Criminal P. C. (1898), S. 520—Order passed in favour of person should not be set aside behind his back.

Although S. 520 does not prescribe the issue of notice to any person before an order under that section is passed, yet it is a general principle of law that an order duly passed by a competent authority in favour of any person should not be set aside without that person being heard: 35 Bom. 253, *Foll.* [P 66 C 1]

H. S. Gour—for Applicant.

G. P. Dick—for Non-Applicant.

Order.—The order of the Sessions Judge in this matter is not supported either by the learned standing counsel for the Crown or by the non-applicant's pleaders. It was passed without hearing the present applicant, to whom at the close of the non-applicant's prosecution for criminal breach of trust the property in dispute was delivered with the non-applicant's consent. The prosecution in fact was only withdrawn by the police because the non-applicant professed his readiness to allow the property to be so delivered. It is true that S. 520, Criminal P. C., does not prescribe the issue of a notice to any person before an order under that section is passed. But it is a general principle of law that an order duly passed by competent authority in favour of any person should not be set aside without that person being heard. If particular authority is required to support this proposition, I would refer to *Laxman Rangu, In re* (1). The Sessions Judge's order is set aside and he will now proceed to dispose of the application made to him under S. 520, Criminal P. C., after giving notice thereof and of the date fixed for hearing to Mt. Raj-rani.

P.N./R.K. *Order set aside.*

(1) [1911] 35 Bom. 253=12 Cr. L. J. 169=9 I. C. 947.

A. I. R. 1918 Nagpur 66

MITRA, OFFG. A. J. C.

Komalsingh—Plaintiff—Decree-holder—Appellant.

v.

Jagannath Muratsingh and others—Defendants—Judgment-debtors—Respondents.

Second Appeal No. 340 of 1915, Decided on 12th September 1916, from order of Divl. Judge, Hoshangabad, Nerbada Dn., in Misc. Appeal No. 3 of 1915, D/- 13th March 1915.

(a) Civil P. C. (1908), S. 148—Executing Court cannot extend time for payment.

Section 148 does not empower an executing Court to extend the time fixed for the payment of a decretal amount. [P 66 C 2]

Time can be extended under that section only when a period is fixed for the doing of any act prescribed or allowed by the Civil Procedure Code, and not by a decree: 3 I. C. 497; 14 I. C. 240; 17 I. C. 912 and 31 I. C. 240, *Foll.*

[P 67 C 1]

(b) Civil P. C. (1908), S. 151—Executing Court cannot alter decree.

Section 151 is not meant to empower an executing Court to alter a decree or in any way to affect its finality. [P 67 C 2]

(c) C. P. Land Revenue Act (1881), S. 65 (a), Sub-S. 7—S. 65 (a), Sub-S. 7 recognises validity of agreement providing for re-entry of landlord on default of payment of theka jama.

Section 65 (a), sub-S 7 though not expressly providing for ejectment on the ground of a thekadar's failure to pay the theka jama, recognises the validity of an agreement providing for the re-entry of the landlord on default of the theka jama. [P 67 C 1]

F. W. Dillon and M. R. Dixit—for Appellant.

Bipin Krishna Bose—for Respondents.

Judgment.—The plaintiff-appellant is the superior proprietor of a village of which the defendant is a thekadar with protected status. On 15th May 1914 a decree was passed for arrears of rent, which provided that on failure to pay the amount on or before 11th November 1914, the defendants were to be ejected. The decretal amount was not paid and the plaintiff-appellant was put in possession of the village on 15th January 1915. On 19th January 1915 the defendants deposited Rs. 2,500, which was a few rupees short of the decretal amount, and asked that the time should be extended and they should be restored to possession. The first Court refused to do so. Against this order there was an appeal to the Divisional Judge, who remanded the case for an inquiry as to whether there was sufficient cause for the delay in payment. The plaintiff-appellant has filed this appeal against the order of remand.

The first point for consideration is whether S. 148, Civil P. C., empowers an executing Court to extend the time fixed for payment of the decretal amount. There is nothing in the language or the position of the section in the Code, which would make it inapplicable to an executing Court, if the condition required by the section is otherwise fulfilled. That section enables a Court to enlarge time, even though the period originally

fixed may have expired. But time can be enlarged only when a period is fixed for the doing of any act prescribed or allowed by the Civil Procedure Code. It does not, in my opinion, apply to a case where time is fixed by a decree. The act which has to be done must be an act or a duty imposed by the Code itself and not by a decree under the Code. The following cases support the view which I have taken: *Jug Ram v. Jema Ram* (1), *Het Singh v. Tika Ram* (2), *Suranjan Singh v. Ram Bahad Lal* (3), *Suranjan Singh v. Ram Bahad Lal* (4) and *Dharmaraja Iyer v. Sreenivasa Mudaliar* (5). In *Suranjan Singh v. Rambahad Lal* (3) Charnier, C. J., points out that the same view has been accepted by Reil, C. J., in *Hukam Chand v. Hayat* (6) and by Messrs. Evans and Piggott in *Narendra Bahadur Singh v. Ajudhya Prasad* (7). It has been argued before me that although the payment of money is not prescribed by the Code, it is allowed by the Code, and O. 21, R. 1, is referred to. But that order merely provides for paying money under a decree. It is the decree however which creates the duty of paying the money. The words "not prescribed" refer to a duty and the words "not allowed" refer to a privilege created by the Code. The payment of decretal money is not therefore an act such as is contemplated by S. 148. I therefore agree with the appellant that the Courts below have no power under S. 148 to extend the time fixed by the decree.

It is urged for the respondents that the decree for ejectment was illegal, as there is no Statute applicable to the case which provides for such ejectment. S. 65 (a), sub-S. 7, Land Revenue Act, however, though not expressly providing for ejectment on the ground that the thekadar has failed to pay the theka jama, recognises the validity of an agreement providing for the re entry of the landlord on default of payment of theka jama. The defendants did not contest the claim for ejectment, and it is not possible to say whether there was such an agreement between the parties or not. It is next urged that the decree

in this case should be regarded as a consent decree and relief against forfeiture granted on the principle recognised in a number of cases: *Krishna Bai v. Hari Govind* (8), *Nagappa v. Venkat Rao* (9) and *Balamhat Karjibhat v. Vinayak Ganpatrao* (10). These cases however proceed upon the view that a consent decree is merely the adoption of a contract with all the incidents of that contract. In the present case, there was no consent decree, but it is argued that as the defendant did not raise any objection to the relief for ejectment, they must be deemed to have consented to it. I can find no warrant for such a presumption. The failure to raise the plea is consistent with the existence of a contract providing for such ejectment.

Lastly it is urged for the respondents that this was a case for the exercise of the inherent power of the Court to enlarge time for the ends for justice under S. 151, Civil P. C. The Court passed a decree, rightly or wrongly, for ejectment against the defendants, if they failed to pay the arrears of rent within the time fixed by the Court. There was no appeal from the decree, nor was any review of that decree sought. I do not think S. 151 was meant to empower the executing Court to alter the decree, or in any way affect its finality. The case is undoubtedly a hard one, but it is my duty to give effect to the law as I understand it. The order of the lower appellate Court is reversed and that of the first Court restored. Each party will bear his own costs throughout.

P.N./R.K.

Appeal allowed.

(8) [1907] 31 Bom. 15.

(9) [1901] 24 Mad. 265.

(10) [1911] 35 Bom. 229=10 I. C. 746.

A. I. R. 1918 Nagpur 67

DRAKE-BROCKMAN, J. C. AND

PRIDEAUX, A. J. C.

Ramji—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 14 of 1915, Decided on 27th February 1915.

Penal Code (1860), Ss. 302 and 392—Murder and robbery forming one transaction—Recent unexplained possession of stolen property is presumptive evidence even on charge of murder.

In a case in which murder and robbery form part of one transaction, the recent and unexplained possession of the stolen property by the accused is not only presumptive evidence against

(1) [1900] 6 A. L. J. 617=3 I. C. 497.

(2) [1912] 34 All. 383=14 I. C. 240.

(3) [1912] 17 I. C. 912.

(4) [1913] 25 All. 592=21 I. C. 585.

(5) [1915] 39 Mad. 876=31 I. C. 240.

(6) [1912] 99 P. R. 1912=15 I. C. 911.

(7) [1910] 13 O. C. 28=5 I. C. 443.

him on the charge of robbery but is also evidence against him on the charge of murder : 13 *Mad.* 426, *Rel. on.* [P 69 C 2]

Judgment. — The appellant Ramji Mahar, aged 20 years, has been convicted and sentenced to death for the murder of Bahini Mhalin. The Assessors concurred in thinking his guilt established.

The evidence was fully recorded by the learned Sessions Judge and is exhaustively discussed in his judgment. The appellant at his own request was produced before us, so that we had the advantage of hearing his defence from his own lips. What he wishes us to believe is that Timia Dhimar (P. W. 8) was seen to murder Bahini by Bakia the nephew and Damia the son of Ramji Kunbi (P. W. 11) and that they gave this out in the village before the police arrived to investigate. Bakia and Damia will be found mentioned, towards the close of the case-diary for 23rd October last, in a statement attributed to the appellant, but not as in any way cognizant of the crime. We may say at once that we entirely discredit this story. There is no indication of it in the record of the appellant's examination by the Commissioner, Drug, nor did he tell it to the Sessions Judge. The appellant complains that he was not properly examined by the Sessions Judge, and it must be conceded that the record of that examination is not as full as it should have been. He was however defended by a pleader at the trial—indeed on 2 out of the 3 days for which the trial lasted two pleaders represented him—yet the lengthy cross-examination of Timia contains no hint that he was, to begin with, accused of the murder, nor were Bakia and Damia cited as witnesses for the defence. To the committing Magistrate Timia was mentioned by the appellant as bearing him a grudge because he had accused another Dhimar Sonia of making an indecent proposal to his wife. In the grounds of appeal the improper overtures are attributed to Timia himself, and by what is evidently a similar afterthought that person is alleged to have himself murdered Bahini.

It is proved beyond possibility of doubt that Bahini, a girl of 7, was in her parents' house at Mauza Sangam on Thursday 22nd October up to about 10 a. m., that about 4 p. m. the same day her corpse was found covered with sand

in a pit a mile from the abadi, and that she had been strangled and all her ornaments removed. The first information was laid at the Bhandara station-house at 9 p. m. by the Kotwar Kisnia (alias Pichgia), since deceased, and the Sub-Inspector Chunnial (P. W. 1) reached Sangam at 3.30 a. m. on 23rd October, being joined by the Circle Inspector (P. W. 9) at noon. The appellant was arrested at 3 p. m. and is said to have shortly afterwards given up all except two, a silver bindla and a gold nose ring, of the murdered girl's missing ornaments. The chalan was prepared on 24th October and on Monday the 26th idem the appellant was placed before the committing Magistrate. The investigation was thus completed with exceptional despatch a circumstance which tells very strongly if not conclusively, against any theory that evidence was fabricated. We would also observe that the Kotwar Kisnia, who was the appellant's uncle and lived on the same premises as the appellant's father, would in all probability have named Timia as the murderer in the first information had Bakia and Damia denounced him as the appellant now asserts.

Looked at in the light of these considerations, the evidence of Bahini's parents Dina (P. W. 4) and Jhega (P. W. 5), her sister, Maini (P. W. 6) and the little girl Sokri (P. W. 7) satisfies us, that the appellant seized a favourable opportunity of taking Bahini to the jungle on the pretext of giving her sitaphal from the trees of which his family had a theka and that he turned Jhega back from the jungle on her going thither in search of the child. He was staying for Diwali, then just over, with his father Yeshwantia, whose premises have an entrance opposite to and only a few paces from that of Dina's compound. The Sessions Judge writes that Sokri answered his questions fairly intelligently and that Jhega is a simple woman. Nor is there any suggestion that either Dina or Jhega has anything to gain by falsely accusing the appellant, who indeed appears to have been on friendly terms with the family. The appellant denies that he went to Dina's house at all on 22nd October, just as he denies that he went with Bahini to the jungle and gave up her ornaments. To the committing Magistrate he said he went to the jungle

early that morning to watch the sitaphal crop which was already ripe, while in this Court he declared that he must have been back at home at the time the murder seem to have been committed: both of these statements, if true, might surely had been supported by evidence, especially as a next door neighbour would be likely to show himself or be referred to as soon as active inquiry for the missing child began to be made.

With regard to Tima, we think like the Sessions Judge that no sufficient reason for disbelieving him appears. It is not likely that Bahini found her way to the jungle alone or that a man and a child going there towards noon would meet or see nobody en route. Tima was asked in cross-examination about Sonia, and this is what he said:

"Sonia Dhimar is my caste-fellow. He had not made any gestures calling the accused's wife and I had no quarrel with Ramji on that account."

There remains the evidence that after being arrested the appellant undertook to give up the murdered girl's ornaments and did in fact produce all but two from a faggot of hemp twigs in his father's compound. In this Court the appellant says that the police searched the compound and so found the ornaments without any help or disclosure from him. In this connexion it is essential to bear in mind that the investigation began in the jungle, a mile from the abadi, and that the appellant was arrested in the jungle. The Circle Inspector having on the strength of a comparison between the appellant's footprints and those found in the jungle pronounced his guilt clear and undertaken to trace the stolen property in a similar way, the appellant may well have thought further concealment useless. Our experience leads us to believe that such an attitude of mind is common among ignorant criminals confronted with evidence of their guilt on the very scene of their crime. Nor can we find sufficient reason for doubting the testimony of Abdul Rashid (P. W. 10), malguzar of the neighbouring village Tiddi, to say nothing of Ramji (P. W. 11), mukaddam gomashtha of Sangam Sub-Inspector Chunilal (P. W. 1) and Circle Inspector Rachpal Singh (P. W. 9). No doubt there are discrepancies as to the entrance by which the police got into Yeshwantia's premises and whether,

while still in the jungle, the appellant did or did not mention the faggot of hemp twigs as the place where the ornaments were concealed. The former may be due to some members of the party entering one way and the rest by the other. As to the latter Ramji is the witness who said that the appellant described the place of concealment before going to the dense, and his memory seems to be hazy on the point, for he said:

"When the darogha came the accused said the ornaments are not here, I will give them, they are at home. There he did not say that the ornaments were kept in the jankaris. Nor he did say there that the ornaments were in the sank aris. He said so within the hearing of the malguzar of Tiddi."

The ornaments found in Yeshwantia's compound are clearly proved to be Bahini's. If they were put there by some one other than the appellant, that other must have been the murderer, and we altogether fail to understand why when so strong a case had been made out against the appellant he should have sacrificed so large a part of the booty. Having given all the evidence our careful consideration we consider it established beyond reasonable doubt that the appellant is himself the murderer. We do not agree with the Sessions Judge that recent possession of property taken by murder can show no more than that the possessor was either the thief or the dishonest receiver. This is manifestly a case in which murder and robbery formed part of one transaction and in such it has been held that recent and unexplained possession of the stolen property, while it would be presumptive evidence against a prisoner on the charge of robbery, would similarly be evidence against him on the charge of murder; see *Queen v. Empress v. Sami* (1). The murder was a peculiarly cold-blooded and sordid crime and we find no sort of justification for declining to confirm the sentence of death passed by the Sessions Judge. The appeal is accordingly dismissed.

P.N./R.K. *Appeal dismissed.*
(1) [1890] 18 Mad. 426.

A. I. R. 1918 Nagpur 69

PRIDEAUX, A. J. C.

Nago and others—Defendants—Appellants.

v.

Tukaram—Plaintiff—Respondent.

Second Appeal No. 215-B of 1916,
Decided on 16th November 1917.

(a) Registration Act (1908), S. 49—Unregistered deed of lease rejected—Evidence of witnesses testifying relationship of landlord and tenant between parties is admissible.

Where an unregistered deed of lease is rejected as being inadmissible as proof of a lease, there is nothing to prevent the evidence of witnesses who speak to the existence of the relationship of landlord and tenant between the parties being admitted. (P 72 C 1)

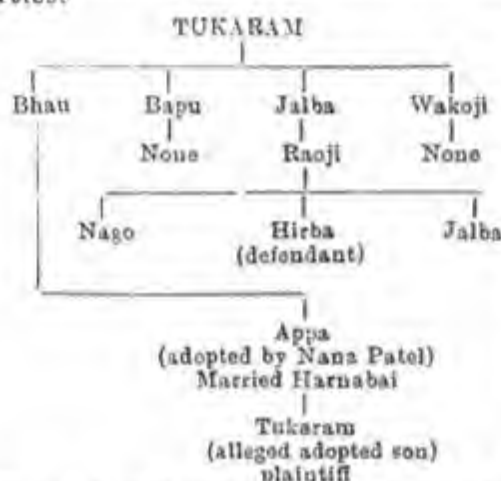
(b) Landlord and Tenant—Tenancy—Proof of.

A tenancy can be proved without proving the lease, if there be any: *A. I. R.* 1915 *Cal.* 39, *Foll.* (P 72 C 1)

M. V. Joshi—for Appellants.

G. R. Pradhan—for Respondent.

Judgment.—The following genealogical tree explains the relationship of the parties:



The plaintiff's case is that the 4 fields in suit situated at Daosari in the Pasad Taluq belonged to his grandfather Bhau, son of Tukaji Maratha, who died some 30 years ago. He says the family are separate and that Bhau's son Appa inherited the fields and cultivated them. He died in 1898 when the land came to his widow, Harnabai. Plaintiff was adopted by Harnabai. In 1901-02 Harnabai had leased the fields to Raoji, the deceased father of the present defendants. He paid the lease money till 1911, the year of his death since when the defendants have paid nothing and are cultivating the fields by force. He sues for possession. The defence is that the fields were not the self-acquired property of Bhau but were acquired by Tukaram, plaintiff's ancestor. After his death his four sons were his heirs. Bhau's son Appa was given in adoption to Nana some 40 or 50 years ago and by this adoption Appa lost all rights to the fields. After Jalba's death Raoji became the sole

owner of the land and after his death the defendants have been peacefully enjoying the fields as owners. The lease was denied and it was stated that neither Appa nor his widow ever cultivated the fields during the last 30 or 40 years. Harnabai had filed a suit against Raoji, Suit No. 27 of 1908 on the file of the Munsif, Dharwar, to recover lease-money but that suit was dismissed. Defendant 1 had filed a suit against the plaintiff, Suit No. 265 of 1912, for mutation of names and got a decree. In that suit the question of adoption of Appa by Nana was decided and it is now res judicata. They deny all knowledge of the adoption of the plaintiff by Harnabai and state that if the adoption of Appa by Nana is not proved, then the family being joint Harnabai had no right to adopt a son. It was lastly contended that as defendants have been in possession as owners for more than 12 years they had acquired a valid title to the land. In his reply plaintiff stated he held possession within 12 years of suit and that Civil Suit No. 27 of 1908 was dismissed as a result of compromise out of Court by Raoji paying the lease-money to Harnabai; that he knows nothing about the question of the adoption of Appa being decided in Suit No. 265 of 1912 and if decided, the question was incidental and could not be res judicata.

The findings of the first Court may be summarised thus: (a) Bhau was separate and the fields in suit were his self-acquired property; (b) the decision in Suit No. 265 of 1912 as regards Appa's adoption by Nana was not res judicata but that there was evidence to show that Appa was so adopted; (c) plaintiff had been adopted by Harnabai to her husband Appa and that she had a right to adopt to him; (d) after Bhau's death Appa used to manage the lands in suit and after his death his widow, Harnabai let the fields to Raoji; (e) that the lease by Raoji in favour of the lady for the years 1311 to 1319 Fasli being unregistered could not be received in evidence; (f) that there was evidence to show that rent in money or in kind was paid by Raoji to his lessor; (g) plaintiff's predecessor was found to have been in possession within 12 years of suit and defendants' possession was not adverse. The claim was decreed. On appeal the finding that the plaintiff was validly

adopted by Harnabai was not attacked and the Judge writes:

"Also in the argument it has not been disputed that Appa was given in adoption to Nana. The learned pleader for the respondent urges title of Bhau alone and also prescriptive title of Appa from 1894 and also the allotment of defendants as tenant which estops them. The property belonged to Bhau solely. If it belonged to the family and was held adversely to the family by Appa who had gone out of the family the defendants' right would be extinguished. If defendants took the land on lease from Harnabai then estoppel would work."

The Judge finds that the Bhagni Register of 1874, Ex. P. 2, showed Bhau as the owner of the fields alone and that Exs. D-10 to D-24 show that from 1899.00 to 1908.09 the assessment was paid by Harnabai, wife of Appa and from 1909.10 to 1912.13 it was paid by the plaintiff, the defendants not paying until 1913.14 (Exs. D. 25 and D. 26). The Court finds that the plaintiff's evidence established that the land belonged solely to Bhau but as Appa went out of the family by adoption, his interest in the land ceased but he continued to hold the land as his own and after him his widow did the same paying assessment and leasing out the fields; and further that this possession could not have been on behalf of the family since he was no member of it and hence it was adverse and for more than 12 years; and lastly among the lessees was Raoji, the father of the present defendants. The appeal was dismissed. Against that dismissal the present appeal has been filed.

Whether Appa's adoption by Nana is or is not *res judicata* it is unnecessary to consider, for both Courts have found the adoption proved. It is urged for the appellants that under Expl. 4, S. 11, Civil P. C., plaintiff's ownership by adverse possession on Appa's part not having been raised in the former suit could not be raised now. This question was not raised by the plaintiff in the former case, so the defendants in any case were not required to meet the issues not tended by the plaintiff. The present plaintiff then was sued as the son of Bapu. The case was *ex parte* and though an *ex parte* judgment can, of course, be *res judicata* yet in matters that travel beyond the record the principle cannot well be applied. A copy of the plaint in that suit is not on record, nor a copy of the decree. Stress is laid on the fact that Exs. D.6 to D.9, copies of the

entries in the register of right with respect to these 4 fields show that they had been placed in the names of the defendants; but though there is a presumption as to the correctness of such entries, that presumption is rebuttable and it is obvious that the Judge of the Court below has considered the evidence sufficient to show that despite these entries the defendants are not the real owners of the land. The entries in Ex. P. 2 may not be inconsistent with the defendants' case, but we would have expected the names of the other members of the family to be entered in the column headed "Extent of the share held by sub-sharer, jointness shown in fractions of a rupee." The exhibit as it stands shows that Bhau was the sole owner of those fields. It is further contended that adverse possession was never advanced either in the plaint or the pleadings; that plaintiff claimed by inheritance; and that the lower appellate Court has made out a new case for the plaintiff. The plaintiff in his plaint certainly claimed possession as the son of Appa who held as the son of Bhau. He also stated:

"Appa, son of Bhau, Patel, cultivated the said field. Appa, son of Bhau, died in the year 1898 approximately and after him his widow Harnabai cultivated the said fields as owner thereof. The plaintiff is the adopted son of Appa Patel taken in adoption by Harnabai."

But if the land belonged solely to Bhau, which is the finding of the lower appellate Court and a finding of fact, on his death it would not go to his family but to his widow, if he had one. This point has not been made clear. But even if he had a widow after her death the land would revert to the family. The objection that the pleadings did not support the case of title by prescription by Appa and Harnabai is met by the learned Judge of the Court below in para. 8 of his judgment in these words:

"But the plaint itself states this long possession and clearly means as owner. The latter statement certainly gives the basis of this ownership as the self-acquisition by Bhau and the denial of adoption of Appa. But though one part falls the other remains and the plea is that plaintiff's predecessors have been in possession as full owners for very many years past. No further plea of fact is required to show that defendants' claim would be extinguished long ago. I do not think then that this is making out a new case. The case is contained in the plaint and pleadings. But apart from that the fact Raoji himself took the land on lease shows that this ownership was admitted. The relationship of landlord and tenant was established and

cannot be denied so long as defendants remain in possession."

I think the lower appellate Court is correct. Issue 3 runs—

"Was the plaintiff and his predecessor-in-title in possession of the fields in suit as owner within 12 years before the institution of the suit?"

Under this issue plaintiff was entitled to show that he and Appa were owners either by inheritance or by prescription, and I do not think it can be said, as has been argued, that the defendants were taken by surprise and that the case of adverse possession on the part of the plaintiff and Appa and Harnabai is a new one. As regards the lease it is said that as it is not registered it cannot be admitted in evidence, nor is the evidence to prove it admissible. The lease has not been taken into account, but evidence to show that Raoji did as a matter of fact pay lease money is admissible and though the witnesses as to the lease have been rejected, there is nothing to prevent the evidence of witnesses who speak to the relationship of landlord and tenant being admitted, for a tenancy can be proved without proving the lease, if there be any; *Amir Ali v. Aykup Ali Khan* (1). The judgment in Suit No. 27 of 1908 Ex. D-4 shows that it was dismissed under S. 102, of the old Civil P. C., as the plaintiff was absent and therefore the decision in that case cannot help in this. The true facts of the case seems to me to be that Bhau was separate and the property being self-acquired on his death Appa, his natural son, was allowed to take possession after he had been given away in adoption. After Appa, Harnabai continued in possession and it was not until Raoji's death that the defendants asserted their title to the land. On a full consideration of the arguments advanced on behalf of the appellants I am of opinion that the case has been correctly decided. This appeal is therefore dismissed with costs.

P.N./R.K.

Appeal dismissed.

(1) A. I. R. 1915 Cal. 39=25 I. C. 503=41 Cal. 347.

* A. I. R. 1918 Nagpur 72

MITTRA, A. J. C.

Narainrao and others—Appellants.

v.

Fathelal and another—Respondents.

Second Appeal No. 88 of 1915, Decided on 26th September 1916.

(a) C. P. Tenancy Act (11 of 1898), S. 41—Mortgage of absolute occupancy holding—Malguzar obtaining declaration of invalidity of mortgage—Attachment of holding by malguzar in execution of money decree—Holding could not be sold free from mortgage—Interest of tenant, i. e. equity of redemption, was only saleable.

One N., an absolute occupancy tenant, mortgaged his holding to the defendants. The plaintiffs malguzars obtained a declaration that the mortgage was not binding upon them. After the death of N the plaintiffs attached the holding in execution of a money decree, not for rent but for money lent, obtained against the son of N. The defendants mortgagees filed an objection, which was successful. The plaintiffs then sued for a declaration that they were entitled to sell the holding free of the mortgage as it was not binding upon them:

Held: that the mortgage, though not binding on the plaintiffs, was binding on the tenant and that the plaintiffs decree-holders could only sell the interest of the tenant which was a mere equity of redemption. [P 73 C 1]

(b) Execution—Scope of—Auction-purchaser derives his title from judgment-debtor.

An auction-purchaser in execution of a money decree derives his title from the judgment-debtor, and not from the decree-holder. [P 73 C 1]

(c) Execution—Scope of—Auction-purchaser does not derive any right which judgment-debtor may have to set aside or question validity of deed executed by him.

There is no authority for the proposition that the purchaser at a sale in execution of a decree of the right, title and interest of the judgment-debtor acquires by that purchase not merely the right, title and interest of the judgment debtor, but any right which the judgment-creditor might have to set aside or question the validity of any deed which had been previously made by the judgment-debtor himself: 18 W. R. 39, *Rel. on.* [P 73 C 1]

M. R. Bobde—for Appellants.

V. D. Kale—for Respondents.

Judgment.—The plaintiffs are the malguzars of the village in which one Namnya Mahar was an absolute occupancy tenant. The latter mortgaged his holding to the defendants. No notice, as required by law, was given to the malguzars, nor was the mortgage consented to by them. The plaintiffs had sued the defendants and obtained a declaration that the mortgage was not binding on the plaintiffs. After the death of Namnya, the plaintiffs obtained a simple money decree, not for rent but for money lent, against his son Bajya and attached the absolute occupancy holding. An objection was then preferred by the defendants on the strength of their mortgage. The objection was allowed, and the property was ordered to be sold subject to the mortgage. The plaintiffs have

now brought a suit for declaration that, as the mortgage is not binding on them, they are entitled to sell the holding free of the defendant's mortgage. The plaintiffs have failed in both the Courts below and have now preferred this second appeal.

The contention on behalf of the appellants is that, as the mortgage cannot be enforced against them, they are entitled to have the property sold free of the incumbrance. Now the mortgage, though voidable at the instance of the plaintiff malguzars, is binding upon the tenant. The mortgage though it is sought to be enforced against the malguzars is valid until a tenant right is set up by the mortgagee or his representative-in-interest. Under S. 60, Civil P. C., the Court can attach and sell such property over which the judgment-debtor has a disposing power. The latter can only sell his equity of redemption and the Court can therefore only attach and sell such equity of redemption. If the mortgagees had made no objection, and the property had been sold, the auction-purchaser, unless the malguzars themselves purchase it, would be bound by the mortgage, for an auction-purchaser in a money decree does not derive his title from the decree-holder, but only from the judgment-debtor. The fact that the mortgagees have put in an objection and the objection has been allowed ought not to make any difference. The decree-holder's right to avoid the mortgage does not pass to the auction-purchaser. In fact it is a right inseparably connected with his title as malguzar. In *Lalla Ram Suran Lal v. Mt. Lokesh Koor* (1) it has been laid down that there is no authority for the proposition that the purchaser at a sale in execution of a decree of the right, title and interest of the judgment-debtor acquires by that purchase not merely the right, title and interest of the judgment-debtor but any right which the judgment-creditor might have to set aside or question the validity of any deed which had been previously made by the judgment-debtor himself. If the property could be sold free of incumbrances at the instance of the plaintiffs then it seems that other creditors, not being malguzars, would be entitled to share in the rateable distribution of the assets, even though the mortgage could not be questioned by such creditors.

(1) [1872] 19 W. R. 39.

All the relief to which the malguzars are entitled, until there has been a foreclosure on the mortgage, is a mere declaration that the mortgage will not bind them. Practically the plaintiffs are now asking that the mortgage should be cancelled, as if it was absolutely void and of no effect whatever.

This cannot be done. They would no doubt be entitled to eject the mortgagees when he claims to be the malguzars' tenant, but no further relief can be granted to the plaintiffs at present beyond a declaration that the defendants by virtue of the mortgage will not become the plaintiffs' tenants. It is urged that under O. 21, R. 63, the plaintiffs are entitled to establish the right which they claimed to the property in dispute. The right which they claimed was the right to bring the property to sale free of incumbrances. If the property cannot be sold free of incumbrances, they cannot succeed in a suit under O. 21, R. 63, any more than they can in execution proceedings. I think there is no force in the argument based on *res judicata*. What was held in the previous suit was that the mortgagees cannot claim to be the malguzars' tenants. This they are not doing in the present suit. The order for sale must be read as subject to the declaration already obtained by the plaintiffs in the former suit. The appeal fails and is dismissed with costs.

P.N./R.K.

Appeal dismissed.

A. I. R. 1918 Nagpur 73

PRIDEAUX, A. J. C.

Ramlal—Plaintiff—Appellant.

v.

Champabai and another—Defendants—Respondents.

Civil Misc. Appeal No. 1 of 1917, Decided on 22nd August 1917, from decree of Dist. Judge., Khandwa, in O. A. No. 83 of 1916, D/- 14th September 1916.

Civil P. C. (1908), Ss. 52 and 2 (11)—Legal representative—Executor de son is legal representative.

The term "legal representative" in S. 52, means a person who in law represents the estate of a deceased and includes any person who intermeddles with the estate of the deceased. An executor de son sort would therefore be a legal representative and liable to be brought on the record under that section on the death of a defendant. [174 C 2]

S. R. Pandit—for Appellant.

Judgment.—In this case the plaintiff sued in the Court of the Second Mun-

sif for possession of a house at Khandwa. His story was that it had been let to one Sukhnandan, now dead on 20th August 1915. Defendant 1 was said to be Sukhnandan's wife and defendant 2 a sub-lessee of defendant 1 of a portion of the premises. Defendant 1 pleaded that she was not the wife of Sukhnandan but his mistress. Plaintiff then said that in any case she came to live in the house as dependant of Sukhnandan and had no possession during the lifetime of her paramour. Other pleas were also raised which it is unnecessary at present to enter into. The first Court found that defendant 1 was a dependant of Sukhnandan and passed a decree in plaintiff's favour. In the lower appellate Court it was contended that defendant 1 was not the heir of Sukhnandan whose death extinguished the tenancy and therefore the plaint which had been valued at Rs. 18 a year as rental was insufficiently valued. It was further contended that the value of the house was Rs. 1,500 and the suit was therefore not triable by the Court of the Munsif. The lower appellate Court finds that defendant 1 could not step into Sukhnandan's shoes with reference to the continuance of the lease and that plaintiff could not enforce against her any liabilities under the lease. She was found to be a trespasser and therefore the plaint should have been stamped on the market-value of the house. This was said by the plaintiff to be Rs. 1,000 and by the defendant Rs. 1,500. The lower appellate Court has found that the case had to be remanded to determine the value of the house. It therefore directed that it be tried by a Sub-Judge.

It seems to me that in the present case the lower appellate Court would have been better advised if it had remitted an issue as to the value of the house in dispute to the original Court and on receiving a finding it could then settle whether the case had been properly tried by the Munsif. But as it has directed a remand I must consider whether the remand is justifiable. The first question for consideration is whether defendant 1 who is Sukhnandan's mistress is his legal representative. It seems clear from Exs. P-19 and P-20 that she was meddling with Sukhnandan's estate. Sukhnandan died when he had been sued in Suit No. 934 of 1912, in the Small Cause Court at

Khandwa. Defendant 1 stated in Ex. P-19 that she was Sukhnandan's widow and his heir and in possession of his property and asked that her name be substituted for that of Sukhnandan. Ex. P-20 is an affidavit in support of that application. In S. 2(11), Civil P. C., a "legal representative" is defined. It means a person who in law represents the estate of a deceased and includes any person who intermeddles with the estate of the deceased. An executor de son tort would therefore be a legal representative and liable to be brought on record on the death of a defendant under S. 52, Civil P. C. On the case as laid, defendant 1 was wrongly shown as Sukhnandan's widow, a fact which the plaintiff or the pleader's clerk must have known to be false, for she is a Gond and Sukhnandan was a Teli. Defendant 1 is shown as holding over after Sukhnandan's death. Though she was not his widow, she is as stated above his legal representative and I think the plaint was rightly stamped. It was therefore unnecessary in my opinion to remand the case to have it determined what the market-value of the house was. I therefore set aside the order of remand and direct that the appeal be disposed of on its merits. I make no order as to costs.

P.N./R.K.

Appeal allowed.

A. I. R. 1918 Nagpur 74

MITTRA, A. J. C.

Kalicharan—Plaintiff—Appellant.

v.

Lal Indar Shah—Defendant—Respondent.

Second Appeal No. 116 of 1916, Decided on 1st September 1917, from decree of Divl. Judge, Chhattisgarh Divn. D/-22nd November 1915, in Appeal No. 45 of 1915.

Registration Act (1908), S. 49—Unregistered instrument is admissible to prove collateral fact.

An unregistered instrument is admissible in evidence to prove a collateral fact, but to be collateral, the fact must be independent of or separable from the purpose to effect which the law requires registration. [P 75 C 2]

Plaintiff sued defendant for compensation for improvements effected by him as a lessee of a village under the defendant, and relied on an unregistered deed of lease containing an implied condition to compensate him for improvements:

Held: that the deed of lease was inadmissible in evidence under S. 49 inasmuch as the plaintiff sought to prove the terms of the lease

for the purpose of enforcing those terms, and not merely for a collateral purpose. [P 76 C 1]

M. B. Kinkhede—for Appellant.

D. B. Tiwari—for Respondent.

Judgment.—The plaintiff-appellant was a thekadar of the village of Hathi Kanhar within the zamindari of Ambagarh Chowki. On the expiry of a previous lease the plaintiff was given a lease for a term of three years commencing from 6th May 1908. This instrument is unregistered. The defendant-respondent, who is the zamindar, instituted Suit No. 214 for the ejectment of the plaintiff and he was duly ejected in pursuance of the decree. It was held in that suit that the plaintiff was a lessee from year to year and that his lease was determined by a notice to quit given on 7th October 1913. The plaintiff now sues for compensation for improvements made by him. He built three houses, sunk a well and made an embankment. The claim for compensation is based upon the allegation that the plaintiff was encouraged by the zamindar to make these improvements. In support of his claim he has no evidence to tender except the unregistered lease. The lower appellate Court has held the lease to be inadmissible in evidence for want of registration and has dismissed the plaintiff's claim for compensation. In second appeal it is contended that the lease should have been admitted in evidence as the plaintiff is no longer making any claim to the village. He wants to establish that the zamindar induced him to make these improvements. The lease contains a covenant not to eject the lessee in case he improved the village and there is also by implication an agreement to compensate for such improvements. The sole question is therefore whether in view of the provisions of S. 49, Registration Act the lease should have been admitted in evidence. S. 49 provides that an instrument which is compulsorily registrable shall not affect any immovable property comprised therein.

So far as this part of the provision is concerned it does not stand in the way of the plaintiff, for the plaintiff does not seek to establish a charge or other interest in the village by reason of his improvements. He merely makes a claim for compensation. But there is another part of the section which lays down that such an instrument shall not be received in evidence of any transaction affecting such

property. The expression "affecting such property" governs the word transaction and not "evidence." The contention of the appellant is that in all suits for money the instrument is receivable as evidence. This is a position which cannot be maintained. It is clear law that in a suit for rent the terms of the lease cannot be proved by putting in an unregistered deed of lease. The relationship of landlord and tenant can be proved but not the terms of the contract. As held in *Narayan Bimoi v. Jaywant Singh* (1), such an instrument is admissible to prove a collateral fact, but to be collateral, the fact must be independent of or divisible from the purpose to effect which the law requires registration. When the plaintiff says he seeks to give evidence of an encouragement on the part of the zamindar, he really means to prove an implied agreement in the lease to compensate him for improvements. This is part and parcel of the lease and the plaintiff cannot prove the terms of the lease when the lease is unregistered. A recent case decided by the High Court of Bombay and cited on behalf of appellant emphasises the distinction between the parties to a contract and proof of the terms of a contract: *Chhotatal Aditram Travadi v. Bai Mahakore* (2). None of the cases cited before me seems to have much bearing on the point for decision. In *Balaji Teli v. Mt. Bana Bai* (3) an unregistered lease was held not admissible in evidence in a suit for damages for breach of contract to retain the defendant in possession of certain lands. In *Parmanand v. Birku* (4) there was not only claim for damages but also for injunction and the unregistered document was held inadmissible in evidence.

In *Gangabisan v. Tukaram* (5) an unregistered deed of sale was held admissible in support of a claim for specific performance of a contract. The Full Bench in *Rajah of Venkatagiri v. Narayana Reddi* (6) held that in an action for damages for breach of contract to execute the lease an unregistered kabulyat was admissible in evidence to prove the contract. Upon a consideration of the cases cited before me I have come to the

(1) [1905] 1 N. L. R. 147.

(2) [1917] 41 Bom. 466=40 I. C. 83.

(3) [1905] 1 N. L. R. 47.

(4) [1903] 5 N. L. R. 21=1 I. C. 903.

(5) [1903] 5 N. L. R. 70=2 I. C. 214.

(6) [1931] 17 Mad. 456.

conclusion that the appellant is not entitled to prove the terms of the lease for the purpose of enforcing those terms. This is giving evidence of the transaction of lease, for which registration was essential. It is argued that the village is one of the Scheduled Districts and hence the Registration Act does not apply to it as no notification under the Scheduled Districts Act of 1874 has been issued, but the Registration Act of 1877 and the present Registration Act extend to the whole of British India.

"except such districts or tracts of country as the Local Government may from time to time with the previous sanction of the Governor-General in Council exclude from its operation."

There is no such notification excluding Ambagarh Chowki from the operation of the Registration Act. It is contended that some of the covenants in the lease (i. e., those relating to improvements) should be regarded as mere license, and in support of this reliance is placed upon *Narasindas v. Ratanlal* (7). I am unable to agree with this contention. The ruling cited does not apply to this case. The lease in this case was not merely a license but was meant to create an interest in immovable property. The authority to build houses was not given independently of the lease but only as part of the lease. Moreover, it was merely an agreement not to eject the lessee if he makes certain classes of improvements. I cannot therefore regard part of the lease as merely creating a license and as such not requiring registration. The appeal fails and is dismissed, but in the circumstances of the case I direct that each party will bear his own costs of the second appeal.

P.N./R.K. *Appeal dismissed.*

(7) [1918] 12 N. L. R. 75=34 I. C. 471.

A. I. R. 1918 Nagpur 76

STANYON, A. J. C.

Raisingh Chamar — Complainant — Applicant.

v.

Patia Chamar — Accused — Opposite Party.

Criminal Revn. No. 23 of 1917, Decided on 30th March 1917, on a report by Sess. Judge, Raipur, against order of Subdivl. Magistrate, Mungeli, D/- 10th November 1916, in Criminal Case No. 89 of 1916.

Criminal P. C. (1898), S. 259—Warrant case—Charge framed—Complainant absent—Dismissal in default and acquittal based upon it are illegal.

It is no part of a complainant's duty to call any witness for cross-examination or any other purpose of the defence once a charge is framed, and S. 259 gives no power to the Court to dismiss a warrant case in default after a charge has been framed. An acquittal cannot be based on a dismissal in default. [P 76 C 2]

Order.—This case has been reported by the Sessions Judge. One Rai Singh prosecuted one Patia under S. 497, I. P. C., in the Court of the Subdivisional Magistrate of Mungeli in the Bilaspur District. Process was issued against the accused on 3rd October 1916, and on the 23rd of the same month, having taken all the evidence for the prosecution the Magistrate framed a charge against the accused, and fixed 10th November 1916 for hearing the defence. On this day the order sheet sets out the procedure of the Magistrate in these words:

"The complainant appeared before me 15 minutes ago and went away from the Court saying he would fetch his pleader without caring to obtain my permission to do so. I will wait 10 minutes more.

(Sd.) N. K. HARDAS.

The complainant has not turned up though I waited for him sufficiently long. It has been found that the complainant did not take steps to recall his witnesses for being cross-examined. This default is fatal to the prosecution. The case is therefore dismissed and the accused acquitted.

(Sd.) N. K. HARDAS,
Subdivisional Magistrate."

It is disappointing to find a Subdivisional Magistrate falling into childish errors of the kind here disclosed. It was no part of the complainant's duty to call any witness for cross examination or any other purpose of the defence once the charge was framed. S. 259, Criminal P. C., gives no power to dismiss a warrant case in default after a charge has been framed. Nor does it need any citation of the authorities referred to by the learned Sessions Judge to perceive that an acquittal cannot be based on a dismissal in default. The order dismissing the case is set aside, and the Magistrate concerned, or his successor or other Magistrate appointed by the District Magistrate, is directed to resume the case from the point at which the above illegal order stopped it, subject to the provisions of S. 350, Criminal P. C., and to dispose of the same according to law.

P.N./R.K.

Order set aside.

A. I. R. 1918 Nagpur 77

BATTEN, A. J. C.

Dinbai—Defendant—Appellant.

v.

Fromroz and another—Plaintiff and
Codefendant — Respondents.

First Appeal No. 51 of 1917, Decided on 30th November 1917, against decree of Dist. Judge, Nagpur, D/- 4th April 1917, in Civil Suit No. 10 of 1916.

(a) Parsi Marriage and Divorce Act (15 of 1865), S. 17—Delegate unable to understand proceedings—Trial is not satisfactory.

No trial under the Parsi Marriage and Divorce Act can be satisfactory in which a delegate, who is to all intents and purposes a member of a jury, cannot understand the proceedings.

[P 77 C 2]
(b) Parsi Marriage and Divorce Act (15 of 1865), S. 17—Delegate cannot be challenged in appeal.

A delegate under the Parsi Marriage and Divorce Act is in a similar position to a jurymen, and cannot be challenged in appeal. [P 78 C 1]

(c) Civil P. C. (5 of 1908), O. 11, R. 21—Non-compliance with order for discovery—Penalty cannot be levied.

No penalty for non-discovery of documents, under O. 11, R. 21, can be asked for the first time after the case is closed. [P 79 C 1]

(d) Evidence Act (1 of 1872), S. 129—Statements of witnesses recorded for purpose of obtaining legal advice are privileged (O'Brien).

O'Brien.—Statements of witnesses recorded for the special purpose of being shown to a legal adviser with a view to ascertaining whether there is a good case to go to Court are privileged under S. 129. [P 79 C 1]

D. H. Binnings, P. R. Naidu and G. R. Pradhan—for Appellant.

M. V. Abhyankar, G. R. Des, G. P. Dick and P. Lobo—for Respondents.

Judgment.—This appeal is under S. 42, Parsi Marriage and Divorce Act 15 of 1865. The appellant is the defendant who was the wife of the plaintiff. The appeal is brought on the ground that there have been two substantial errors or defects in the procedure of the case which may have produced error or defect in the decision of the case upon the merits.

The first error or defect alleged is that the two of the delegates appointed under S. 17 of the Act to aid the Judge in the trial of the case were possessed of such poor knowledge of the English language that they were unable to follow such of the proceedings as were in English, and consequently could not possibly have used independent judgment in arriving at their decision on the facts. The delegates whose knowledge of English is thus attacked are Messrs. Naoraji Pallonji Talati

and Naoraji Cawasji Pavri, who number 4 and 5 in the list of delegates as given in the order sheet under the date 22nd January 1917. The whole of the proceedings of the Court were in English, except the evidence of witnesses 4, 6, 7, 8 and 9 for the plaintiff, witness 1 for the defendant and part of the evidence of witnesses 2 and 3 for the defendant and witness 2 for the co-defendant. The most important witnesses gave their evidence in English. In support of the allegation an affidavit has been put forward by the brother of the defendant appellant. His affidavit runs as follows:

"I, Minoocher, son of Manoharji Taden and brother of the appellant (Dinbai) make an oath and say that Messrs. Naoraji Pallonji Talati and Naoraji Cawasji Pavri are extremely poor in the English language."

A counter-affidavit has been put forward by the plaintiff-respondent to the effect that the above two gentlemen know English sufficiently well to have fully understood and followed the proceedings at the trial of this Court. It will be observed that the affidavit put forward by the defendant is extremely cautiously worded. It merely says that the above two gentlemen are extremely poor in the English language. It does not say that their knowledge of English was so poor as to incapacitate them from understanding the proceedings. Such an affidavit is of very little value for the person making it could not be prosecuted for perjury if the two gentlemen had any knowledge of English at all and whether they were or were not able to understand the proceedings. It is urged for the appellant that if the allegation is true, then there was a substantial defect in the procedure, for no trial can be satisfactory in which a delegate, who is to all intents and purposes a member of a jury, cannot understand the proceedings; so much I think may be conceded. It is urged on behalf of the respondent plaintiff that as the verdict of the jury, that is to say, the decision of the delegates, was unanimous, there would have been a majority in favour of the divorce even if these two persons did not understand the proceedings, and it is also urged that some of the instances of adultery which were believed by the delegates were proved by witnesses who did not speak in English. It is argued for the appellant that this will be no answer to her complaint, for it is possible that these two delegates may have been

influenced as to these particular instances by the imperfectly understood evidence as to the other instances, given in English, and that they might have influenced the rest of the delegates if on a proper consideration of the evidence they themselves had come to a different conclusion. On referring to the order sheet I find the following entry under date 22nd January 1917 :

" I select the following gentlemen as delegates to aid in the trial of the suit and the parties have no objection to their selection."

It is urged for the respondent-plaintiff that having failed to object to these delegates at the proper time, the defendant cannot challenge them now for the first time in appeal. I consider that there is overwhelming force in this objection. There is certainly no precedent for a delegate under the Parsi Marriage and Divorce Act being challenged for the first time in appeal. A delegate is in a similar position to a jurymen. But there is certainly no precedent for a jurymen being challenged for the first time in appeal. It is pressed upon me that it would be very easy by an inquiry, by or by the direction of this Court, to ascertain whether or not the two gentlemen really understood English sufficiently to understand the proceedings and that such an inquiry should be ordered. I have to consider whether a case has been made out for such an inquiry. I am of opinion that no case has been made out. It is impossible for me to believe that if the gentlemen had not understood English, the matter would not have at once been brought to the notice of the Court either by themselves or by other members of the body of delegates. The foreman of the delegates was a very experienced Barrister, Mr. Kotwal, and Sir Bezonji Mehta was one of the delegates. It is impossible to suppose that two experienced men of the world like these two would have solemnly allowed the proceedings to go on if two of the delegates did not understand English, especially as the two delegates are perfectly well known to many other members of the body of delegates. Both these gentlemen live in Nagpur. Mr. Talati is a Civil Engineer in the mills managed by Sir Bezonji Mehta and he is perfectly well known to Sir Bezonji Mehta and to his son Mr. Sorabji Mehta, who is also employed in the mills and who was one of the dele-

gates. Mr. Talati is also a close neighbour of the defendant and her brother who made the affidavit and the extent of Mr. Talati's knowledge of English cannot possibly be a new discovery. The defendant's father works under Mr. Pavri and the brother who made the affidavit lives in the same house with his father. It is not denied that his brother was present at several hearings of the case except at that part of the case which took place in camera. In the circumstances it would, in my opinion, require something much stronger than the very unsatisfactory affidavit of the appellant's brother to justify me in ordering in appeal an inquiry as to whether or not these two gentlemen understood English sufficiently to follow the proceedings. Everything must be presumed to have been done legally and according to order, and I find no *prima facie* ground for holding that this maxim is not to be followed in this case. The second alleged defect in procedure is that the learned Judge erred in submitting the case to the delegates without having before him and the delegates the written statement of the plaintiff's witnesses, which the Judge, in the course of the hearing of the suit, ordered the plaintiff to produce. In the course of his evidence, as his own first witness, the plaintiff stated that he took down the statements of some of his witnesses in writing and asked them to sign the same. He says that he did this because he wanted to send their statements to his step father to show to a good Counsel in Bombay. As a result of this admission by the plaintiff the Judge passed the following order on 31st March 1917 :

" At the request of the defence I order discovery of the written statements which the plaintiff took from his witnesses in November last. Mr. Deo (for the plaintiff) says he cannot obey this order without consulting his senior Mr. Abhyankar, who is absent to-day being ill."

There were three further hearings of the case on 2nd, 3rd and 4th April, during which days all the witnesses were examined, and on 4th April the delegates gave their findings and the Court recorded its finding on the question of law, that is to say, the Jury delivered their verdict and the Judge delivered something in the nature of a judgment. All that remained was for the Court to draw up its decree. On 5th April before the decree was drawn up and signed, the Counsel for the defendant represented that the plaintiff was

not entitled to a decree because he had not obeyed the order of the Court for the production of documents. The Judge recorded the following order:

"The order was passed some days ago, and the delegates were advised by the Court to draw certain inferences with regard to these non-produced documents. This being so and the delegates presumably having considered the Court's advice before giving their finding, I do not think that the non-production of these documents is sufficient legal ground under S. 32 of the Act, for refusing a decree."

The Judge then proceeded to draw up and sign the decree. By the word "production" of documents in this order, the Judge evidently referred to the "discovery" ordered on 31st March, for discovery and production are not technically the same thing. This point is not of importance as the documents were neither discovered nor produced. The discovery was evidently ordered under O. 11, R. 21. It is contended for the respondent-plaintiff that the defendant and co-defendant took no further action as regards the disobedience of the order until they knew that the verdict was against them. Under O. 11, R. 21, a plaintiff is liable to have his suit dismissed for want of prosecution, but a Court will not necessarily take such an extreme step. In this case the defendant and co-defendant kept silent and made no further demand for the discovery of the documents until after the verdict had been pronounced. The Court was not asked to exercise its discretion or dismiss the suit while the suit was still proceeding. I am of opinion that there was no illegality on the part of the Judge and that the appellant is to blame for her own failure to press for the production of the documents. No penalty for the non-production can be asked for the first time after the case is closed. It is urged on behalf of the respondent-plaintiff that the documents were privileged under S. 129, Evidence Act. On the other hand authorities have been cited by the learned Counsel for the appellant according to which privilege is not extended to documents of this nature.

The ruling, according to the authorities, appears to be that if the statements of the witnesses were recorded for the special purpose of being shown to the plaintiff's legal advisers with a view to ascertaining whether there was a good case to go to Court, then they would be privileged, but not otherwise. It seems

to me unnecessary to decide in this case whether the papers in question were privileged or not, since I am of opinion that the appellant, if she really wished the documents to be produced, should have pressed for their production before the evidence was relegated to the delegates for their decision. In pressing for their production after the verdict was delivered, I am of opinion that she asked too late that the Judge's order should be enforced. The appellant also asks that the alimony granted to her by the lower Court under S. 33 of the Act, should be continued pending the disposal of the appeal. In view of the ruling in *Hirabai v. Dhurghilhoj Bomanji* (1), this request has not been pressed by the learned Counsel for the appellant. For the above reasons I dismiss the appeal. The appellant asks that her costs may be paid by the co-defendant who has been made respondent to the appeal, and the respondent-plaintiff asks that the co-defendant and the defendant should pay his costs in this Court. I see no special reason why the ordinary rule in civil cases should be departed from. The plaintiff-respondent's proper course would have been to make the appellant to give security for his costs. I, therefore order that the appellant do pay her own costs and the costs of the plaintiff-respondent in this Court and that the co-defendant-respondent pay his own costs in this Court. Counsel's fees Rs. 100.

P.N./R.K.

Appeal dismissed.

(1) (1893) 17 Bom. 146.

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MITTRA, A. J. C.

Sadashivrao and others—Appellants.

v.

Baijnathpuri—Respondent.

Second Appeal No. 120 of 1917, Decided on 21st November 1917, from decree of Dist. Judge, Raipur, D/- 16th December 1916.

(a) Civil P. C. (1908), S. 11—Proceedings before Revenue Officer—Dismissal for default—Proceedings not final—Decision on default does not operate as *res judicata*.

A dismissal in default does not under the Land Revenue Act operate as a bar to the institution of fresh proceedings. It is only when a Deputy Commissioner decides to enquire into the merits of an objection raising a question of title that the Civil Procedure Code applies. The dismissal of a suit not on the merits, but for default does not operate as *res judicata*. If there is an adjudication expressly or by necessary implication,

then perhaps on general principles of law such adjudication will bar a fresh application for partition before a Revenue Officer. But omission to set up the question of title in the first application also cannot operate as *res judicata*, when the proceedings terminated in a dismissal for default. [P 80 C 2]

(b) Practise—New plea—Second appeal.

A new plea should not be allowed to be entertained for the first time in second appeal. [P 81 C 1, 2]

(c) C.P. Land Revenue Act (1881), S. 136-K—Proceedings in partition are not analogous to preliminary decree—Order is not final and not appealable.

A proceeding specifying the principles to be followed in making the partition is not analogous to a preliminary decree under the Civil Procedure Code. The order is not a final order and is not appealable. There is no appeal to the Commissioner, but the order of the Deputy Commissioner requires confirmation by the Commissioner. On completion of the partition the Deputy Commissioner submits the proceedings to the Commissioner whose sanction is essential to a final partition. [P 80 C 2]

B. K. Bose—for Appellants.

H. S. Gour and *M. Y. Shareef*—for Respondent.

Judgment.—The facts of the case are briefly as follows: The plaintiff is the recorded co-sharer to the extent of half-share in Mauza Tarponga. The defendants have purchased the remaining eight annas share from the plaintiff's brother. Since 1894-95 the plaintiff has been cultivating 41.95 acres of *sir* land, whilst his brother and after him the defendants have been holding 109.28 acres of *sir* land. This suit has been instituted in accordance with the order passed by the partitioning officer on 6th March 1916 under S. 136-G, Land Revenue Act, 1881. The order was passed in Revenue Case No. 9 of 1915-16. There was a previous application for partition (Revenue Case No. 12 of 1914-15) which after a certain stage was dismissed for nonprosecution, in consequence of the applicant's failure to deposit a certain sum of money for the expenses of the *amin*. It does not appear that any question of title was raised in these proceedings. The partitioning officer on 11th September 1915 recorded a proceeding which is said to be a proceeding by consent of parties and which is said to have been made under S. 136-K, (Ex. P-2). The present suit which is the outcome of the second application for partition asks for a decision on the question of title raised before the partitioning officer who directed the plaintiff to obtain a decision from the civil Court. The defendants pleaded a

partition between their predecessor and the plaintiff of the *sir* land in 1894. They also relied upon the order of the partitioning officer, dated 11th September 1915 (Ex. P-2) as final and operating by way of *res judicata*. There was also claim for compensation put forward by the defendants. Both the Courts below have found the alleged partition of 1894 not proved. The lower appellate Court has found that the defendants are not entitled to compensation for improvements. These findings are not and cannot be attacked in second appeal.

The first point argued before me is that second application for partition was incompetent and that it was the duty of the plaintiff to have the former proceedings restored. A dismissal in default does not under the Land Revenue Act operate as a bar to the institution of fresh proceedings. It is only when a Deputy Commissioner decides to enquire into the merits of an objection raising a question of title that the Civil Procedure Code applies. Upon the first application for partition no question of title was raised and the Deputy Commissioner therefore did not try the case in accordance with the provisions of the Civil Procedure Code. The bar created O. 9, R. 9 therefore does not apply, even if we regard the present application as based upon the same cause of action. The dismissal of a suit not on the merits, but for default does not operate in favour of the defendants as *res judicata*: *Chand Kour v. Pratap Singh* (1).

It is however contended that the order dated 11th September 1915 (Ex. P-2) is an order under S. 136-K, Land Revenue Act, 1881. It may be taken that this was a proceeding under S. 136-K though the Deputy Commissioner did not specify the lands held in severalty as required by the section.

I cannot however regard a proceeding specifying the principles to be followed in making the partition as analogous to a preliminary decree under the Civil P. C. It does not appear to be an appealable order. There is no finality attached to such an order. Under S. 136 (Q), Sub S. 2, the Deputy Commissioner may at any stage of the proceedings set aside the order of partition and order the proceedings to be quashed. On com-

(1) [1889] 16 Cal. 98=15 I. A. 156=5 Sar. 243 (P.C.).

pletion of the partition the Deputy Commissioner submits the proceedings to the Commissioner whose sanction is essential to a final partition. There is no appeal to the Commissioner, but the order of the Deputy Commissioner requires confirmation by the Commissioner. Having regard therefore to the provisions of S. 136-Q, Sub-S. 2, and the other provisions of the Land Revenue Act, 1881, I am of opinion that no final order was passed which would preclude the entertainment of a second application for partition.

It is not denied on behalf of the respondent that the proper stage for raising any question of title is the date fixed for objections to the partition by the proclamation. But it does not follow the Deputy Commissioner cannot entertain such an objection at a later stage before he is functus officio. This is made clear in S. 168 of the new Land Revenue Act (C. P. Act 2 of 1917): The Full Bench decision of the Allahabad High Court in *Muhammad Sadiq v. Dault Ram* (2) merely lays down that after a partition is complete no question of title can be entertained by the civil Court, and this view has been accepted in *Seth Birdi Chand v. Mt. Kaim Bi* (3). In *Pandit Sitawati v. Nandkishore* (4) the judgment, to which I was a party, lays down as follows:

"The provisions of the Civil Procedure Code relating to res judicata do not apply to an application before a Revenue Officer, but as pointed out by their Lordships of the Privy Council the provisions of S. 11 are not exhaustive: *Munyal Pershad Dicit v. Girija Kant Lahiri* (5) and *Ram Kripal v. Mt. Rup Kanri* (6). If there is an adjudication expressly or by necessary implication, then perhaps on general principles of law, such adjudication will bar a fresh application for partition before a Revenue officer."

Here there was no adjudication as I have already stated in reference to Ex. D-2. The omission to set up the question of title in the first application also cannot operate as res judicata when the proceedings terminated in a dismissal for default. In the lower Courts the appellants relied upon the order (Ex. D-2) as an adjudication binding upon the parties. It is now contended before me that there was an agreement come to between the parties

which should be given effect to. There was no plea based upon an agreement. The order (Ex. D-2) recites that the parties had no objection to a certain scheme for partition drawn up by the Sub-Divisional Officer with the powers of the Deputy Commissioner. The plaintiff in his deposition before the Sub-Divisional Officer stated that he had no objection to the other cosharers becoming occupancy and ordinary tenants respectively of the *sir* and *khudkasht* land which may fall into his patti of his cosharers. I cannot regard this as an agreement. Certain erroneous view of the law was suggested by the Sub-Divisional Officer to which the plaintiff raised no objection. In the present appeal the agreement is sought to be enforced with reference to the *sir*, but not with reference to the *kudkasht* land. I think this new plea of an agreement and its effect should not be allowed to be entertained for the first time in second appeal.

Lastly it is contended in argument, though this point is not taken in the grounds of appeal, that the plaintiff has admitted before the partitioning officer that the *sir* land is held in severalty. The exact words used in the vernacular for the words "held in severalty" do not appear in the deposition. The Revenue Officer recording the deposition must have had present to his mind the distinction drawn in the ruling by the Chief Commissioner between land belonging to a cosharer and land held in severalty by a cosharer in the manner noted in the Revenue Manual. The deposition further says that no land is held in exclusive right by any cosharer in the village. This admission therefore is of no avail to the appellants in the partition proceedings. The *sir* land did not belong to any cosharer within the meaning of S. 136-L, according to the admission made by the plaintiff. The plaintiff seems to have in his deposition anticipated the very wording of S. 175 of the new Land Revenue Act which gives special privileges to the holder of *sir* land as his "exclusive" property. Under S. 136-L which corresponds to S. 173 of the new Act, lands held in severalty should be left in the possession of the parties holding the same so far as this is compatible with a fair partition. In this case it is admitted that since 1894-95 the defendants have been holding a larger area of *sir* land

(2) [1907] 29 All. 231.

(3) [1901] 17 C. P. L. R. 5.

(4) F. A. No. 69 of 1916.

(5) [1892] 8 Cal. 51=3 I. A. 123=4 Sir. 2:8 (P.O.).

(6) [1881] 6 Cal. 269=11 I. A. 37 (P.O.).

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Advocate
Jammu Court

than the plaintiff. This will not prevent the partitioning officer from making a fair partition. The appeal is therefore dismissed with costs. I fix Rs. 30 as pleaders' fees in this Court.

P.N./R.K.

Appeal dismissed.

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DRAKE-BROCKMAN, J. C.

Deorao—Appellant.

v.

Ambadas and others—Respondents.

Second Appeal No. 654 of 1915, Decided on 13th December 1916, from decree of Divl. Judge, Nagpur, D/- 11th August 1915 in Appeal No. 100 of 1913.

(a) Contract Act (9 of 1872), Ss. 16 and 74—Unconscionable bargain, explained—Delay in payment making discharge of debt impossible—Bargain is not unconscionable.

A bargain is unconscionable where it is such as no man in his senses and not under delusion, would make on the one hand and as no honest and fair man would accept on the other : 2 C. P. L. R. 23, *Foll.*

This definition is not satisfied by a case where long delay in payment brings about a position where discharge of the debt is impossible, the debtor being a man of intelligence. [P 83 C 1]

(b) Civil P. C. (1908), S. 100—Whether bargain unconscionable is question of fact.

The question whether a particular bargain is unconscionable or not is a question of fact, not of law. [P 83 C 1]

(c) Civil P. C. (1908), S. 100—Question whether stipulation amounts to penalty is one of fact.

In India the question whether a particular stipulation in a contract amounts to a penalty is one of fact rather than of law : 1 N. L. B. 9, *Foll.* [P 83 C 2]

D. N. Khare—for Appellant.

P. S. Kotwal and S. K. Barlinge—for Respondents.

Judgment.—This case comes before me in second appeal for the third time. In my judgment of 14th December 1914 disposing of Second appeal No. 152 of 1914, I remanded it for a fresh decision by the lower Appellate Court directing that explicit findings should be recorded on two points, namely : (1) Whether the mortgagee Kesho Rao occupied a position enabling him to dominate the will of the mortgagor Akaji ; (2) Whether the terms of the mortgage were unconscionable. Kesho Rao was an Honorary Magistrate at the date (July 1895) of the mortgage. The Subordinate Judge considered that Akaji was shown to be a clever man and declined to believe that the position of Honorary Magistrate gave his creditor any particular influence over him. On the second point the Subordinate Judge

did not come to any explicit finding: he did however conclude that the parties dealt at arm's length with full knowledge of the terms of their bargain, that no question of penalty arises and that no equity entitling the defendants to relief exists.

The lower appellate Court duly considered the facts that Kesho Rao besides being member of a Bench of Honorary Magistrates was a local magnate, a Brahman by caste and already a creditor of Akaji. It held that in spite of these advantages Kesho Rao was not in a position to dominate Akaji's will and that the terms of the mortgage were not unconscionable. The defendant Deorao alone has appealed to this Court. It is contended firstly on his behalf that as a matter of law Kesho Rao was necessarily in a position to dominate Akaji's will. Illustration (b) S. 16, Contract Act, is cited as showing that such a question is one of law, not of mere fact. That illustration is worded thus :

"A, a man enfeebled by disease or age, is induced by B's influence over him as his medical attendant, to agree to pay B an unreasonable sum for his professional services. B employs undue influence."

I am unable to see that these words enable me to decide one way or the other on the point whether the question of power to dominate the will of another is one of fact or law. If it be conceded that the question is one of law, then I can only say that I agree with the Courts below. Akaji was himself a malguzar and lived not at Kesho Rao's town (Ashti) but at Lingapur, 5 miles away; he had other creditors and is not shown to have been in any way bound to take a further advance from Kesho Rao, while he was mentally able to look after his own interests. A member of a Bench has no independent power of dealing with complaints; even if he is authorised to sit alone it cannot be presumed that he will deal otherwise than according to law with any complaint brought before him or procure a complaint which the author would not voluntarily prefer. Qua Honorary Magistrate Kesho Rao held no authority over Akaji in the absence of any proceeding against Akaji in his Court and therefore the first branch of sub.S. (2), S. 16, Contract Act, has no application. Illus. (b) to the section is explained by the second branch of the sub-section combined with the first branch : We have

there a doctor standing as such in a confidential relation to a patient and the patient permanently affected by age.

Upon the question whether the bargain in the mortgage deed is unconscionable, it is urged for the appellant that no reasonable man could possibly contemplate the accumulation of debt a hundredfold in 21 years, much less in 12. The mortgage provides the security of 22.35 acres of land and grain is commonly advanced without any security at all. Now as to the value of the security no evidence has been given. Nearly half the area mortgaged consists of an ordinary holding, which is of course unsaleable. Again, compound dethi the rate which causes a debt to increase a hundredfold in 12 years, applies in the present case to a principal quantity of less than 2½ kuras worth only Rs. 3.5-9, and no sort of explanation is vouchsafed of the failure to return the trifling quantity of under 4 kuras at the ensuing harvest. As to the stipulation for compound sawai which applies to the great bulk of grain, we have here a very ordinary agreement recognised by the general practice of the country based on the well known fact that while grain is dear at sowing time it is much cheaper at harvest. A bargain is unconscionable where it is such as no man in his senses and not under delusion would make on the one hand and as no honest and fair man would accept on the other : see *Debi Dass v. Hanmat Singh* (1). This definition is certainly not satisfied by a case where long delay in payment brings about a position where discharge of the debt is impossible, the debtor being like Akaji a man of intelligence. Such a man can by a simple enough calculation arrive at the position which will result if for several years he makes no repayments : if Akaji is incapable of making such a calculation, one would expect to find that the appellant examined him in order to establish this point, whereas Akaji was not made a witness by any party at any stage of the trial.

The respondents contend and, in my opinion, correctly contend, that the question whether a particular bargain is unconscionable or not is one of fact, not of law. In *Dhanipal Das v. Maneshwar Bakhsh Singh* (2) their Lordships of the

Privy Council had to deal with the concurrent findings of the Courts below that a bargain was unconscionable and said :

"Their Lordships are not disposed to differ from a concurrent finding of the Courts below, even if it be not strictly a finding of fact."

I do not regard this statement as indicating that the question considered was one of law and in this connexion would refer to *Pestonji Mancherji Mody v. Queen Insurance Co.* (3), where their Lordships had to deal with an issue whether the defendant had reasonable and probable cause in an action for malicious prosecution. The judgment (p. 336) contains the following passage :

"It is quite true that according to English law it is for the Judge and not for the jury to determine what is reasonable and probable cause in an action for malicious prosecution. The jury finds the facts. The Judge draws the proper inference from the findings of the jury. In that sense there is a question of law. But where the case is tried without a jury, there is really nothing but a question of fact and a question of fact to be determined by one and the same person."

In England under the Money-lenders Act, 1900, it is for the Judge to decide whether the evidence shows

"that the interest charged in respect of the sum actually lent is excessive, or that the amounts charged for expenses, injuries, fines, bonus, premium, renewals or any other charges are excessive, and that, in either case, the transaction is harsh and unconscionable or is otherwise such that a Court of equity would give relief;" see *Abramson v. Bromwich* (4), a decision by the Court of appeal.

But this view was rested on the wording of the Act (S. 1). In India the question whether a particular stipulation in a contract amounts to a penalty is one of fact rather than of law : see *Bhagwant Almaram v. Ganpati Choudhure Kanbi* (5), and to my mind the character of a particular bargain as a whole stands on a very similar level. I hold then that I cannot interfere with the finding of the lower appellate Court that the bargain is not unconscionable and further agree with that Court in its conclusion on the matter. The third contention advanced for the appellant relates to the increase in the amount decreed by the trial Judge, as the result of the re-trial ordered by the lower appellate Court. It is said that the Judge was incompetent to allow more than the first decree gave. Some increase, however, was inevitable, inas-

(1) [1889] 2 C. P. L. R. 23.

(2) [1906] 24 All. 570=33 I. A. 118=3 O. C. 188 (P.C.).

(3) [1901] 25 Bom. 232 (P. C.).

(4) [1915] 1 K. B. 662=84 L. J. K. B. 802.

(5) [1905] 1 N. L. R. 9.

much as the dates fixed for payment by the two decrees are separated by 2½ years and the earlier decree allowed interest to the date which it fixed. Apart from this source of difference due to the action of the appellant himself, there is the fact that the second decision allowed higher money values for the grain than the first and in my judgment in Second Appeal No. 152 of 1914 I held that it was no longer open to the appellant to object to this result. This contention therefore must fail.

Lastly it is urged that the lower appellate Court should have treated the stipulation for compound interest at derhi on linseed and sawai on other grain as a penal one. The trial Judge disallowed a contention to this effect and his decision was not questioned at the hearing of the first appeal therefrom. Moreover, the case relied on here for the appellant, *Dinanath Bihari Lal v. Dharmola* (6), is no authority for interference, inasmuch as there the debtor was precluded from repaying till ten years had elapsed from the date of the loan. As already remarked, the question whether a particular stipulation constitutes a penalty or not is one of fact rather than one of law; it cannot therefore be raised here if not pressed in the lower appellate Court. The appellant has no intention of redeeming, so it is unnecessary to alter the date fixed for payment. The appeal is dismissed with costs. In the lower Courts costs will be paid as already ordered.

P.N./R.K. *Appeal dismissed.*

(6) [1891] 4 C. P. L. R. 146.

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MITTRA, A. J. C.

Bhagwan—Appellant.

v.

Sadhuram—Respondent.

Second Appeal No. 246 of 1917, Decided on 16th August 1918, from decision of Dist. Judge, Chhindwara, in Civil Suit No. 156 of 1914.

(a) C. P. Tenancy Act (11 of 1898), S. 94—Ejectment under authority of landlord—S. 94 applies.

An occupancy tenant is not entitled to sell his rights in his holding or any portion thereof. The intervention of landlord is essential to the creation of rights in favour of purchasers. The transaction is a surrender to the landlord followed by a lease to the purchasers. [P 85 C 1]

When a tenant surrendered his part of holding in favour of landlord but through mistake excess of land was delivered to landlord who leased out

the holding to another tenant. Suit for recovery of possession of such excess of land is governed by S. 94. [P 85 C 1]

(b) Adverse Possession—Possession under mistake — Intentional possession, though innocent, is nevertheless adverse.

A disseisin may be committed by mistake, as that a man may by mistake take possession of land, claiming title and believing it to be his own. The possession is not the less adverse because the person possessed intentionally, though innocently. [P 85 C 2]

D. T. Mangalmurti—for Appellant.

P. S. Kotwal—for Respondent.

Judgment.—The plaintiffs were occupancy tenants of field Nos. 386 area 48.69 acres and 387 area 3.18 acres. The rent of two fields which form a single holding was Rs. 37. On 29th April 1902 they surrendered part of the holding to the malguzar who on the same day executed a lease in favour of the defendants of the surrendered portion. In the surrender deed (Ex. P-5) and the lease (Ex. P-6) the area surrendered is described as 26 acres and the rent Rs. 18.8.0. As this area was approximately half of the total area and the rent was half, it was held in Second Appeal No. 364 of 1915 that the intention of the parties was to effect a surrender of half the holding. It has now been found that the plaintiffs are in possession of 20.93 acres and the defendants of 30.84 acres. The plaintiffs have been given a decree for possession of 5.07 acres.

The plaintiff alleged a subsequent encroachment by the defendants but this statement was modified in the course of the pleadings. There is a dhura running east to west and dividing the field into two portions. The plaintiffs admit that the possession of the plot lying north of the dhura was given up, as the plaintiffs were told by the patwari that the area of the plot was 26 acres. The mistake is said to have been discovered five years before the date of the suit. The suit itself was instituted just before the expiry of 12 years from the date of surrender. It is contended in appeal that the suit is barred by S. 94, Tenancy Act. That section runs as follows:

"The period of limitation for a suit instituted by a tenant other than an absolute occupancy tenant to recover possession of land from which he has been ejected shall be two years from the date on which he is ejected."

It has been held in *Sonsa Chamar v. Puran Singh Rajput* (1) and *Dinaban-*

(1) [1903] 16 C. P. L. R. 145.

dhu v. Dukhu Mirdha (2) that the special period of limitation applies where the dispossession is by the landlord or by some one acting under his authority. It is contended that the transaction between the plaintiffs and defendants was one of sale made through the instrumentality of the landlord, and therefore S. 94 does not apply. But an occupancy tenant is not entitled to sell his right in his holding or in any portion thereof. He can however surrender, subject to certain claims by his heirs within two years made before a revenue officer. No doubt, the consideration for the transaction was paid by the defendants, but S. 46, Tenancy Act prohibits the registration of documents transferring occupancy rights. There could be therefore no sale by the defendants. The intervention of the landlord was essential to the creation of rights in favour of the defendants. We must therefore regard the transaction as a surrender to the landlord followed by a lease to the defendants, and this was the form in which the transaction was embodied. If there was an ejectment within the meaning of S. 94, then I think it is clear that the ejectment was under the authority of the landlord within the meaning of the rulings I have already cited.

The plaintiffs respondents rely upon *Ganpat v. Trimbak* (3) and argue that the use of force is essential to constitute an ejectment. What was actually decided in the case was that a voluntary surrender was not an ejectment by the landlord. In the present case the plaintiffs intended to surrender 26 acres of land, but by mistake put the landlord in possession of a plot which has now been found to be about 30 acres: *Ganpat v. Trimbak* (3) is therefore no authority for holding that there was no dispossession, in the eye of the law as regards the excess land put in the possession of the landlord: *Ganpat v. Trimbak* (3) was considered in *Mt. Amba v. Sheoram* (4) where Batten, A.J.C., says:

"Ejectment in S. 94 means a dispossession, that is to say, a loss of possession through some act of the defendant which was a taking of possession with the intention of excluding the plaintiff."

The landlord and the defendants when they took possession of the plot lying to

the north of the dhura certainly intended to exclude the plaintiffs from that land, though possession was delivered of part of the land through a mistake as regards the area of the plot. The plaintiffs must be deemed to have been dispossessed from the five acres which they are now claiming, from the date of surrender, as the landlord and the defendants intended to exclude the plaintiffs from the whole of that plot. It is urged that as the defendant's entry was with the consent of the plaintiffs, the former's possession is not adverse. The following passage from the judgment of Jenkins, C. J., in *Dwarkanath Choudhury v. Shastri Kinkar Banerjee* (5) (at p. 602), furnishes a complete answer to this argument:

"The test is whether the person, who sets up adverse possession, is able to show that he held for himself and if he did so, the mere fact that there was acquiescence or consent on the part of the other person concerned can, in circumstances like the present, make no difference."

I am indebted to Mr. Rustomji's valuable book on the law of limitation for an extract from an American Report. In *Pearce v. French* (Wood, Edn. 1, p. 513) Hosmer, C. J., is reported to have said:

"The intention of the possessor to claim adversely is no doubt an essential ingredient. But the person who enters on land believing and claiming it to be his own, does thus enter and possess. The very nature of the act is an assertion of his own title and the denial of the title of all others. It matters not that the possessor was mistaken, and had he been better informed, would not have entered on the land. In the case *Ross v. Gould* it is said: A disseisin (i. e., dispossession) cannot be committed by mistake because the intention of the possessor to claim adversely is an essential ingredient in disseisin. I do not admit the principle. It is as certain that a disseisin may be committed by mistake as that a man may by mistake take possession of land, claiming title, and believing it to be his own. The possession is not the less adverse because the person possessed intentionally, though innocently. Adopt the rule that an entry and possession under or right, if through mistake, does not constitute an adverse possession, and a new principle is whether visible possession with the intent to possess, under a claim of right, and to use and enjoy as one's own, is a disseisin; but from this plain and easy standard of proof we are to depart, and the invisible motives of the mind are to be explored; and the inquiry is to be had whether the possessor of land acted in conformity with his best knowledge and belief."

To the same effect is the judgment of Lord Romilly, M. B., in *Williams v. Pott* (6). I have come to the conclusion that the plaintiffs' suit is barred by S. 94, Tenancy Act. The result is that the

(5) [1913] 17 C. W. N. 595=18 I. C. 869.

(6) [1871] 12 Eq. 149.

(2) [1905] 1 N. L. R. 73.

(3) [1909] 5 N. L. R. 97=3 I. C. 51.

(4) [1915] 11 N. L. R. 8=27 I. C. 861.

decree of the lower appellate Court dated 6th March 1917 is set aside and in lieu thereof the previous decree of that Court dated 4th February 1915 dismissing the plaintiff's suit is restored. As the point of limitation was not taken before, I think the parties should bear their own costs throughout, and I order accordingly.

P.N./R.K.

*Order accordingly.***A. I. R. 1918 Nagpur 86 (1)**

MITTRA, A. J. C.

Baliram Patel—Appellant.

v.

Hanvabi and another—Respondents.

Second Appeal No. 357-B of 1917, Decided on 13th September 1918, from decree of Addl. Dist. Judge, Akola, D/- 14th May 1917.

Lease—Rent.

If a lessee is evicted by a title paramount, he is not liable to pay rent. [P 86 C 1]

Atmaram Bhagwant—for Appellant.*G. R. Pradhan*—for Respondent.

Judgment.—The plaintiff as assignee of one Kashi claims Rs. 180 (one hundred and eighty) as rent for two fields leased by Kashi to the defendants. After entering into possession the defendants were dispossessed towards the end of July by one Malang who is the lessee of Kashi's step-mother Ahelai. It is conceded that the mother was a preferential heir to the daughter. Therefore Malang had a right to possession of the field and lawfully dispossessed the defendants. Under these circumstances it is somewhat impudent on the part of the plaintiff to come and claim rent for the same year plaintiff's assignor having no title to the land. I am inclined to think that upon a true construction of the lease there is a covenant against the very disturbance that had taken place. The mother and the daughter were fighting and the disturbance spoken of clearly refers to a disturbance by persons acting on behalf of the mother. On this ground the suit may be dismissed.

The case of *Gopabund Jha v. Lalla Gobind Pershad* (1), is authority for the view and, if a lessee is evicted by a title paramount, he is not liable to pay the rent. The appeal fails and is dismissed with costs.

P.N./R.K.

*Appeal dismissed.***A. I. R. 1918 Nagpur 86 (2)**

BATTEN, A. J. C.

Surti and another—Plaintiffs—Appellants.

v.

Munni—Defendant—Respondent.

Second Appeal No. 426 of 1915, Decided on 7th October 1917, from decree of Addl. Dist. Judge, Betul, in Civil Appeal No. 20 of 1915, D/- 6th April 1915.

(a) C. P. Tenancy Act (11 of 1898), S. 35 (4)—Implied surrender—Knowledge of landlord is necessary.

There can be no implied surrender under S. 35 (4) without the knowledge and intervention of the landlord. [P 86 C 2]

(b) Evidence Act (1872), S. 114—Joint tenants—Payment of rent by one raises no presumption of sole tenancy.

Where a holding is in the name of an uncle and his minor nephews, there is no presumption that the rent paid by the uncle is paid on his sole behalf and not on account of his nephews also, especially where the nephews continue as the recorded tenants. [P 87 C 1]

W. R. Puranik—for Appellants.*J. C. Ghosh*—for Respondent.

Judgment.—The Additional District Judge remanded the case for fuller pleadings on the subject of implied surrender. The pleadings of the defendant on that point do not really raise a case of implied surrender. There can be no implied surrender under S. 35 (4), Tenancy Act, without the knowledge and intervention of the landlord. In this case there is no plea and no evidence that the landlord accepted the defendant Munni as his sole tenant in place of the original tenants who were Munni and his nephews, the plaintiffs, through their mother. This case is to be distinguished from Second Appeal No. 56 of 1910 relied on by the Additional District Judge, for in that case Suka had never been recorded as a tenant whereas in the present case first their mother Mt. Amriti and after her death the plaintiffs have always been recorded as joint tenants, with the defendant, of the holding. There is no evidence that the landlord ever recognized Munni as the sole tenant and the presumption is to the contrary, since the plaintiffs have all along up to the date of the suit been recorded as joint tenants. The Additional District Judge has held that the plaintiffs' mother did not abandon the holding when she left it to go to a neighbouring village and that apart from the special provisions of S. 35 (4) the defen-

dant had failed to prove that he held the land adversely to the plaintiffs. To prove that he was paying the rent entirely for himself and not on behalf of himself and his nephews would require the same evidence with reference to S. 35(4) as it would if it were a question of non-tenancy land. The Additional District Judge himself has held that it is not proved that Mt. Amriti abandoned the holding when she left the village.

This being so, and the presumption being that the plaintiffs are still the tenants since they are recorded tenants, it lay on the defendant to plead and prove circumstances under which an implied surrender can be presumed. He has neither pleaded nor proved any such circumstances. When a holding is in the name of an uncle and two minor nephews, there is certainly no presumption that the rent paid by the uncle is paid on his own sole behalf and not on account of his nephews also, specially when, as here, the nephews are still the recorded tenants. The Additional District Judge has decided the case on an erroneous view of the law and on his own findings on the facts he has decided the case wrongly. I set aside the judgment and decree of the lower appellate Court and restore the judgment and decree of the first Court, dated 9th September 1911, with this modification that the defendant do also pay the plaintiffs' costs in all Courts.

P.N./R.K.

*Appeal allowed.***A. I. R. 1918 Nagpur 87**

MITTRA, A. J. C.

Laxman—Appellant.

v.

Pandurang and others—Respondents.

Second Appeal No. 48.B of 1918, Decided on 18th December 1918, from decree of Dist. Judge, Amraoti, D/. 21st December 1917.

(a) Evidence Act (1872), S. 115—Expression of opinion does not amount to disclaimer of title—Disclaimer.

A mere expression of opinion by a person that he believed that a certain property did not belong to his father does not amount to disclaimer of title. [P 88 C 2]

(b) Practice—New plea—Second appeal.

A point not raised in the lower Courts and requiring investigation of facts cannot be dealt with as an abstract proposition of law in second appeal. [P 88 C 1]

B. R. Pendharkar and M. V. Joshi—for Appellant.

G. S. Khaparde, S. K. Barlingay and G. V. Deshmukh—for Respondents.

Judgment.—The two plaintiffs and defendant 3 are the sons of the deceased Balaji. The contesting defendants 1 and 2 are Balaji's cousins. The main point in controversy between the parties was whether at a partition in 1890 the fields in dispute fell to the share of Balaji or to the share of defendants 1 and 2. This question has been decided by the Courts below against the defendant-appellant, and it is conceded that this has now become a finding of fact which can no longer be impeached in second appeal. Two points are argued before me: neither of them seems to have been raised in the Courts below. In 1912 there was a partition amongst the sons of Balaji. The fields in dispute were not divided at the time as they were in the possession of defendants 1 and 2, and in para. 7 of the plaint it is stated that these fields still form the joint coparcenary property of the plaintiffs and defendant 3. As defendant 3 declined to be joined as plaintiff he was made a defendant. The case went *ex parte* against defendant 3. The only reply to para. 7 of the plaint made by the other defendants is to be found in paras. 16 and 17 of their written statement dated 29th September 1916.

The written statement points out that the partition deed is silent as regards these fields and calls upon the plaintiffs to show how they claim these fields to be their property. There was no specific issue framed upon this allegation. It is however argued now that the plaintiffs must show their title to the land. This is perfectly correct. The plaintiffs prove their title by showing that it fell to their father's share in 1890. They also prove constructive possession through the Collector's lessee up to 1907. The other point urged before me is that the plaintiffs are entitled only to a two-thirds share of the fields on the ground that defendant 3, when examined as a witness, stated his belief that the fields did not belong to Balaji, and that his branch of the family has not been in possession to his knowledge. The latter statement is correct, for it was leased by the Collector in execution of a decree against the father. The first is a question of opinion, and this defendant was only eleven years old at the time of the partition of 1890. I cannot regard this as a disclaimer of title.

Moreover the question cannot be dealt with as an abstract proposition of law. Facts will have to be investigated before it can be decided whether the plaintiffs are entitled to a decree for the whole of the fields or only to a two-thirds share therein. The point not having been raised in the Courts below and the appellant not being entitled to a remand, the plea is overruled. The appeal is dismissed with costs.

P.N./R.K.

*Appeal dismissed.***A. I. R. 1918 Nagpur 88 (1)**

BATTEN, A. J. C.

Khadaksingh—Plaintiff—Appellant.

v.

Deepchand and others—Defendants—Respondents.

Second Appeal No. 579 of 1915, Decided on 31st October 1917 against appellate decrees of Dist. Judge, Chindwara, D/- 9th July 1915.

(a) C. P. Tenancy Act (11 of 1898), S. 46 (5)—Registration obtained by fraud, i. e. false recitals—Document must be regarded as if not registered and is ineffective for purpose created.

If owing to fraud, that is to say, owing to false recitals in a document tendered for registration under S. 46 (5), C. P. Tenancy Act, the Registering Officer has been deceived into registering a document which under that sub-section he is not empowered to register, the document must be regarded as not registered and is not effective for the purposes for which it is created.

[P 88 C 2]

(b) Fraud—False recitals.

False recitals in a deed amount to fraud.

[P 88 C 2]

(c) Jurisdiction—Civil and revenue registered deed of gift containing false recitals—Jurisdiction of civil Courts to declare deed inoperative is not barred.

If the recitals in a deed of gift which induce the Sub-Registrar to register it are false, the jurisdiction of the civil Courts to declare the deed to be inoperative is not barred, 8 N. L. R. 22 Expl; 1 N. L. R. 112, Foll. [P 88 C 2]

*Atmaram Bhagwant and W. R. Puranik—*for Appellant.

*G. L. Subhedar—*for Respondents.

Judgment.—In this case the allegations of the plaintiff are that the registration of the document (deed of gift) was obtained by false recitals therein, to the effect that the donees were persons entitled to inherit the occupancy holding. The learned District Judge has held, relying on the head-note in *Ganesh Das v. Shankar* (1), that the civil Courts have no jurisdiction. The case before the learned A. J. C., was one in which registration

(1) [1012] 8 N. L. R. 22=13 I. C. 909.

was effected by inadvertence, after the Tenancy Act, 1898, came into force. The learned District Judge has overlooked the remarks of Stanyon, A. J. C., in the body of the ruling that he agrees with the head-note in *Baji Vithal v. Moreswar Venkatesh* (2), that if owing to fraud, that is to say, owing to false recitals in a document tendered for registration under S. 46 (5), Tenancy Act, the Registering Officer has been deceived into registering a document which under that sub-section he is not empowered to register, the document must be regarded as not registered and is not effective for the purposes for which it is created. False recitals in a deed undoubtedly amount to fraud. If the recitals in the deed of gift, which induced the Sub-Registrar to register it, are false, the jurisdiction of the civil Courts is not barred. The appeal is remanded for further trial with reference to the above remarks. Costs will be costs in the suit. There will be a refund certificate.

P.N./R.K.

Appeal remanded.

(2) [1905] 1 N. L. R. 112.

A. I. R. 1918 Nagpur 88 (2)

PRIDEAUX, A. J. C.

Seth Nannalal—Appellant.

v.

Seth Hiralal—Respondent.

Misc. Appeal No. 3 of 1917, Decided on 19th September 1917, from order of Dist. Judge, Hoshangabad, D/- 16th September 1916.

(a) Provincial Insolvency Act (1907), S. 16, Cl. (2), (7)—Time should be counted from last appellate decree.

In a petition under S. 16(2), time should be counted from the last appellate decree for the purposes of the insolvency suit for the proof of creditors. [P 89 C 1]

(b) Provincial Insolvency Act (1907), S. 26—Right of debtor to apply.

Debtor can apply for solvency petition i. e. for expunging or reducing a debt entered in the schedule, only when there is a composition or scheme. [P 89 C 2]

*G. L. Subhedar—*for Appellant.*M. R. Dixit—*for Respondent.

Judgment.—This judgment disposes of Miscellaneous Appeals Nos. 3 and 4 of 1917. Seth Nannalal is the appellant in the first case and Gowrishanker in the second. Both cases arise out of an insolvency case No. 4 of 1913, in which Seth Hiralal has been adjudicated an insolvent. The application for insolvency was presented on 17th March 1913 and the adju-

dication actually made on 21st June 1913. Under S. 16, Cl. (2)(vii), the order of adjudication relates back and takes effect from the date of presentation of the petition on which it is made. The debts were held proved and entered in the schedule. Then on 24th June 1916 a petition was filed by the insolvent which was disposed of by the order under appeal. It is to the effect that all debts except one due to the friends' mission were time barred. It is argued that this is not the case, the lower Court having taken the days of the decree passed by the first Court in all three instances and failed to see that time should count from the last appellate decree. Seth Nanhelal's decree in the case No. 34 is dated 23rd January 1901. From the Civil Court Register Creditor's Ex. 46, it appears that the first appeal to the Court of the District Judge was decided on 24th June 1901 and then a second appeal was filed. The date of its disposal is not given; but it must have been subsequent to 24th June 1901. The date of the adjudication must be held to be 17th March 1913. It is clearly within 12 years and not time barred. Seth Nanhelal's second case No. 35 was disposed of in the original Court on 28th January 1901 and the appeal to the Divisional Judge was disposed of on 24th June 1901 and the second appeal in this Court on 23rd September 1901. This is within 12 years of the date of adjudication.

Gourishanker's case, No. 39 of 1899, see (Ex. 45), was disposed of by the first Court on 26th December 1900. The appeal to the Divisional Judge was disposed of on 15th May 1901 and a second appeal was apparently filed to this Court but its date of disposal has not been given. In any case 15th May 1901 is within 12 years of 17th March 1913 and therefore this decree was not time barred for the purpose of the insolvency suit. The correctness of these dates is not denied by the respondent and their learned counsel frankly admits that the order of the District Judge appealed from cannot be sustained. A further argument is that the District Judge had no power under S. 26, Provincial Insolvency Act, to entertain solvency petition. The question is only of an academic interest, as it is clear that the order is wrong on the facts. But I think the argument is sound as a debtor can apply only when there is a composi-

tion or scheme. In the present case there is neither. In this case a receiver was appointed and in fact two dividends were paid to the appellants. I set aside the order expunging the three debts from the schedule and direct that they be restored thereto. These two appeals are decreed with costs. I fix pleader's fee in each case at Rs. 15.

P.N. R.K.

*Order set aside.***A. I. R. 1918 Nagpur 89**

STANYON, A. J. C.

Govind Madho—Defendant—Appellant.

v.

Dhasu and others—Plaintiffs—Respondents.

Second Appeal No. 458-B of 1916, Decided on 7th September 1917, against judgment and decree of Dist. Judge, Akola, D. 3rd August 1916.

Mesne profits—Profits which can be claimed are those that wrongful holder might have obtained with due diligence.

Where the person dispossessed by a trespasser is himself ordinarily a cultivator of the land in dispute, the profits to which he is entitled are those that the wrongful holder might have obtained by actual cultivation with due diligence. It is not open to a trespasser to dispossess an actual cultivator, and then to sub-let the land trespassed upon to some third person, and claim to compensate the rightful occupant only to the extent of what he may have obtained by the sub-letting. [P 89 C 1]

*V. V. Chitale—for Appellant.**S. Ramdas—for Respondents.*

Judgment.—I do not see any reason for interference in this case. I think the judgment of the lower appellate Court has not been properly understood. The learned District Judge does not hold any point in this case to be res judicata by reason of the judgment in the former suit by his predecessor. He has applied a perfectly correct principle in calculating mesne profits, namely, that where the person dispossessed by a trespasser is himself, ordinarily, a cultivator of the land in dispute, the profits to which he is entitled are those that the wrongful holder might have obtained by actual cultivation with due diligence. It is not open to a trespasser to dispossess an actual cultivator, and then to sub-let the land trespassed upon to some third person, and claim to compensate the rightful occupant only to the extent of what he may have obtained by the sub-letting. In this case the plaintiffs are admittedly owners of an occupancy right in unalien-

nated land, and by caste they are Kunbis, and therefore cultivation is their hereditary occupation. It has not been seriously disputed in the Courts below, and there is plenty of evidence for holding, that they are actual cultivators of the land whereof the defendant had wrongfully dispossessed them. Under these circumstances the mode of assessing damages adopted by the lower appellate Court is correct. The quantum of damages has been arrived at in a somewhat summary way but there is the evidence of P. W. 2 to sustain it. The land measures 32 acres and it has not been disputed that 32 acres are equivalent to 8 tiffans. P. W. 2 deposed that one tiffan produces 3 or 4 khandis of cotton. The Court has taken the figure as 3 khandis. The same witness deposed, and he stands uncontradicted, that during the year for which profits are claimed, cotton sold at Rs. 81 per khandi. In that way the Judge finds the value of the produce to be Rs. 1,944. He has made a reasonable allowance towards the cost of cultivation and deducted the Government assessment. In that way he arrived at Rs. 1,178 as the plaintiffs' share. Of this the plaintiffs had claimed only Rs. 400 in appeal and the Judge gave them a decree for that sum only over and above the decree of the first Court. Under these circumstances the judgment of the lower appellate Court is properly valid and I dismiss this appeal with costs.

P.N./R.K.

*Appeal dismissed.***A. I. R. 1918 Nagpur 90**

MITTRA, A. J. C.

Gopal Khushal—Appellant.

v.

Mt. Rukhmi—Respondent.

Second Appeal No. 339-B of 1917, Decided on 16th August 1918, from decree of Special Addl. Dist. Judge, Akola, D/- 18th April 1917.

(a) **Hindu Law—Succession—Daughters.**

In matters of succession under the Hindu Law, a married daughter is excluded by her unmarried sister. [P 90 C 2]

(b) **Practice—Appeal—New case.**

Appellate Court has power in appeal to make out a new case. [P 90 C 2]

*M. Chukerbutty—for Appellant.**M. Bhawanishankar—for Respondent.*

Judgment.—One Nandram died leaving a widow Mt. Rukhma and two daughters Lungi and Mungi. Rukhma died in 1903. Lungi in 1908 and Mungi in 1914.

The plaintiff is the husband of Lungi and claims possession of half share of the property left by Nandram. The defendants relied upon a gift and will which have been held not proved. The lower appellate Court in view of certain statements made upon the death of Rukhma in the mutation proceedings framed an issue, whether Mungi, the younger daughter, was unmarried at Rukhma's death. The parties were asked whether they wished to give any further evidence, and they declined. The lower appellate Court found that Mungi was unmarried at the time of Rukhma's death, and therefore she excluded Lungi who was married. In support of this view the learned Additional District Judge relies upon *Jamnabai v. Khimji Vullubdas* (1). The plaintiff's suit has been dismissed upon this view. In second appeal it is contended that the lower Court was not justified in making out a new case in appeal. I am unable to agree with this. The lower appellate Court had the power to do so, and the plaintiff cannot be said to have been prejudiced as he was given a chance of giving further evidence upon the issue framed by the appellate Court.

Next it is contended that the evidence is insufficient to support the finding that Mungi was unmarried at the death of Rukhma. The evidence of the plaintiff examined as a witness clearly proves this fact, and it is also in accordance with the inference to be drawn from a statement made by the deceased Lungi in 1903 before the Revenue Officer. I must therefore accept the findings arrived by the lower appellate Court. Upon the question of law the learned counsel for the appellant says as Mungi was married at the plaintiff's expense, she cannot exclude her elder sister, the plaintiff's wife, from succession. The argument has no force whatever. The view taken by the Additional District Judge is supported by the ruling cited, and I have been shown no case in which a contrary view has been taken. The appeal fails and is dismissed with costs.

P.N./R.K.

Appeal dismissed.

(1) [1890] 14 B. & M. 1.

A. I. R. 1918 Nagpur 91

MITTRA, A. J. C.

Narayan—Defendant—Appellant,

v.

Syed Bahadur and others—Plaintiffs—Respondents.

Second Appeal No. 408-B of 1916, Decided on 17th March 1917, from decree of Dist. Judge, Amraoti, D/- 31st August 1915.

(a) Civil P. C. (1908), S. 11—Appeal does not lie merely on ground that unfavourable observations are made against person in whose favour decree is passed—Opinion of Court in such appeal cannot operate as res judicata.

No appeal lies from a decree merely on the ground that certain observations made in the judgment of the Court below are unfavourable to the person in whose favour the decree is passed. An opinion of the appellate Court in the course of a judgment in such an appeal cannot operate as res judicata when in point of law, no appeal lay and the Court had no power to adjudicate on the rights of the parties on an appeal from such a decree. [P 91 C 2, P 92 B 1]

(b) Berar Land Revenue Code (1896), Ss. 78 and 79—Notice under S. 78 not acted upon for one year—Fresh notice under S. 79 is not necessary.

If a notice has been duly served under S. 78, then in the absence of waiver the person served is not entitled to a fresh notice under S. 79 merely because more than one year has elapsed since the time when in accordance with the notice the tenant should have vacated the land. [P 92 C 1]

(c) Berar Land Revenue Code (1896), S. 78—Enhancement can be decreed only if Court deems it reasonable.

Section 78, sub-Ss. (4) and (5), are not restricted to the tenancies mentioned in sub-S. (2) of that section, but the enhancement contemplated therein can be decreed only if in the judgment of the Court it be just and reasonable: 2 I. C. 990 and S. A. No. 22; D. of 1919, Foll. [P 92 C 2]

(d) Berar Land Revenue Code (1896), Ss. 78 and 79—Notice to quit under S. 79 unconditionally determines tenancy—Non-compliance with notice under S. 78 (8) does not have that effect.

A notice to quit under S. 79 unconditionally determines the tenancy, but a notice under S. 78 (8), if not complied with is not intended to have that effect inasmuch as the tenant has a right to appeal to the Court for a decision as to whether in its opinion the enhancement is just and reasonable. [P 93 C 1]

(e) Berar Land Revenue Code (1896), Ss. 78 and 79—Eviction of tenant for not paying enhanced rent.

A tenant is to be evicted for not paying the enhanced rent only after it has been determined to be just and reasonable by the Court. [P 93 C 1]

G. P. Dick—for Appellant.

S. B. Tambe—for Respondents.

Judgment.—This is a suit by the inam certificate holder of a Jagir for

ejection of certain tenants, on the ground that notwithstanding a notice issued under S. 78, Berar Land Revenue Code, they have refused to agree to pay the enhanced rent or to vacate the fields. One Tanba was the original tenant of these fields. In this second appeal we are however concerned with one of the fields, field No. 18. It appears from the plaint that Tanba held this field from the year 1869. The rent for this field according to the plaintiff was Rs. 39 and it was sought to have it enhanced to Rs. 50. Defendant 1, who is the appellant before me, purchased from the original tenant this field on 10th January 1910, the notice under S. 78 of the Land Revenue Code having been served on the original tenant on 25th September 1909. Various pleas were raised in the case and so far as they are material, they will be apparent from my judgment when I deal with each of the grounds of this second appeal. It is urged that Tanba was an ante Jagir tenant of field No. 18 and some reference is made to a previous judgment in which an opinion to that effect was expressed by Mr. Obbard, the Civil Judge and Sessions Judge, H. A. D., an opinion which seems to have been confirmed by the then Judicial Commissioner. The plaintiff had fixed a definite time, namely, 1869, as the commencement of Tanba's tenancy. The defendants never pleaded that they were ante Jagir tenants. All that they said was that the field had been in their possession for 40 or 50 years.

The utmost that can be said on that plea is that their possession commenced from 1862, but we find that the Inam investigating officers were making inquiries about the same period and found that the Jagir was in the Jagirdar's family for three generations at least. Under the circumstances, it will be useless allowing the appellant leave to advance a fresh plea of a character inconsistent with the pleas raised in the first Court. I ought to notice that although Mr. Obbard expressed an opinion that this particular field was ante-Jagir yet the decree was entirely in favour of the Jagirdar, for he apparently allowed the entire rent claimed. The Jagirdar had filed a second appeal, though in point of law, no such appeal lay from the decree merely on the ground that certain observations made in the judgment of the Court below were

unfavourable to the person in whose favour the decree was passed. The appeal was however entertained and the opinion of the lower Court upheld, but I cannot regard the opinion in such a case as operating by way of *res judicata* when in point of law no appeal lay and the Court had no power to adjudicate on the rights of the parties on an appeal from such a decree.

I have already mentioned that the appellant purchased the field a few months after the notice was given to his predecessor under S. 78. It is contended before me that the appellant, although bound by the notice under S. 78, was entitled to a further notice under S. 79 of the same Code. It is urged that the Jagirdar having waited for more than one year must be deemed to have allowed the tenants to hold on. I see however no force in this argument. There was no waiver of the notice inasmuch as no rent was accepted, nor was the possession of the transferee in any manner recognized by the Jagirdar. If notice has been duly served under S. 78, the person so served or his transferee is not entitled to a fresh notice under S. 79 merely because more than a year had elapsed since the time when in accordance with the notice, the tenants should have vacated the land. It is next contended that the plaintiff Jagirdar alone cannot sue inasmuch as there are some members of the family who are opposed to the ejectment and the enhancement of rent. All the defendants who are hostile to the Jagirdar are however bound by a deed executed by themselves or by their predecessor-in title in the year 1887, under which the plaintiff was to have the sole management of the Jagir and the other cosharers are only to receive their share of the profits from the plaintiff. Having entered into a solemn agreement as regards the management of the village, it is not open to any cosharers arbitrarily to dispute the plaintiff's authority until they can again come to a fresh arrangement for the management of the village. I hold therefore that the plaintiff is entitled to maintain the suit.

There remains for me to consider whether the appellant is entitled to be relieved against forfeiture for non-payment of rent. The way in which the appellant has put his case before me is unsound. S. 114, T. P. Act., which now applies to

Berar, refers to forfeiture for non-payment of rent, that is to say, it refers to forfeiture already incurred under the terms of a lease. In the present case there is no such lease providing for forfeiture for non-payment of rent. Moreover, the rent for non-payment of which the forfeiture takes place is a rent already fixed and agreed upon between the parties. Although S. 114, T. P. Act, therefore does not apply to the present case, yet I have to consider whether the Courts below are justified in passing an unconditional decree for ejectment against the defendant. The plaintiff issued a notice under sub-S. 8, S. 78, Berar Land Revenue Code. In *Maruti v. Jagannath* (1) and *Ramya v. Krishna* (2), the view taken was that S. 78, sub-Cls. 8 and 4, are not restricted to tenancies mentioned in sub-Cl. 2 of the said section. This view commends itself to me. Sub-Cl. 4 says:

"Nothing contained in this section shall affect the right of the landlord to enhance the rent etc."

If it were intended to limit sub-S. 4 to cases contemplated by sub-S. 2, the wording would have been "nothing contained in sub-S. 3 shall affect the right of the landlord to enhance the rent." It is therefore unnecessary to say whether the appellants' predecessor was a tenant of antiquity within the meaning of sub-S. (2). Now the plaintiffs' own case is that he was entitled to enhancement of the rent apparently by virtue of usage, and for that purpose he was entitled to issue a notice through a Revenue Officer under sub-S. 8. The enhancement however can only be decreed if in the judgment of the Court it be just and reasonable [see sub-S. (4)]. The Berar Land Revenue Code, sub-S. (1), seems to recognize a customary right to just and reasonable enhancement of rent and lays down a procedure for its enforcement. The first Court has found that it is just and reasonable that the former rent of Rs. 39 should be enhanced to Rs. 50. Then comes the question what should have been the nature of the plaintiff's suit and the form of the decree? It cannot be said that the rent was duly enhanced the moment the notice was served through the Tahsildar. It was determined to be just and reasonable only by the decision of the Court. To my mind

(1) [1909] 5 N. L. R. 10 = 2 I. C. 995.

(2) S. A. No. 229-B of 19

the decree contemplated by sub-S. 4 is a decree directing the defendant to pay the rent and in default of payment to give up possession.

A notice to quit under S. 79 unconditionally determined the tenancy. But the Code does not say that a notice under S. 78 (8), if not complied with has any such effect. Appx. 17 to the rules framed by the Local Government gives a form of notice under S. 78 (8). It no doubt asks the tenant to vacate the land in the event of his not consenting to pay the enhanced rent. But the tenant has a right to appeal to the Court as to whether in its judgment the enhancement claimed is just and reasonable. Could it have been the intention of the legislature to determine the tenancy on non-compliance with the notice subject to a future adjudication as to whether the enhancement is just and reasonable? Such a conditional determination of the tenancy is unknown to the ordinary law. In the absence of express words to that effect, I would hesitate to adopt such a construction which leads to manifest injustice for the tenant is punished for an error of judgment as to what is just and reasonable enhancement. The tenant's silence is consistent with an agreement to pay the enhanced rent, if determined to be just and reasonable by the Court. The conclusion to which I come is that the tenant is to be evicted for not paying the enhanced rent after it has been determined to be just and reasonable by the Court. I now pass the decree which the lower Court should have passed. The decrees of the Courts below are set aside so far as the defendant-appellant is concerned and in lieu thereof the defendant is directed to pay Rs. 50 as the rent for the year in suit within three months or in default to deliver possession of field S. No. 18 to the plaintiff. The ejection of the defendant will not prevent the plaintiff from recovering Rs. 50 from the defendant. The defendant will also pay the plaintiff's costs in all Courts.

P.N./R.K.

Decree set aside.

A. I. R. 1918 Nagpur 93

STANYON, A. J. C.

Pundalik—Applicant.

v.

Chandrabhan—Opposite Party.

Civil Revn. No. 8-B of 1917, Decided on 26th July 1917.

Civil P. C. (1908), O. 23, R. 1 — Application for withdrawal of suit—If defects are not specified in application for withdrawal order permitting withdrawal becomes irregular—Omission to state defects in order permitting withdrawal amounts to material irregularity—Civil P. C. S. 115.

A plaintiff who has misunderstood his case is not entitled on that ground to be allowed to harass the opposite party again. If he wishes to obtain an order under O. 23, R. 1, he must specify the formal defect or other ground on which his application is based and the Court must show by its order the facts which make the provisions as to withdrawal applicable. A mere general statement that there are formal defects is not sufficient. [P 31 C 1]

The omission to state the formal defects which justify an order for permission to withdraw a suit with liberty to bring a fresh suit amounts to material irregularity within the meaning of S. 115, Civil P. C. [P 31 C 2]

Vivian Bose—for Applicant.

G. V. Deshmukh—for Opposite Party.

Order.—The facts are correctly given in the application for revision and. I have no doubt that the order of the lower Court discloses material irregularity of the kind contemplated by S. 115, Civil P. C., 1908, and must be set aside. The plaintiff sues for a plot of land which he described in his plaint by reference to its area and boundaries. The suit was filed on 13th February 1914. The trial proceeded for a year and after nine hearings the plaint was returned for amendment on 25th February 1915. It was re-presented after amendment on 15th April 1915. Two more hearings followed and then on 23rd July 1915 a further amendment of the plaint was allowed. Such was the procedure that issues were not framed until 1st October 1915 or over 19 months after the institution of the suit. Documentary evidence was filed and 7th January 1916 was fixed for oral evidence. Thereafter six more hearings took place and all the evidence tendered by both parties having been taken both sides closed their cases on 20th November 1916 and 23rd of that month was fixed for delivery of judgment. But on that date the plaintiff presented an application asking for permission under O. 23, R. 1, to withdraw the suit with permission to institute a fresh suit upon the same cause of action. The material part of that application has been translated thus:

"A mistake has been made in prosecuting this suit. There is an error in the description of the site and in the map also. Therefore permission may be given to withdraw this suit and bring a fresh suit."

The Sub-Judge wrote thus in his order-sheet:

"Plaintiff has filed an application for withdrawing the suit with liberty to bring a fresh suit on the ground that the plaint was not properly drafted and there are formal defects. Mr. (illegible) opposes the application.

"I have gone through the plaint pleadings and evidence and I am satisfied that plaintiff is likely to fail on account of a good many formal defects in drafting the plaint. Under the above circumstances I allow his application. He will pay the defendant's costs."

The Sub Judge also wrote a separate order in these words:

"The plaintiff has been allowed to withdraw the suit with liberty to bring a fresh suit on the same cause of action as owing to bad drafting of the plaint and several formal defects in its frame he is likely to fail. Plaintiff shall pay the defendant's costs."

There were no less than 15 defendants in the plaint as amended and Pandu or Pundalik the son of Narayan was the 15th of them. He has applied to revise the order. It is quite impossible to maintain that order; *prima facie* a most unwarrantable use of the power to allow withdrawal with leave to bring a fresh suit seems to have been made. The learned Judge having studied the plaint, pleadings and evidence found that the plaintiff was likely to fail. That looks like an opinion based on the merits of the case. It offered no ground for any order under O. 23, R. 1. A mere use of the terms contained in that enactment is not sufficient. Neither the application to withdraw nor the orders of the Judge thereon specify the "formal defects" referred to. I asked the learned counsel for the non-applicant before me to point them out and he could not or at any rate did not do so. A plaintiff who has misunderstood his case is not entitled on that ground to be allowed to harass the opposite party again. If he wishes to obtain an order under O. 23, R. 1, he must specify the formal defect or other ground on which his application is based and the Court must show by its order the facts which make the provision as to withdrawal applicable. A mere general statement that there are formal defects is not sufficient. Here the case went on for nearly three years there were two amendments of the plaint and the case was tried out to a finish. Then the plaintiff discovered that he had fought his case badly and was likely to lose. He therefore applied to withdraw with leave to begin the whole fight all

over again and the Court having formed an opinion on the merits adverse to the plaintiff allowed a withdrawal without any specification of the facts which went to constitute the alleged formal defects. This was an artificial disposal of a fully tried out case and an arbitrary and capricious exercise of discretion.

The order for withdrawal of the suit is set aside and the Court concerned is directed to dispose of the suit according to law. The Court will still have power to allow withdrawal on proper grounds but those grounds must be stated in detail by the applicant and found by the Court which must show in what way they bring the case within O. 23, R. 1. The non-applicant must pay costs here. I allow one sovereign pleader's fee.

P.N./R.R. *Suit remanded.*

A. I. R. 1918 Nagpur 94

DRAKE-BROCKMAN, J.C.

Laxmi Narayan—Appellant.

v.

Bhioraj and others—Respondents.

Second Appeal No. 55/B of 1918, Decided on 20th August 1918, from decree of District Judge, East Berar, D/- 2nd November 1917.

(a) Limitation Act (1908), Art. 182 (5)—Step-in-aid—Payment of process fees—Memo of talbana parcha put in for auction sale—Proclamation issued—Oral application should be presumed.

A mere deposit of process fees will not suffice to give a fresh start for the computation of limitation. Any fresh start is taken from the date of some application and the real question in each case where no written application is forthcoming appears to be whether the making of an application may be fairly presumed. [P 95 C 1, 2]

Where on the talbana parcha being put in for auction sale of moveable property, an order of the issuing of proclamation was passed, oral application was presumed to have been made within the meaning of Art. 182 (5).

[P 95 C 2; P 96 C 1]

(b) Practice—New plea—Second appeal.

An objection raised for first time in second appeal that the application for execution did not give the date of previous application as required by O. 21, R. 11 (f), cannot be entertained. [P 95 C 2]

Atmaram Bhagwant—for Appellant.

G. V. Kukde—for Respondents.

Judgment.—The lower Courts have concurred in holding that the respondent's application for execution filed on 13th November 1913 is not time barred and the judgment-debtors have appealed. The decree of which execution is sought was passed on 26th September 1910. Certain property had been attached before

judgement and on 8th October 1910 sale of certain moveables was ordered. Some delay occurred because one of the articles to be sold was a locked safe which the Court desired to have opened in the presence of the judgment-debtors. On the 14th November following, the safe was broken open in Court, the judgment-debtors having failed to attend in response to notices. The following order was then recorded:

"Proclamation for sale of the property including the open safe be issued. Sale on 6-12-10. Report on 10-12-10."

The next day the decree-holders put in what is known as a talhana parcha the material part of which has been translated as follows:

"Process fee in the shape of Court-labels worth Re. 1 is herewith paid for auction sale of the moveable property of the defendants mentioned above on behalf of the plaintiff."

On the 18th November the Court passed on this parcha an order which has been translated thus: "Let proclamation be issued." In the executing Court it was urged on behalf of the judgment-debtors on the strength of *Sheo Prasad v. Indar Bahadur Singh* (1) that the parcha is a mere memorandum of the deposit of the process fee and as such cannot amount to a step in aid of execution for the purposes of Cl. (5) in Art. 182, of the Limitation Schedule. Both the Courts below however have followed the decision of Banerjee and Rampini, JJ., in *Norendra Nath v. Bhupendra Narain* (2) which the lower appellate Court seems to have regarded as laying down that mere payment of process fee for service of the sale proclamation necessarily includes an application to take some step-in-aid of execution. In this Court it is urged that the parcha of 15th November 1910 represents no more than a mere deposit of process-fee, the order to issue proclamation of sale having been passed the previous day. It is also urged that R. 66 (3), O. 21, Sec. 1, Civil P.C., requires an application for an order for sale to be accompanied by a statement signed and verified in a certain manner and giving certain particulars, whereas no such statement can be found in the proceedings of 1910. It seems to be clear on the authorities that a mere deposit of process fee will not suffice to give a fresh start for the computation of

limitation. Any fresh start is taken from the date of some application and the real question in each case where no written application is forthcoming appears to be whether the making of an application may fairly be presumed: see *Trimbak v. Kashinath* (3). In *Sheo Prasad v. Indar Bahadur Singh* (1) above cited nothing appears to have been done after the process fee for proclamation of sale was paid. In *Norendra v. Bhupendra* (2) there was not only payment of the process fee but also a petition by the decree-holder for issue of sale proclamation and in *Indra Pershad Singh v. Surdhar Lal* (4) on which the later decision was rested the decree-holder did in fact apply for issue of a proclamation. In the present case it seems to me clear that an application must be taken to have been made. The order to issue such a process made on 11th November 1910 was either absolute or conditional on payment of process-fee. If absolute it must have been preceded by an oral application of the decree-holders, for otherwise the Court would presumably not have made it at all. If on the other hand that order be regarded as conditional, then the condition was fulfilled on 15th November 1910 and the talhana parcha should be taken as in effect an application for a final order: that it was so regarded appears from the order actually passed by the executing Court on the 18th November. I may refer in this connexion to R. 4 of the notification issued under S. 20 (1), Court-fees Act, which is reproduced in this Court's Civil Circular 4-3 and runs as follows:

"No process shall be drawn up for service or execution until the fee chargeable under that rule has been paid. The fee shall be paid in 'court-fee-stamps, which shall be affixed either to the application by which the Court is moved to issue the process, or if no such application be filed to the order by which the Court directs the issue or service of the process'."

As remarked in *Vijayaraghavalu v. Srinivasulu* (5) the mere fact that issue of proclamation had been previously ordered does not affect the character of the talhana parcha, for proclamation would not have been issued if the parcha had not been put in. Looking to all the circumstances I think it impossible to avoid the conclusion that an application

(1) [1908] 30 All. 179.

(2) [1896] 23 Cal. 374.

(3) [1898] 22 Bom. 722.

(4) [1884] 10 Cal. 851 (F.R.).

(5) [1905] 28 Mad. 309.

for issue of proclamation was made either on 14th or 15th November 1910 and in either case the application under consideration is not time barred. The contention rested upon R. 66 (3), O. 21, Sch. 1, Civil P. C., is not one which can be raised at this stage. The sale proclaimed was actually held and its proceeds paid to the decree-holders on 10th December 1910 and the judgment-debtors took no steps of any kind to set aside those proceedings.

On the 17th current certain additional grounds of appeal were tendered to this Court but were not seen by the respondents' learned counsel till yesterday, the day before being Sunday. In the first two it is alleged that two out of three judgment-debtors have recently been adjudged insolvent and their property vested in the receiver, the decree now under execution being included in the schedule of debts. Neither an affidavit nor a copy of the order of adjudication has been filed and the respondents' counsel is not in a position to admit the allegation which I must therefore decline to consider. It is also conceded that the application for execution out of which the correct proceedings arise is out of order, inasmuch as it does not give the date of the previous application as required by sub-R. (2) (f), R. 11, O. 21, Sch. 1, Civil P. C. This belated objection cannot be entertained now. It might have been advanced no less than four years ago and there is no suggestion that the judgment-debtors have been in any way prejudiced by the omission in question: they have in fact been aware all along of the actual fact as is apparent from the pleadings and the issues recorded in August 1914.

The appeal is accordingly dismissed with costs. In the lower Courts costs will be paid as already ordered. I allow Rs. 15/ as hearing fee in this Court.

P.N./R.K.

Appeal dismissed.

A. I. R. 1918 Nagpur 96

MITTRA, A. J. C.

Bhagwansa and another—Defendants—Appellants.

v.

Maroti—Plaintiff—Respondent.

Second Appeal No. 14-B of 1917, Decided on 24th September 1917, against appellate decree of Addl. Dist. Judge, Amraoti, D/- 12th September 1916.

(a) Civil P. C. (1908), S. 11 — Subsequent suit for different property on different causes of action is not barred.

Plaintiff brought a suit for possession of certain property basing his claim on a gift of the property by his grandmother to his mother. The suit was dismissed. He then brought a suit for possession of certain other property as heir of his maternal grandfather through his mother.

Held: that the suit was not barred as res judicata. [P 97 C 1]

(b) Possessory suit — Defendant wrongly dispossessing defendant— Defendant cannot plead that plaintiff is not sole owner.

A person who has been wrongfully dispossessed from property is entitled to sue for its possession, and it is no defence to the suit to say that the plaintiff is not the sole owner of the property. [P 97 C 1]

J. C. Ghosh—for Appellant.

M. V. Joshi—for Respondent.

Judgment.—The facts of this case are stated in the judgment of the lower appellate Court. The first point argued before me is that the present suit is barred by res judicata by reason of the decision in Suit No. 467 of 1917. The present suit is a suit for the possession of a field on the allegation that it belonged to the plaintiff's maternal grandfather Laxman, after his death to his widow, and after her to the plaintiff's mother to whom the plaintiff has succeeded. In the former suit which related to the possession of a house, the title set up by the plaintiff was a gift made to his mother by the maternal grandmother. This plaintiff's claim to the house was dismissed by the lower appellate Court on the sole ground that the title set up by the plaintiff was not a valid title. There was no issue in that suit which can have the remotest bearing on any of the issues in the present case. It is however argued that under Expl. 4, S. 11, Civil P. C., the plaintiff's title by inheritance must be deemed to have been substantially in issue in the former suit. This would have been perfectly correct, if the present suit was an attempt to obtain possession of the same house, but this is not the case. It does not follow from the fact that the plaintiff has lost all title to the house, whether he set it up expressly or whether he omitted to do so, that his title to other property is in the least affected by Expl. 4, S. 11.

There is no force in this argument. It is argued that as appellant's predecessor-in-title obstructed the plaintiff when he was seeking to obtain possession in pursuance of a decree against one Akbarali

and this obstruction was the subject-matter of an inquiry which terminated in an order in favour of the defendant-appellant's predecessor, the suit is barred by limitation under Art. 11 (a), Lim. Act. This argument overlooks the fact that the plaintiff is still a minor. The contention of the defendant-appellant that the plaintiff has failed to prove the possession within 12 years of the suit, is negatived by the finding arrived at by the lower Appellate Court that the plaintiff was in possession till 1908. The defendant-appellant pleaded that plaintiff's mother had a sister still alive who was a necessary party and on whom title to half the property has devolved. This appears to be correct, but the lower Appellate Court has decreed the claim in full on the ground that the plaintiff was previously in possession and the defendants have without any title dispossessed the plaintiff. In other words, the plaintiff's prior possession entitles him to a decree for the entire field, though his title to half the property may be disputed by his co-sharer if she likes. The appeal, therefore fails and is dismissed with costs.

P.N./R.K.

*Appeal dismissed.***A. I. R. 1918 Nagpur 97**

STANYON, A. J. C.

Ganpat Wanjari—Appellant.

v.

Amrita and others—Respondents.

Miss. Civil Appeal No. 10-B of 1917, Decided on 21st August 1917, from order of Addl. Dist. Judge, Buldhana, Df. 17th January 1917.

Provincial Insolvency Act (1907), Ss. 16, 18, 20 and 23—Petition for adjudication—Court cannot call upon debtor of insolvent to pay money into Court without adjudication.

Where a debtor presents a petition for adjudication as an insolvent, the Court has no power, without making an order for adjudication or appointing a receiver, to order a debtor of the insolvent to pay into Court any money which he owes to the insolvent. [P 97 C 2]

*D. T. Mangalmurti—for Appellant.**Atmaram Bhagwant—for Respondents.*

Judgment.—This is an appeal from an order made under the Provincial Insolvency Act. That order was ultra vires of the lower Court and must be set aside. One Krishnaji applied to be declared an insolvent on the ground that his debts amounted to Rs. 1,808 and his assets to

Rs. 6-8-0. The petition was opposed by five of his creditors, who alleged inter alia that the petitioner, was the owner of a field which he had pretended to sell to his uncle one Ganpat for Rs. 900. The petitioner replied that he had in truth sold the field for the said amount and used the money in satisfying some of his creditors. The contesting creditors gave no evidence whatever in support of their allegations as to the legality and force of a deed executed one year before those proceedings began, but the lower Court, having accepted evidence tendered by the petitioner for the purpose of proving that the sale was a real transaction, held: (1) that the sale was in fact a real transaction; and (2) that Ganpat had paid Rs. 450 out of the price of Rs. 900 to the petitioner.

Thereupon, the lower Court, without making any order of adjudication under S. 16, Insolvency Act 1907, or for the appointment of a receiver under S. 18 of that enactment, directed that Ganpat should pay Rs. 450 into Court for the benefit of the general body of the petitioner's creditors. The learned Judge does not enlighten us as to the section of the Insolvency Act under which he passed this order upon Ganpat and I have been unable to find any such section. Ganpat has appealed from the order, and there is no doubt that the appeal must succeed. The question, whether or not Ganpat owes any money to the petitioner for insolvency is not a question to be decided in these proceedings, to which Ganpat is no party. If the lower Court is satisfied that the petitioner has fraudulently concealed the existence of assets belonging to him, that may be good ground for dismissing the petition. But if the Court decides to proceed with the administration of the petitioner's affairs, it must first make an order of adjudication under S. 16. Thereafter, unless it elects to carry on the administration itself under the powers given to it by S. 23 of the Act, it should appoint a receiver under S. 18 of the Act. Then under S. 20 of the Act, steps can be taken according to law to release the property of the debtor. The learned Judge will avoid such errors as he has made in this case if he proceeds with the Insolvency Act 1907, open before him, and follows the procedure laid down for him in proper order by section after section.

The appeal is allowed, the order of the lower Court directing Ganpat to pay Rs. 450 into Court is set aside and that Court is directed to proceed with the case according to law. I make no order as to costs of this appeal. Costs in Courts below will be disposed of as that Court may think proper.

P.N./R.K.

Appeal allowed.

A. I. R. 1918 Nagpur 98

MITTRA, A. J. C.

Radhakisan—Applicant.

v.

Narasinha—Non-Applicant.

Civil Revn. No. 5/B of 1918, Decided on 15th August 1918.

Civil P. C. (1908), S. 145 and O. 21, R. 43—Supratdar entrusted with cattle attached on executing bond—Another decree-holder applying for rateable distribution—Attaching creditor compromising—Compromise certified—Return of cattle to judgment-debtor by supratdar—Liability of supratdar cannot be enforced by executing Court, but must form subject-matter of regular suit.

A supratdar was entrusted with livestock on executing a security bond to the extent of the value of property attached for its production in good condition when required after an attachment of the cattle at the instance of a decree-holder. Another decree-holder applied for rateable distribution. The attaching creditor having compromised, cattle were returned to the judgment-debtor and the compromise was certified. On the latter decree-holder's applying for the enforcement of the liability of supratdar:

Held: the matter could not be inquired into by the executing Court, but must form the subject-matter of a regular suit. [1918 C 2]

W. H. Dhabe—for Applicant.

Atmaram Bhagwant—for Non-Applicant.

Judgment.—The question raised in this petition of revision is whether the liability, if any, of non-applicant 1 can be enforced by an order of the executing Court. The non-applicant was a supratdar or depositary of cattle attached under O. 21, R. 43, and entrusted to him in accordance with Circular 1-31 on his executing a security bond to the extent of the value of the said livestock for its production in good condition when required. The applicant who had applied for a rateable distribution, after an attachment of the cattle at the instance of another decree-holder, complains that the cattle had been returned without the order of the Court to the judgment-debtor who had compromised with the attaching creditor, and whose compromise was certified to the Court. The

Munsif has held that the matter cannot be inquired into by the executing Court but must form the subject of a regular suit. For the applicant reliance is placed upon *Nathoo Ram v. Kamal Rama* (1) where Obbord, J. C., held that the Court has an inherent power to enforce a security bond given under similar circumstances. This case however was dissented from by Ismay J. C., in *Joshi Powar v. Jiwaraj Hazarimal* (2). Both these cases were decided under the Code of 1882. The applicant's pleader relies upon S. 151 of the present Civil P. C., (5 of 1908), as supporting the view taken by Obbord, J. C., S. 151 runs thus:

"Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

The terms of this section are very wide, and if an order can be passed under this section to enforce the depositary's liability, that order will not obviously be a decree, and will not be open to appeal. S. 145, Civil P. C., deals with the liability of a surety. It is clear that the supratdar was not a surety for the judgment-debtor. It may however be noted that S. 145, declared that the surety shall, for the purposes of appeal, be deemed a party within the meaning of S. 47. O. 40, R. 4, enables the Court to enforce the duties of a receiver by directing his property to be attached and sold. It is clear that the supratdar in this case was not appointed a receiver. An appeal lies under O. 43, R. 1 (s), from such an order. In both these instances where proceedings may be taken for the enforcement of the liability of a person other than the parties to the suit, an appeal has been given by law. In *Nathoo Ram v. Kamal Rama* (1) the Court declined to say whether the order was appealable or not, and whether if unjust it could be impeached by a separate suit. The mode in which the liability of the depositary is to be enforced has also not been considered in that case. There being no decree, the depositary's property cannot be attached and sold in the absence of a statutory power as now contained in O. 40, R. 4. It has also been pointed out by Ismay, J. C., that the refusal of the depositary to deliver up to the attached property can be summarily dealt

(1) [1899] 12 C. P. L. R. 149.

with in the mofussil as a contempt of Court.

For these reasons I agree with the later ruling in *Joshi Powar v. Hazarimal* (2) and dismiss this application for revision with costs. I fix Rs. 10 as pleader's fee in this Court.

P.N./R.K. *Application dismissed.*

(2) [1900] 13 C. P. L. R. 104.

A. I. R. 1918 Nagpur 99

MITTRA, A. J. C.

Pandurang Shamji—Appellant.

v.

Narayan Rao—Respondent.

Second Appeal No. 51 of 1916, Decided on 24th February 1917, from decree of Divl. Judge, Nagpur, D/- 15th October 1915.

Evidence Act (1872), S. 115—Prior mortgage—Agreement between subsequent co-mortgagees to pay off prior mortgage—Failure by one co-mortgagee to inform other of his charge on prior mortgage amounts to such omission as is contemplated by S. 115.

One S. executed a mortgage in favour of A and B. Some payments were made by S. towards the satisfaction of the mortgage debt which were admittedly taken by B. alone. Subsequently S. executed another mortgage in favour of B and C in order to pay off the prior mortgage. B and C foreclosed the property. B sold his half share in the foreclosed property to the plaintiff and he also sold his right under the prior mortgage, alleging that it had not been fully satisfied. Plaintiff sued to foreclose C's share of the property on the basis of the first mortgage, alleging that it had not been completely satisfied.

Held, that in view of the implied terms of the contract between B and C, that contract being that they embarked upon a joint adventure for the purpose of extinguishing the prior mortgage and taking a first charge on the property, it was the legal duty of B to inform his co-mortgagee within a reasonable time that he had still an outstanding claim under the prior mortgage and that B's omission to give the information amounted to such an omission as is contemplated by S. 115 and operated as an estoppel against A under that section.

[P 100 C 1]

M. B. Kinkhede and W. R. Puranik—*for Appellant.*

K. K. Gandhe—*for Respondent.*

Judgment.—One Sitaram executed a mortgage for Rs. 2,000 on 16th September 1886 in favour of Naik and Pingle. Two payments aggregating Rs. 850 were made to Naik and it is admitted that Pingle had received his half share of this amount. On 11th March 1891 he executed a fresh mortgage for Rs. 2,000 of the same property in favour of Pingle and one Nandurkar in order to pay off

the prior mortgage. Pingle credited Rs. 999 towards the former mortgage and Rs. 1,000 was paid by Nandurkar to the mortgagor for satisfaction of the prior mortgage. Out of this Rs. 745 was paid to Naik. Naik admits that his share of the mortgage debt has been fully satisfied. On 11th June 1904 Pingle and Nandurkar foreclosed the mortgaged property. On 13th April 1908 Pingle sold his half share in the foreclosed village to the plaintiff and he also sold his rights under the prior mortgage, alleging that it had not been fully satisfied. The plaintiff now sues to foreclose Nandurkar's share of the village on the basis of the first mortgage. Both the Courts below have dismissed the suit on the ground that the first mortgage has been satisfied. According to a calculation made by the first Court, Rs. 1,978-8-0 was due on the date when the joint mortgage in favour of Pingle and Nandurkar was executed; it is clear from the recitals in that document that the intention of the parties was to extinguish the prior mortgage and each of the co-mortgagees advanced his share of the mortgage money. The plaintiff's case is that his vendor did not receive his share of Rs. 625 paid to Naik. He therefore claims half that amount with interest thereon. The suit was filed on the last day of the period of grace given by S. 31, Act 9 of 1908. The lower appellate Court has presumed satisfaction from a long delay in enforcing the claim under the mortgage of 1886. It is contended that the burden of proof as regards satisfaction was wrongly placed upon the plaintiff and in support of this an unreported ruling of the learned Judicial Commissioner in Second Appeal No. 245 of 1915 has been cited.

There is a finding by the Courts below, which I think enables me to dispose of the case on the ground of estoppel. The finding is to the effect that Pingle never asserted a claim till 1908 for the short payment said to have been made to him under the first mortgage. The view taken by the first Court is that the estoppel so far as it is based upon the recitals in the document, is correct as far as it goes. The lower appellate Court has not discussed the question of estoppel at all. But there is an aspect of the case not considered by the Court below, though Pingle's silence for many years has been

pleaded as a ground for holding that he is estopped. Let us now look at the facts. Pingle and Nandurkar found that about Rs. 2,000 was due on the prior mortgage. Their intention, as would appear from the recitals in their mortgage, was to extinguish the prior mortgage and to obtain a first charge upon the property. They agreed to advance half the sum each. It is not suggested that Nandurkar acted improperly in paying over his share to Sitaram. Pingle had no doubt a right to an account from Naik. Pingle may have equally a claim against Sitaram, the mortgagor, for not paying the amount due to Pingle. The intention of the two mortgagees was to extinguish the title, and in the absence of a complaint made by Pingle, Nandurkar was justified in assuming that it had been duly satisfied so far any claim on the part of his co-mortgagee was concerned. It is however urged that Nandurkar represents the mortgagor after the foreclosure decree, and is therefore bound to the same extent as the mortgagor. This is so far correct.

The question arises whether there was not a duty cast upon Pingle to inform within a reasonable time that he had still an outstanding claim under the prior mortgage, which was meant to be extinguished by this joint adventure. That there was a moral duty on his part to so inform Nandurkar does not admit of any doubt. I think also that there was a legal duty in view of the implied terms of the contract, that contract being that they have embarked upon a joint adventure for the purpose of extinguishing the prior mortgage and taking a first charge on the property. If it was a legal duty, then Pingle's omission to inform him was such an omission as is contemplated by S. 115, Evidence Act. Nandurkar was lulled into a belief that the property had ceased to be encumbered. Any claim upon that mortgage ought to have been made long ago. The joint mortgage was, in consequence of this belief, not enforced by Nandurkar till the debt reached near the full value of the property, for it is obvious that it was foreclosed because it reached that value. If Nandurkar had been so informed within a reasonable time, he would have enforced his mortgage at a time when the alleged outstanding claims on the prior mortgage and the mortgage

money due under the joint mortgage had not reached the full value of the property. His position therefore has been altered for the worse by reason of the unreasonable delay in asserting the claim. Pingle and his representative, the plaintiff, are therefore estopped from saying that the claim under the prior mortgage has not been fully satisfied. On the whole, the suit has been rightly dismissed and I dismiss the appeal with costs.

P.N./R.K.

*Appeal dismissed.***A. I. R. 1918 Nagpur 100**

STANYON, J. C.

Mt. Kalva—Plaintiff—Appellant.

v.

Bhawar Singh and another—Defendants—Respondents.

Second Appeal No. 477 of 1916, Decided on 24th September 1917, from decree of Dist. Judge, Raipur, D/- 29th July 1916, in Appeal No. 178 of 1916.

(a) C. P. Tenancy Act (1898), S. 46—Suit for possession of occupancy tenancy by heir—Civil Court has jurisdiction to entertain suit—Gift by Hindu widow in absence of necessity is invalid—Hindu law, Alienation.

In a suit for possession of an occupancy holding in the civil Court on the ground that it devolved on the plaintiff after the death of the former holder, her mother, the defendant resisted the claim on the ground that as the land was gifted to him by a registered deed by the plaintiff's mother the suit was barred by the Central Provinces Tenancy Act.

Held: (1) that as the suit was one for possession of an occupancy tenancy and not a suit to set aside an alienation made by the former tenant in contravention of the provisions of the Tenancy Act, the civil Court had jurisdiction to entertain the suit; (2) that irrespective of the provisions of the Central Provinces Tenancy Act the deed of gift regarded as an attempt to alienate anything more than the life-interest of a Hindu widow was invalid. In the absence of legal necessity a Hindu widow cannot alienate more than her life-interest merely because to do so would be to give effect to some wish, indicated but not carried into effect, by her husband during his lifetime. [P 101 C 2]

(b) C. P. Tenancy Act (1898), S. 46—Testamentary direction for disposal of occupancy tenancy cannot be given by tenant.

An occupancy tenant in the Central Provinces cannot leave any testamentary direction for the disposal of his tenant right by his widow after his death. [P 102 C 1]

(c) C. P. Tenancy Act (1898), S. 46—Devolution of occupancy tenancy—One of several tenants can take up entire holding.

On the death of an occupancy tenant the occupancy right devolves by operation of law on all the heirs as co-tenants and any one of them willing to do so can take up the whole tenancy

in the event of the other heirs being unwilling to do so. (P 102 C 1)

D. T. Mangalmurti—for Appellant.

J. C. Ghosh—for Respondents.

Judgment.—It is necessary to state the facts of this case. One Badri Lodhi was a tenant of an occupancy holding. He died some three years before the suit, leaving him surviving a widow Durpat, three daughters (1) Kalwa, (2) Kelhi and (3) Mathura, and a nephew Bhawarsingh, the son of his younger brother Gopy Lodhi. During his lifetime Badri executed a document purporting to gift some of his holding to his nephew, but the document was never registered or acted on. After Badri's death the tenancy devolved on his widow Durpat. On 21st December 1912, Durpat executed a deed of gift in favour of Bhawarsingh in respect of 12 of the occupancy fields and a house. This deed (Ex. D-1) does not purport to transfer anything except Durpat's right, title and interest in the gifted property. Durpat died in or about October 1914. On 28th July 1915, Mt. Kalwa, one of the daughters of Badri, sued Bhawarsingh for possession of the property included in Durpat's gift. Her two sisters being unwilling to join in the suit as plaintiffs were impleaded as defendants. Mt. Mathura, died soon after and as her legal representatives in the estate of Badri were her two sisters her name was expunged from the record without any other person being substituted. Kelhi stated that she had no objection to the disposition made by her father.

The suit therefore resolved itself into a contest between the plaintiff and Bhawarsingh. The defendant Bhawarsingh pleaded that he had become re-united with his uncle and was entitled to the fields gifted to him by survivorship. He also relied upon the unregistered document executed by Badri and the registered deed of gift executed by Durpat. The first Court found for the plaintiff and gave her a decree. The lower appellate Court has reversed that decree and dismissed the plaintiff's suit with costs. The plaintiff has therefore made this second appeal. I have no doubt whatever that the decision of the lower appellate Court is wrong. It was urged before the Judge that this suit was barred by the Central Provinces Tenancy Act, as being a suit to set aside an alie-

nation made by Durpat in contravention of the provisions of S. 46, Tenancy Act, and the case of *Ganeshtas v. Shankar* (1) was cited in support of that contention. The lower appellate Court rightly found on the pleadings that the ruling cited had no application. No doubt Durpat made an alienation of her own interest in the occupancy holding in contravention of S. 46, Tenancy Act, and if the plaintiff, as one of the persons upon whom the tenancy would devolve on the death of Durpat, had sought to set aside Durpat's alienation of her own tenant right, the ruling would have been applicable and the civil Court would have had no jurisdiction. But the suit is not one to set aside the alienation by Durpat. It is a suit for the possession of an occupancy right which, according to the Tenancy Act, devolved upon the plaintiff and her sisters on the death of Durpat. It is the defendant who sets up Durpat's gift and the plaintiff's reply is that the gift has been exhausted by the determination of the subject-matter of it, viz. the life-interest of Durpat.

Regarded as an attempt to alienate anything more than that life interest the deed of gift is invalid irrespective of the provisions of the Central Provinces Tenancy Act, and therefore that enactment is not called into operation. But after having gone right up to this point, the lower appellate Court went completely off the rails and expounded the so called law which is without foundation or authority. It held the deed of gift of an occupancy holding made by the widow to be binding upon the person on whom the holding would devolve under the Tenancy Act, because the gift was made by Durpat, (in the Judge's own words) "in order to complete the wish of her husband." This decision is unsustainable from every point of view. In the first place it was never pleaded that the widow executed the gift under the authority, or in furtherance of any wish, of her husband; nor does the deed itself contain any recital of such an authority or purpose. Therefore the decision of the learned District Judge is of a case neither pleaded nor put in issue nor proved. The mere fact that during his lifetime Badri made an abortive attempt to gift certain property to his nephew raises no presumption that he left authority behind to his

(1) [1912] 8 N. L. R. 22=13 I. C. 903.

widow to complete his intention. Next, it is manifest that an occupancy tenant cannot leave any testamentary direction for disposal of his tenant right in the Central Provinces by his widow after his death. Finally, it is an entirely novel proposition that, in the absence of legal necessity, a Hindu widow can alienate more than her life-interest merely because to do so would give effect to some wish indicated, but not carried into effect, by her husband during his lifetime. In this second appeal the learned Advocate for the respondent has felt the difficulty of supporting the obviously unsound view of the law adopted by the lower appellate Court, and he attempted to sustain the verdict in favour of his client by putting forward a number of pleas which were neither pleaded nor put in issue; such as that the gift was for legal necessity or for the securing of religious benefit to Badri, or was part of a family arrangement made by Badri. I give no consideration to these irrelevant pleas. An attempt was also made, for the first time before me, to set up a *jus tertii*, viz. that of the plaintiff's sister Mt. Keldi; but I am clear that the defendant Bhawarsingh cannot resist the suit on that ground. On the death of Mt. Durpat the occupancy tenant right devolved by operation of law upon the three daughters as co-tenants. Any one of those three daughters willing to do so can take up the whole tenancy in the event of her sisters being unwilling to do so. The decree of the first Court was perfectly correct, and the lower appellate Court was not justified in interfering with it. I therefore allow this appeal. I reverse the decree of the lower appellate Court and restore the decree of the first Court. The defendant Bhawarsingh must pay the costs of the plaintiff-appellant in both the appellate Courts.

P.N./R K

*Appeal allowed.***A. I. R. 1918 Nagpur 102**

BATTEN, A. J. C.

Deoba—Defendant—Appellant.

v.

Laxman—Plaintiff—Respondent.

Second Appeal No. 558 of 1916, Decided on 5th December 1917, from decree of Dist. Judge, Nagpur.

(a) Civil P. C. (1908), S. 47 and O. 21, R. 92—Property purchased by decree-holder in execution—Sale confirmed—Oral agree-

ment to re-transfer by decree-holder is invalid—Sale by judgment-debtor during pendency of execution proceedings is void—Vendee is representative of judgment-debtor—Suit being instituted in Court not passing decree could not be treated as application under S. 47—T. P. Act, (1882), S. 52.

Defendant, a decree-holder, purchased certain immovable property belonging to his judgment-debtor in execution of a money-decree. The sale was confirmed, but the defendant afterwards agreed to accept the decretal amount and to reconvey the property to the judgment-debtor. No document was however executed and the judgment-debtor sold the property to the plaintiff. The latter then sued for possession of the property:

Held: (1) that the defendant having on confirmation of the sale become absolute owner of the property under O. 21, R. 92 a re-transfer of the property to the judgment-debtor could only be effected by a registered deed;

(2) that the plaintiff having purchased the property from the judgment-debtor during the pendency of the execution proceedings the purchase was void;

(3) that the plaintiff being the representative of the judgment-debtor, a separate suit for possession was barred by S. 47.

(4) that the Court in which the suit was brought not being the Court which passed the decree or in which the decree was executed, the suit could not be treated as an application under S. 47 of the Code. [P 103 C 2]

(b) Civil P. C. (1908), S. 47—Decree-holder purchaser is party to suit.

A decree-holder, who is an auction-purchaser, remains a party to the suit for the purposes of S. 47. [P 103 C 1]

(c) Evidence Act (1872), S. 115—Title by estoppel.

There is no such thing in law as title by estoppel. [P 103 C 1]

K. K. Gandhe—for Appellant.

N. D. Udhoji and M. R. Indurkar—for Respondent.

Judgment—The facts of the present case are that the decree-holder was allowed to bid at an auction held on a simple money-decree and purchased the 1/3rd share in the land of his judgment-debtor Gosavi. The sale was confirmed and therefore under R. 92, O. 21, the decree-holder, the present defendant's father, became the absolute owner of the 1/3rd share. After this had happened, he apparently accepted the decretal amount from the judgment-debtor and promised to give back the land to him, but no document of transfer was effected, though a legal transfer for the consideration of the decretal debt required a registered deed. After the decree-holder's death his son, the present defendant, applied for possession of the property purchased. The plaintiff has brought this suit asking for a declaration that the defendant

has no right in the property. The plaintiff claims to be a purchaser from the judgment-debtor after the decree-holder had told the judgment-debtor that he would give him back the property. The First Court dismissed the suit; the lower appellate Court has decreed the plaintiff's claim, apparently on the ground that the defendant is estopped from denying the plaintiff's claim because the defendant's father informed the plaintiff before he purchased the property that he had given up his claims to it. As a matter of fact the execution proceedings had not closed at the date of the plaintiff's purchase. They are still before the Collector and the Collector has not yet put the auction-purchaser in possession.

It is accepted law in this Court that a decree-holder who is an auction-purchaser remains a party to the suit. As between the defendant and judgment-debtor therefore the matter now in dispute would be one to be decided under S. 47, both being parties to the suit. Supposing the sale by the judgment-debtor to the plaintiff to be a valid one, the plaintiff cannot possibly be in a better position than the judgment-debtor and the present claim is one which would fall under S. 47. But the plaintiff has no valid title at all on two grounds: the first is that the execution proceedings still being in the hands of the Collector when he purchased from the judgment-debtor his purchase is void, the second is that his vendor had no title to convey to him.

Under R. 92, O. 21, the defendant's father became the absolute owner of the property on the confirmation of the sale. He could only transfer that property back to the judgment-debtor by a registered deed. There might have been an alternative course, namely, for the Collector to refuse in the circumstances to put the auction-purchaser decree-holder in possession. This course would not give the present plaintiff any title. Thus there was no legal transfer from the judgment-debtor to the plaintiff, nor had the judgment-debtor any subsisting title to convey to the plaintiff. I am unable to understand what the learned District Judge means when he says the relinquishment by the purchaser was perfectly valid and did not require registration. There is no such thing as title by estoppel. If there were such a thing, the whole of the Transfer of Property Act

and Registration Act would become waste paper. If the plaintiff has any status at all in this case it is because he is the representative of the judgment-debtor. If he is such a representative a separate suit would not lie as action has to be taken under S. 47. As a matter of fact however the plaintiff has no legal status on which he can either sue or make an application.

I may note that the Court in which the suit was brought was not the Court which was executing the decree or by which the decree had been passed, so it could not treat the suit as an application under S. 47. Combined with the claim as stated above is a second claim which is of a totally different nature, asking for a declaration that the defendant cannot get separate possession of the 1/3rd share but only joint possession. There is nothing on the record to show that defendant has applied for joint possession and the lower Courts have held that there is no cause of action for this part of the claim. This decision is undoubtedly correct. If at any time the defendant gets possession of anything more than he is entitled to, the plaintiff can take such action as he is advised. For the above reasons I reverse the decree of the lower appellate Court and dismiss the suit with costs in all Courts. I may add that the plaintiff has failed because he has not taken the pains to get his title perfected. This is lucky for the defendant, whose action cannot be said to be that of an honest man.

P.N. R.K.

Appeal dismissed.

A. I. R. 1918 Nagpur 103

BATTEN, A. J. C.

Beharilal—Appellant.

v.

Rameshar and others—Respondents.

Second Appeal No. 839 of 1914, Decided on 9th May 1916, from decree of Divl. Judge, Hoshangabad, D/- 4th September 1914.

(a) Landlord and Tenant—Cosharer—Purchase by cosharer cannot be avoided by other cosharers—Transfer not avoided—Transferee is not trespasser.

Auction-sale whether in presence of a sale decree or a money decree is binding on parties to the decree only. Where a cosharer is himself the transferee of an absolute occupancy tenure, he is not liable to be ejected by other cosharers, since one of the proprietary body the transferee, is not liable to be ejected by other cosharers. Unless and until a transfer is avoided, the transferee cannot be deemed to be trespasser.

[b] Civil P. C. (1908), O. 21, R. 93—Rights of purchaser—Judgment-debtors found to have no interest in property sold—Auction-purchaser entitled to recover purchase-money from decree-holder by separate suit.

Where after property sold at auction, it was found that judgment debtors had no interest at all in the property sold, the auction-purchaser is entitled to recover from the decree-holder the purchase money by a separate suit and the decree-holder is liable to repay the money he received out of the purchase-money at the auction-sale.

[P 105 O 1]

B. K. Bose—for Appellant.

G. M. Gupta—for Respondents.

Judgment.—The facts are as stated by the lower Courts. There are two questions for decision. The first is whether both the lower Courts were right or wrong in holding that the plaintiff's suit for possession against defendant 1 Beharilal, and defendants 2 and 3 Sheocharan and Panna Lal is maintainable. The second is whether or not the Divisional Judge was right in holding contrary to the view taken by the Subordinate Judge, that defendant 4 Ganeshdas is liable to repay to the plaintiff the money he received out of the purchase money at the auction-sale. The first question will be discussed first. The learned Advocate for the appellant-plaintiff concedes that it is of no consequence whether the auction sale was in pursuance of sale decrees or a money decree, since if the first three defendants who were not parties to the suit ought to have been made parties, then the decree was not binding on them, and if these need not have been made parties the sale would not affect their rights. The learned Advocate attacks the decree solely on the ground that they had not acquired the status of tenants. As regards defendant 1 Beharilal, in satisfaction of a money decree he purchased in 1909, 32.81 acres of the holding in dispute from the absolute occupaney tenant Ganpat and his son Mohanlal. At that time Beharilal had a 4 annas proprietary title, the remaining 12 annas share belonging to Ganeshdas defendant 4, who was lambardar. It is not pleaded that the purchase was with the consent of Ganeshdas, and therefore it is argued, Beharilal did not acquire tenancy rights.

The lambardar therefore was bound to sue the original tenants for rent, and this he did in the interests of the proprietary body and he therefore by means of the sale evicted the original tenants in the

interest of the proprietary body and the plaintiff-purchaser at the sale became the tenant of the proprietary body, who had acted through the lambardar. The learned counsel for defendants 1, 2 and 3 says that as Beharilal a cosharer was himself the transferee and as in the course of the suit of 1910 against the original tenants it was brought to Ganeshdas's notice that Beharilal had purchased portions of the holding, Ganeshdas knew that there was a transfer and that it was assented to by one of the cosharers within the meaning of *Ramji v. Syed* (1). Ganeshdas nevertheless refused to make Beharilal a party to the suit. When he was aware that a cosharer had assented to the transfer he was not acting on behalf of the proprietary body in proceeding with the suit as though the transferee was a trespasser. Unless and until a transfer is avoided the transferee is not a trespasser, *Raghoba v. Ragho* (2).

The claim of the plaintiff is that defendant 1 is a trespasser. I am of opinion that the appeal as against Beharilal must fail unless and until the transfer is avoided by the lambardar acting on behalf of the proprietary body, a condition of affairs that cannot be reached in this case, since one of the proprietary body the transferee cannot be ejected. If, as he was here the transferee, be a cosharer, another cosharer has the remedy indicated in *Ramdayal v. Gulabi* (3) but the transferee cannot be ejected. Without an avoidance of the transfer, the claims of the transferee cannot be ignored as Ganeshdas deliberately elected to do in this suit for rent. The case in respect of defendants 2 and 3 is somewhat different but in my opinion the same principle is applicable. They were usufructuary mortgagees with the consent of the lambardar. In place of the mortgage a sale of part of the property took place by means of a conciliation award which however had not the assent of the new lambardar. But one of the cosharers Beharilal did assent to the award for he signed it. It is argued for defendants 2 and 3 that it must be presumed that the lambardar in consenting to a mortgage consented to any possible results there of including a conciliation award. This proposition I cannot assent to.

(1) [1903] 4 N. L. R. 45.

(2) [1901] 14 C. P. L. R. 120.

(3) [1908] 4 N. L. R. 120.

But the defendants in the rent suit brought to Ganeshdas' notice the fact that defendants 2 and 3 had purchased part of the occupancy holding. It was therefore incumbent on Ganeshdas, if he wished to proceed against the original tenants alone to avoid the transfer by joining the transferees as parties. If he had done so this would have pleaded that a cosharer had assented to the award which Ganeshdas therefore could not avoid as lambardar and agent of the proprietary body. The then plaintiff deliberately refused to take the only steps which he could take in the circumstances to avoid the transfer and the transfer has not been avoided. The plaintiff in this suit claims that by Ganeshdas selling the holding as that of the original tenants, the plaintiff has acquired tenancy rights irrespective of the fact that the original tenants had parted with portion of the holding. But the transfer was one that had to be avoided, it could not be ignored. In this view of the case the claim for possession fails. The second question is whether by a suit the plaintiff can recover from Ganeshdas the purchase money that he has received. The case has been argued on the assumption that the judgment debtors had no interest at all in the property sold. This assumption is correct, for through the judgment debtors in part of the holding they had no interest at all in that part of it which had previously been transferred to defendants 1, 2 and 3; more over in his appeal to the Court of the Divisional Judge Ganeshdas never contended that the judgment debtors had any interest in the property sold. The learned Divisional Judge in holding that a separate suit will not lie has relied on the remarks of Napier, J., in *Mohammuddin v. Mahmud* (4) and I have also been referred to some obiter dicta in *Parathi v. Govind Swami* (5).

But there is very strong authority for the view taken by the Sub-Judge. I would cite *Muhammad Vajibullah v. Jainarain* (6) when the sale was under the Code of 1908 *Ram Kumar v. Ram Gour* (7) and the recent case of *Rustamji v. Vinayak* (8) a case under the Code of 1908. I would therefore restore the de-

creet of the first Court against defendant 4 Ganeshdas. The result is that the suit is dismissed with costs in all Courts as against the first three defendants (the present respondents 1 to 3) and the plaintiff's money claim against defendant 4 (now Respondent 6) is decreed to the extent of Rs. 160 2/6 with proportionate costs in all Courts. Future interest will not be allowed.

P.N./B.K.

Order accordingly.

A.I. R. 1918 Nagpur 105

DRAKE-BROCKMAN, J. C.

Gulam and another—Defendants—Applicants.

v.

Sheodin Ram and others—Plaintiffs—Non-Applicants.

Civil Revision, No. 47 of 1918, Decided on 25th June 1918, from decrees of Sub-Judge, Jubbulpore, D. 29th November 1917.

(a) Specific Relief Act (1877), S. 9—Constructive possession is sufficient to maintain suit.

In suits under S. 9 the ordinary rule of possession going with title should be followed in deciding whether a person has been dispossessed within six months of the date of the suit. In order to bring this section into operation it is not necessary that the possession which is lost should be the actual physical occupation of the property. Constructive possession which goes with title would suffice for the purposes of the section. *Id. C. P. C. R. 151, 152.* [P 166 C 1]

(b) Civil P. C. (1908), S. 115—Question of law—Erroneous decision on, is not sufficient ground.

An erroneous decision of law cannot be regarded as an exercise of jurisdiction with which the Court was not vested by law and does not therefore furnish a ground for interference in revision. [P 166 C 2]

(c) Civil P. C. (1908), S. 115—High Court will not interfere when other remedy is open.

It is not the practice of the High Court to interfere in revision when another remedy is open to the aggrieved party, and when no great injustice or inconvenience would follow from the refusal to interfere : 33 All. 647; 38 Mad. 15; 21 Bom. 781; 12 C. P. L. R. 52; 19 Cal 544 (P.N.) and 3 I. C. 466, Full. [P 166 C 2]

*H. S. Gour and J. C. Ghose—*for Applicants.

*M. Gupta—*for Non-Applicants.

Order.—This is an application to revise a decree passed by the Sub-Judge, Jubbulpore, under S. 9, Specific Relief Act, directing the defendant Lachman to put the plaintiff in possession of a certain kotha in the town of Jubbulpore and ordering that the plaintiff's costs should be paid by all the four defendants. For

(1) [1912] 23 M. L. J. 487.

(5) [1913] 23 M. L. J. 467.

(6) A. I. R. 1914 All. 252=36 All. 529=25 I. C. 59.

(7) [1910] 37 Cal. 67.

(8) [1911] 35 Bom. 29.

the purposes of this application the facts may thus be stated. The applicants are Lachman and another defendant, the remaining defendants having been joined as non-applicants. The kotha in question belongs to one Sakharan who let it along with two others to the plaintiff Sheodin Ram for four years by a registered lease dated 3rd May 1913. The plaintiff sublet the kotha to Behari and Nathu on 23rd May 1914 for one year. The sub-lessees held on after the expiry of the term, and Behari died of plague in January 1917. Many of the residents of Jubbulpore had left the town owing to plague. Among them were the plaintiff and Nathu, who met at Gadawara sometime in February where Nathu informed the plaintiff that Behari's property had been removed and that he himself no longer required the kotha. On 15th March 1917 the defendant Gulam took possession and let the kotha to the defendants Nanhulal and Baldeo Prasad, who thereupon put the defendant Lachhu into possession. The Sub-Judge has held that although the plaintiff admittedly did not return to Jubbulpore between the final abandonment of the kotha by Nathu and 15th March 1917, he was still in possession for the purposes of S. 9, Specific Relief Act, and had therefore a right to sue under that section.

In this Court it is urged on the authority of *Dinkarsha v. Anantshe* (1) that the possession which must be lost to bring that section into operation must be an actual physical occupation of the property and that the mere constructive possession which goes with title cannot suffice. The facts in the case cited are distinguishable from those now under consideration, in that there a tenant with a subsisting right of tenancy was in actual physical possession, when the ouster complained of by the landlord took place. The decision goes no further than to lay down that in such circumstances the landlord cannot sue in his own name. To accept the view contended for by the applicants would be tantamount to holding that no suit could be brought under S. 9 by anyone. The plaintiff was admittedly entitled to have physical possession of the kotha as soon as it was finally abandoned by Nathu, and in the circumstances I consider that the or-

dinary rule by which possession is taken to go with title should be followed.

I am further very doubtful whether an erroneous finding upon the question of what constitutes dispossession can properly be regarded as an exercise of jurisdiction with which the Judge was not vested by law. The Sub-Judge had jurisdiction to try the case and had decreed the claim in the view that the plaintiff was in possession and was dispossessed by the entry of the defendants. If the Judge was in error the error was not one of jurisdiction but of law. It is true that this Court interfered in its decision above cited, but the point whether it had the power to do so was apparently not raised. In *Fadu Jhola v. Gour Mohun Jhala* (2) O'Kinealy, J., held that the decision complained of was not subject to revision. There the Munsif had dismissed a suit brought for possession of a right to fish in a certain khal the soil of which did not belong to the plaintiff, holding that such a suit did not fall within the purview of S. 9. A similar view was taken by Sharfuddin and Coxe, J.J., in *Shama Churn Ghosh v. Mahomed Ali* (3). Authority in the opposite direction may be found in *Collector of Vizagapatam v. Abdul Karim Sahib* (4) and *Brajabala Devi v. Gurudas Mundle* (5), but in neither of those cases was any reference made to the decision of the Privy Council in *Amir Hassan Khan v. Sheo Baksh Singh* (6).

There is, moreover, another principle on which I consider this Court should decline to interfere. It is open to the applicants to bring a suit to establish their title, and it is not the practice of this Court to interfere in revision where another remedy is open to the approved party and where no great injustice or inconvenience would follow from the refusal to act. This principle has been acted upon by all the High Courts. See for example *Ram Kishen Das v. Jai Kishen Das* (7), *Chidambaram Chetty v. Nagappa Chetty* (8) and *Kashinath Sakharan Kulkarni v. Nana* (9). The same principle was applied by this

(2) [1892] 19 Cal. 544 (F.B.).

(3) [1909] 3 I. C. 466.

(4) [1898] 21 Mad. 113.

(5) [1906] 33 Cal. 487.

(6) [1885] 11 Cal. 6=11 I. A. 237.

(7) [1911] 32 All. 647=11 I. C. 814.

(8) [1915] 38 Mad. 15=16 I. C. 820.

(9) [1897] 21 Bom. 731.

(1) [1893] 16 C. P. L. R. 154.

Court in *Balram Misar v. Bairagi Mali* (10), in which a suit under S. 9, Specific Relief Act, had been wrongly dismissed.

From the defence filed it does not appear that any of the defendants had any show of title or that the entry upon the kotha was effected otherwise than by way of pure trespass. Having regard to all the circumstances, I decline to interfere in revision. The application is dismissed and the applicants will pay the non-applicants plaintiff's costs in this Court. Follow Rs. 10 for the hearing.

P.N./R.K. *Application dismissed.*
(10) (1899), 12 G. P. L. R. 32.

* A. I. R. 1918 Nagpur 107 (1)

BATTEN, A. J. C.

Paramatra—Plaintiff—Appellant.

v.

Ramji and others—Defendants—Respondents.

Second Appeal No. 141 of 1916, Decided on 22nd December 1917, from Decree of Dist. Judge, Nagpur, D/- 3rd December 1915, in Appeal No. 78 of 1915.

* Civil P. C. (1904), Sec. 3, Para 11—Collector granting permission after execution of sale deed but before registration—Sale is not void.

Plaintiff sued for possession of property under a sale-deed executed during the pendency of an attachment when the execution proceedings were before the Collector, who accorded his sanction to the sale after the execution but before the registration of the sale-deed.

Held: that permission having been granted while the sale was not complete for want of registration, the sale was not void. (107 C 2)

H. S. Gour and A. V. Zinzgerle—for Appellant.

M. B. Kinkhede and V. D. Kale—for Respondents.

Judgment.—The facts are as follows. The plaintiff sues for possession under a sale-deed executed by defendant 1 Ramji on 9th August 1914. The plaintiff had in October 1913 attached the properties, the subject of the sale-deed in execution of a money decree, and the execution proceedings were transferred to the Collector. While the proceedings were still pending, the judgment-debtor executed the sale-deed in question without the previous sanction of the Court or of the Collector. On 10th August the parties to the deed applied to the Munsif to sanction it and he re-transferred the proceedings to the Collector. On 18th August the Collector made the endorsement "permission granted" on the sale-

deed, which was registered on 20th August. The learned Divisional Judge has held that the sale is void, as the Collector's sanction could not ratify a sale already made without his sanction. I am of opinion that the view taken by the learned Judge is incorrect. The sale was not complete until the deed was registered, as registration was necessary. The Collector sanctioned it before it was registered. The written permission was given while the sale was incomplete. I find nothing in *Sahib v. The State* (1) that a sale which creates the written sanction of the Collector after execution but before registration is void. In this view of the case I reverse the decree of the Divisional Judge and restore the decree of the Subordinate Judge dated 10th May 1915. Costs of the first Court will be paid on behalf by that Court. Defendants 2 and 3 will pay their own and plaintiff's costs in the two appellate Courts.

P. S./M.C.

Legal accepted.

(1) (1904) 8 L. R. 1094 (1911, 200).

A. I. R. 1918 Nagpur 107 (2)

BATTEN, A. J. C.

Harising—Appellant.

v.

Ramjee—Opposite Party.

Criminal Appeal No. 134 of 1915, Decided on 31st August 1915, from judgment and finding of Dist. Magistrate, Narsingpur D/- 22nd June 1915.

(a) Criminal P. C. (1898), S. 234—Joint trial for offences under Penal Code (1860), Ss. 379 and 380 is illegal.

It is illegal, with reference to S. 234, Criminal P. C. to charge a person in the same trial and convict him in the same trial of two offences not of the same kind, as e. g. one under S. 379 and the other under S. 380, Penal Code. (107 C 2)

(b) Criminal P. C. (1898), Ss. 234, 236 and 237—"Offences of same kind"—Meaning explained.

Under Cl. (2), S. 234 of the Code offences are of the same kind when they are punishable with the same amount of punishment under the same section and where this is not the case neither S. 234 nor S. 237 can be read with S. 234 of the Code. [109 C 1]

G. P. Dick—for the Crown.

Judgment.—The learned Standing Counsel has in this case been asked to argue the question whether the trial was legal with reference to the terms of S. 234, Criminal P. C. The appellant has been charged in the same trial and convicted in the same trial of two offences one being under S. 379, I. P. C. and the

other being under S. 380, I. P. C. Under S. 231, Criminal P. C. two offences are of the same kind when they are punishable with the same amount of punishment under the same section of the Indian Penal Code. Offences under Ss. 379 and 380 do not come under this description; they are not punishable with the same punishment under the same section. The learned District Magistrate has adopted a definition of his own that offences are of the same kind when they are both cattle thefts of cattle stolen in the same district within the space of a month and sold at the same cattle market. This definition cannot take the place of that given in the Criminal Procedure Code. None of the cases cited by the learned Standing Counsel are relevant except the case of *Bal Gangadhar Tilak, In re* (1). The following remarks at p. 238 (of 33 *Bom*) may be quoted:

"If the exceptions are mutually exclusive the provisions of S. 236 or S. 237 could never be invoked to prevent a miscarriage of justice arising from a failure to make good all the details of a charge joined with two other charges under S. 231."

"For example, if A were charged with three thefts in buildings within the year and the evidence established that in one case the theft was committed on the roof and not in the building, the accused could not be convicted of simple theft under the powers conferred by S. 237, because the applicability of S. 256, would be negatived by the mere fact of the joint trial under S. 231. We find it difficult to believe that the Legislature intended that a joint trial of three offences under S. 231 should prevent the prosecution from establishing at the same trial the minor or alternative degrees of criminality involved in the acts complained of."

Supposing the above remarks to express a correct view of the law, they do not apply in the present case. There is here no question in regard of either offence of a conviction of a minor or alternative offence to that charged. It is not a question of two charges under S. 380, and a conviction for one offence under S. 380 and for the other under S. 379. But as regards one offence the accused has been charged under S. 380 and convicted under that section while as regards the other he has been charged and convicted under S. 379. He has not been convicted under S. 379, though charged under S. 380. And in neither case was he charged in the alternative under S. 379 or S. 380. Thus neither S. 236, Criminal P. C. nor S. 237, Criminal

P. C. can be read with S. 234, Criminal P. C. in this case.

The accused has been charged and tried in the same trial for two offences not of the same kind and I cannot distinguish this case from that in *Emperor v. Bisahu Panka* (2), in which it was held that the accused could not be charged with and tried at one trial for three offences respectively under Ss. 380, 454 and 457, I. P. C. and that with reference to *Subrahmaniam Ayyar v. Emperor* (3) the whole trial was vitiated. I have therefore no alternative but to set aside the convictions and sentences, and to order a re trial, which must be by the District Magistrate as there is no other Magistrate in the District with S. 30 powers. In retrying the case the District Magistrate may well record the evidence in somewhat greater length and detail. Also I consider the evidence as to previous conviction extremely unsatisfactory. Even if finger prints are not available some more recent evidence than that produced is surely available, and some inquiry seems desirable as to whether the accused was really convicted of rape as he says, and whether the person convicted of rape was the same person as was convicted in the other cases. The convictions are set aside and a retrial ordered.

P.N./R.K.

Retrial ordered.

(2) [1901] 15 O. P. L. R. 53 Cr.

(3) [1902] 25 Mad. G1=28 I. A. 257.

A. I. R. 1918 Nagpur 108

DRAKE-BROCKMAN, J. C.

Dharn and others—Defendants—Appellants.

v.

Dildar Khan and others—Plaintiffs—Respondents.

Second Appeal No. 312 of 1917, Decided on 29th October 1917, from decree of Dist. Judge, Saugor, D/- 24th January 1917, in Appeal No. 246 of 1916.

(a) Civil P. C. (1908), Sch. 2, para. 1—Order of reference describing matter in difference as entered in plaint and written statement—Award directing defendant to pay costs—Arbitrators held authorized to decide question of costs.

The parties to the present suit applied to the Court to refer their disputes to arbitrators, on which an order of reference was made describing the matter in difference as entered in the plaint and the defendants' written statement. An award was filed granting the plaintiff the injunction prayed for by him and ordering the defen-

(1) [1909] 32 *Bom*, 221=2 I. C. 277=9 Cr. L. J. 226.

dants to pay the plaintiffs' costs. The defendants objected to the award on a number of grounds, in none of which exception was taken to the order regarding costs. It was urged in second appeal that the order of reference did not authorize the arbitrators to decide the question of costs and that the award was consequently ultra vires:

Heid: that as the plaint included a prayer for costs and as the arbitrators were directed to deal with all questions raised by the plaint and the written statement for the defence, the arbitrators acted within the scope of their authority in deciding the question of costs. [11 100 C 2]

(b) Civil P. C. (1908), Sch. 2, para. 1—Order of reference in general terms—Arbitrators can decide question of costs.

When a reference to arbitration in a suit is a general one of the whole case the power of dealing with costs rests with the arbitrators: 31 J. R. 1888, *Rel. on*. [11 100 C 2]

G. L. Subhedar—for Appellants.

K. V. Deskar—for Respondents.

Judgment.—The plaintiff in the suit out of which this appeal arises is malik mahbuz of a plot in mauza Etawah and the defendants are tenants of an adjoining field. The plaintiff sued for an injunction restraining the defendants from interfering with his right of way over their holding and in his plaint prayed that the defendants should be ordered to pay his costs. After issues were framed but before any evidence was recorded the parties applied to the Court under para. 1, Sch. 2, Civil P. C., to refer the dispute between them to arbitrators named in the application. The order of reference describes the matter in difference as entered in the copies annexed thereto, which are respectively copy of the plaint and copy of the defendants' written statement. An award was filed in due course, which in effect granted the plaintiff the injunction claimed and further ordered that the defendants, besides bearing their own costs of the suit, should pay the plaintiff those incurred by him. No costs were incurred in the course of the arbitration itself. The defendants objected to the award on a number of grounds, in none of which was exception taken to the order regarding costs of the suit. All the objections were overruled and the trial Judge held the award to be a valid one to which effect must be given. The defendants appealed to the District Judge, the first and third grounds entertained in the memorandum of appeal being as follows:

"(1) That the lower Court ought to have held that the award on which it has passed a decree is not a valid and legal award in law and that

it was not submitted in accordance with law. (3) That the award is so vague and indefinite as to be incapable of execution and the lower Court ought to have remitted it for reconsideration of the arbitrators."

The only points pressed before the District Judge were that in the third ground of appeal and another to the effect that the arbitrators exceeded their authority in ordering the defendants to pay plaintiff's costs. We are concerned in second appeal solely with the objection as to costs. It was urged before the lower appellate Court that the petition of reference did not authorize the arbitrators to decide the question of costs.

The District Judge however held that the reference was in general terms and so gave exclusive jurisdiction to deal with the costs. In second appeal *Dagdusa Tilakchand v. Bhukan Govind Shet* (1), which the lower appellate Court distinguished, is again relied on and it is said that the order as to costs should be deleted from the decree, on the ground that a matter not referred to arbitration was determined by the arbitrators. In that case it was expressly held that the submission to arbitration did not extend to the matter of costs. I do not think a similar view can be taken in the present case, having regard to the facts that the plaint included a prayer for costs and that the arbitrators were directed to deal with all questions raised by the plaint and the written statement for the defence. It is also true, as pointed out by the learned District Judge, that *Dagdusa Tilakchand v. Bhukan Govind Shet* (1) was a case of private arbitration; moreover the objection as to costs was not taken before the trial Judge. In *Har Gopal v. Sodhi Kartar Singh* (2) it was held by Powell and Hogg, J.J., that when a reference to arbitration in a suit is a general one of the whole case, the power of dealing with costs rests with the arbitrators. In England under R. 55-B, O. 36, Rules of the Supreme Court:

"Where the whole of any cause or matter is referred to an official referee under an order of Court, he may, subject to any directions in the order, exercise the same discretion as to costs as the Court or a Judge could have exercised."

and this power covers the costs not only of the action but of the reference and of the award: see *Paton v. West of England Iron Co.* (3). Moreover when the arbi-

(1) [1885] 9 Bom. 82.

(2) [1888] 31 P. R. 1888.

(3) [1894] 2 Q. B. 150.

trator does not exercise his discretion as to costs under the rule last cited, his award is equivalent to the finding of a jury and costs follow the events: see *Carr Brithers v. Dougherty* (4). I am asked to hold that if the application for an order of reference is silent as to the costs of the suit, the parties should be deemed to have agreed that such costs should be borne as incurred. For this no authority is cited nor have I been able to trace any. Further it is important to observe that in the present case the greater part of the costs, viz., those on account of processes and witnesses, were incurred in consequence of the appellants' objections to the award and so are not covered by the award at all. The trial Judge must in fact be regarded as having passed his own order regarding those costs and seeing that all the appellants' objections to the award failed they should certainly bear at least the costs of those objections. In conclusion it seems to me clear that had any objection to the award been raised before the trial Judge with regard to the costs of the suit he would certainly not have remitted the award: see the words

"unless such matter can be separated without affecting the determination of the matters referred,"

which found place in para. 14, Sec. 2, to the current Code of Civil Procedure though not in the corresponding provision (S. 520 (a) of the 1882 Code). He would have passed his own order, which would naturally and properly have been one requiring the appellants to pay the costs of the plaintiff and to bear their own costs. The appeal is thus without substance, whether costs prior or subsequent to the award are considered. It is therefore dismissed with costs. Costs in the lower Courts will be borne as already ordered. I allow Rs. 15 as Legal Practitioner's fee for the hearing in this Court.

P.N./R.K. *Appeal dismissed.*

(1) [1898] 67 L. J. Q. B. 371.

A. I. R. 1918 Nagpur 110

MITTRA, A. J. C.

Sakharam—Plaintiff—Appellant.

v.

Bhivrabai and others—Defendants—Respondents.

Misc. Appeal No. 13 B of 1917, Decided on 11th October 1917.

(a) **Guardian and Ward**—Guardian cannot bind minor or his estate by contract for purchase of immovable property—Specific Performance cannot be decreed even at minor's instance—Specific Relief Act (1877), S. 21.

It is not within the competence of the guardian of a minor to bind the minor or his estate by a contract for purchase of immovable property and specific performance of such a contract cannot be decreed even at the instance of the minor for want of mutuality. [P 111 C1, 2]

(b) **Civil P. C. (1908), O. 32, Rr. 6 and 7 (2)**—Agreement by guardian without leave of Court is voidable except against minor.

Under O. 32, R. 7 (2), an agreement or compromise entered into by the guardian of a minor without leave of the Court is voidable against all parties other than the minor. [P 111 C1]

(c) **Civil P. C. (1908), O. 23, R. 3—R. 3 applies to execution proceedings also—Civil P. C. (1908), S. 47.**

Order 23, R. 3, which relates to a compromise of a suit is inapplicable to execution proceedings. [P 111 C1]

(d) **Civil P. C. (1908), S. 47—Plaintiff obtaining decree for possession and mesne profits against minor—Plaintiff agreeing to sell certain field to minor but transfer not completed—No adjustment but merely agreement to adjust—Contract to sell being merely executory minor could not enforce specifically—Specific Relief Act (1877), S. 21.**

Plaintiff obtained a decree for possession of a field and for mesne profits against a minor defendant. He subsequently agreed to sell the field to the minor judgment-debtor at a certain price, but the transfer was not completed:

Held: (1) that this did not amount to an adjustment of the decree but was only an agreement to adjust. [P 111 C1]

(2) that there being nothing to show that the decree-holder gave up his rights under the decree upon the mere execution of the agreement, the contract was an executory one and was not capable of being specifically enforced by the minor for want of mutuality. [P 111 C2]

V. V. Chitale—for Appellant.

M. Chuckerbutty—for Respondents.

Judgment.—This appeal arises out of an application for execution of a decree obtained by the appellant for possession of a field and for mesne profits and costs. The respondent *Jairam* who is a minor pleaded through his guardian that the case had been compromised and in support of his plea put in a document which is described as *Isarpatti*. The parties admit that there was an agreement for the transfer of the field to the minor but the transfer has not yet been completed. The differ as regards the details of the consideration and other points. For the minor respondent it was urged that the terms of the compromise were fully set out in the *Isarpatti*. Objection was taken to the decree-holder's allegations vary-

ing the terms of that document. It was also pleaded that this document was intended to extinguish the decree unconditionally. The decree-holder on his part pointed out that sanction or leave of the Court was not obtained by the guardian before entering into the compromise; and the agreement, it was pleaded was therefore void under O. 32, R. 6 and 7. It was also urged that the judgment-debtor was barred by the provisions of Art. 174, Lim. Act. The first Court held that the agreement could not be enforced as the sanction of the Court was not obtained. It held on the authority of *Vinayachandran v. Shidappa* (1) that O. 32, R. 6 and 7, applied to execution proceedings. On these findings the decree-holder's application was allowed.

On appeal the District Judge correctly pointed out that under O. 32, R. 1, sub-S. 2, the agreement or compromise entered into without leave of the Court is voidable against all parties other than a minor. The case has been remanded for further inquiry into the alleged adjustment. Against this order the decree-holder has filed this appeal. It is contended on behalf of the appellant that the lower appellate Court's view that there has been an adjustment within the meaning of O. 21, R. 2, is erroneous, as, for it is argued for the respondent that the rule does not apply to a decree for possession. There is a conflict of opinion as to whether this rule applies to a decree other than a decree under which money is payable. The argument of the respondent is supported by *Sankaraj Nambiar v. Kanara Kurup* (2), which limits the application of the rule to decrees for money. On the other hand, the High Court of Calcutta has taken the opposite view: *Habu Mohamed v. Weli* (3), *Laxar Chandra Dutt v. Haris Chandra Dutt* (4). The Calcutta view has been followed in the Punjab, *Lachar v. Nishan Lal* (5). In the present case the decree was partly for money. It is unnecessary to decide in this case which view should be followed. But even upon the Calcutta view there has been in this case no adjustment of the decree, but only an agreement to adjust it: *Jatindra Nath Roy v. Chandra*

Nath Banerjee (6). It is also clear that there has been no satisfaction of the decree within the meaning of S. 47, Civil P. C. O. 23, R. 3, which relates to compromise of a suit, is inapplicable to execution proceedings as laid down in O. 23, R. 4.

Whether the plea of the judgment-debtor is an adjustment within the meaning of O. 21, R. 2, or a satisfaction within the meaning of S. 47, is either way his plea fails as a complete answer to the application. The *Paragatti* filed by the defendant provides that a deed should be executed by the '00 within 20th March 1916. There is nothing in that document to suggest that the decree-holder gave up his rights under the decree upon the mere execution of the document. The decree-holder was willing to give up his rights provided he received the balance of his consideration money within the time stipulated. The contract was an executory one. It was not capable of being specifically enforced for want of mutuality. It is not within the competence of the guardian of a minor to bind the minor or his estate by a contract for the purchase of immovable property and specific performance of such a contract cannot be decreed even at the instance of the minor for want of mutuality. *Mir Sarwarjan v. Fakhreddin Mohamed* (7). If a deed of conveyance had been executed and registered, it could not have been impeached by the decree-holder for want of sanction under O. 32, R. 6. But where no such deed has been completed a minor for want of mutuality cannot force a decree-holder to accept or give him such a deed, since the decree-holder, in the absence of the sanction of the Court to the agreement, cannot specifically enforce it. This follows from the principle of mutuality laid down in the above case by the Privy Council. I note that the alleged tender of Rs. 525 has not been followed by a deposit in Court, as it should have been, for the District Judge's view that if the tender is proved the application for execution should be dismissed is erroneous.

There is no allegation of fraud which prevented the guardian from applying under O. 21, R. 2 (2). The guardian did not take steps within the time allowed by Art. 174. The recent Bombay case

(1) [1902] 26 Bom. 102.

(2) [1899] 22 Mad. 182.

(3) [1891] 6 Cal. 785.

(4) [1898] 25 Cal. 718.

(5) [1906] 44 P. R. 1906.

(6) [1912] 16 L. C. 972.

(7) [1912] 39 Cal. 232=13 L. C. 331, (P.C.).

cited by the lower appellate Court *Hansa Godhaji v. Bhawa Jogaji* (8) even if correctly decided, is easily distinguishable. There fraud was admitted inasmuch as the money under the decree had been paid out of Court. In this case there is no allegation of payment but only of a tender. A breach of contract is all that has been pleaded. The decree holder is willing to give credit for Rs. 25 received as earnest money. I can therefore see no fraud of the kind contemplated in the Bombay judgment so as to justify the Court in not giving effect to the plain provisions of O. 21, R. 2 (3). The result is that the judgment-debtor is not entitled to enforce the contract alleged. The adjustment was not certified to the Court within time and cannot be recognized by the executing Court. Moreover, the facts alleged do not amount to an adjustment or satisfaction of the decree. The order of the Divisional Judge is set aside and that of the first Court restored. Costs in both the appellate Courts are to be paid by the respondents.

(8) [1916] 40 Bom. 223=31 I. C. 232.

The first Court will now dispose of the application for execution according to law. I fix Rs. 15 as pleader's fee in this Court.

P.N./R.K.

Order set aside.

A. I. R. 1918 Nagpur 112

STANYON, A. J. C.

Syed Kasam—Defendant—Appellant.]

v.

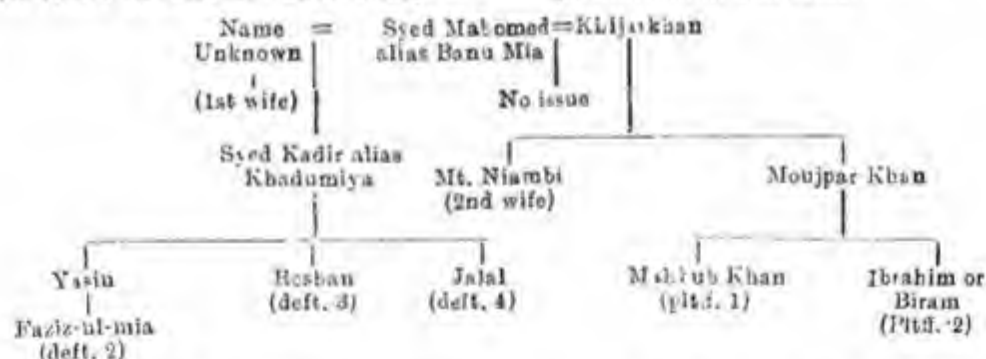
Maheboobkhan and others—Plaintiffs—Respondents.

Second Appeal No. 318 of 1910, Decided on 23rd December 1910.

Civil P. C (1908), S. 11—Representation—Right or title of legal representative decided—Subsequent suit by them on their independent rights is barred.

The right of the legal representatives of a person whose right or title to property is decided in a suit stands concluded by that suit and a subsequent suit by them on foot of their independent rights to the same property is barred by the rule of *res judicata*. [P 113 C 1, 2]

Judgment.—The following genealogical tree shows how the parties related to one another and should facilitate comprehension of the facts:



Defendant 1 Syed Kasam, apparently represents the head branch of this family and is a cousin, several degrees removed of Syed Mahomed. At any rate he holds and collects all the income of two jagir villages named Katora and Takli which are the property of the family. The facts antecedent to the litigation out of which this appeal has arisen are given in my judgment (as Judicial Commissioner of Berar) in Regular Appeal No. 47 of 1904, given on 30th June 1905. It is necessary to advert briefly to that case, which was the first of a series for which Syed Kasam defendant 1 also known as Gabru Mia is mainly responsible, by his failure to pay to Mt. Niambi her acknowledged of the Jagir income. That share consisted of 1/32nd inherited by Niambi

from her husband and another 1/32nd allowed to her apparently in lieu of her claim for dower. Up to the year 1892 this 1/16th or one-anna share seems to have been paid to her without dispute since her husband's death over quarter of a century before, but since 1892 the share has been unobtainable from Syed Kasam except by suit, and he has denied the title of Niambi and also pleaded payment of her share to the male descendants of her husband. In 1896 Niambi filed a suit being suit No. 61 of 1896 in the Court of the Sub Judge of Amraoti, claiming her one-anna share of the income from Syed Karim for the Fasli years 1302, 1303 and 1304 at Rs. 250 a year plus Rs. 177-8-0 interest thereon, or Rs. 927-8-0 in all. Syed Kasam and

Yasin, the eldest son of Syed Kadir were originally impleaded as defendants, but Roshan and Jalal were subsequently joined. That case was not decided till 9th December 1903. In the meanwhile Mt. Niambi and Yasin had both died, and the present plaintiffs had come in as the legal representatives of the former, while Farzulmia had replaced the latter. The Subordinate Judge found Niambi with a good title to a one-anna share and found the money value of that share to be Rs. 686.3.10 for the three years in dispute before him. He disallowed the claim for interest and gave the plaintiffs a decree for Rs. 686.3.10 and proportionate costs. The defendant Syed Kasam alone appealed against the decree to the Court of the Judicial Commissioner of Berar, and the case came before me as Regular Appeal No. 47 of 1914, already mentioned. In that appeal I held: (1) that Niambi had inherited a half-anna share out of the admitted four-annas share of her deceased husband, and that this share devolved upon her heirs; (2) that Niambi was further entitled to another half-anna share under a valid family arrangement, but only until her death in 1897 A. D., such further share not being heritable but subject to lapse; (3) that the present plaintiffs are the heirs-at-law of Niambi; (4) that Syed Kasam as manager of the jagir and sole collector of the income was bound to make direct payment to each co-sharer or branch of co-sharers entitled to receive the same; (5) that Syed Kasam could not be discharged of his liability to Niambi or her legal representatives in respect of the share due to her or them by any payment made to the other defendants.

Meanwhile, on 1st April 1899, the present plaintiffs filed suit No. 99 of 1899 in the Court of the Subordinate Judge of Amraoti, claiming a one-anna share in the jagir income from the same defendant for the Fasli years 1305, 1306, 1307 and 1308, that is, for the period immediately following that covered by Niambi's above suit. This case was still undecided when the Judicial Administration of Berar came under the Local Government of the Central Provinces and suit was given a fresh number as No. 143 of 1905. Nevertheless, it was not disposed of till 21st April 1903 when the plaintiffs were found entitled to the heritable half-anna share of Niambi and given

a decree for Rs. 712.10.2 out of the Rs. 1000 claimed by them and Rs. 78.8.0 out of the Rs. 130 1.0 assessed as expended by them in costs. Syed Kasam appealed against this decree to the Court of the District Judge of East Berar (First Appeal No. 31) of 1908 and that appeal having been dismissed on 14th December 1903, he has made Second Appeal No. 319 of 1910 to this Court.

What happened to the plaintiff's share of profits for the fasli years 1309, 1310 and 1311, does not appear but on 10th January 1906, plaintiffs filed civil Suit No. 28 afterwards renumbered No. 119 of 1906 in the Court of the Sub-Judge of Amraoti claiming Rs. 100 as their share of the profits of Faslis 1312, 1313 and 1314. They obtained a decree against Syed Kasam for Rs. 367.8.0 on 7th October 1908. Syed Kasam made First Appeal No. 108 of 1909 to the Court of the District Judge of East Berar and this appeal was also dismissed with costs on 11th December 1909. Syed Kasam has therefore made second Appeal No. 318 of 1910 to this Court. Once again on 31st March 1908, the plaintiffs lodged civil Suit No. 113 of 1908 in the Amraoti Subordinate Judge's Court claiming Rs. 900 for the fasli years 1315, 1316 and 1317. On 15th May 1909, they obtained a decree for Rs. 355.10.6 and proportionate costs. Syed Kasam made First Appeal No. 167 of 1909 to the Dist. Judge of East Berar and that appeal was dismissed with costs on 13th December 1909. Thereupon Syed Kasam made Second Appeal No. 322 of 1910 in this Court. The above three Second Appeals Nos. 319, 318 and 322 have been heard together and this judgment will govern the disposal of all of them. There is no dispute, nor could there legally be any in this Court as to the money value of the share claimed by the plaintiff; the three appeals raise only the questions of plaintiff's title to a share.

The Courts below have held that question to be *res judicata* by my decision in Regular Appeal No. 47 of 1904 in the Court of the Judicial Commissioner of Berar. That dictum alone was questioned in the three appeals now before me. A technical objection based on the Berar Pensions Act was expressly abandoned at the hearing. It was argued that the decision in the Appeal No. 47 was a decision as to the title of Niambi only and though Niambi died before it was

given the plaintiffs stood and succeeded as her legal representatives, and not as it were on their own feet. The suit of 1899, the earliest of the three cases now before me, was the first instituted by them in their own right and it was therefore open to appellant according to his learned counsel, to dispute their title to any share in the jagir income. In other words, it was urged that in Niambi's suit the plaintiffs merely became her representatives ad litem to allow of the suit being concluded, their own status as heirs-at-law to a share in the jagir income being left in the air. They got the decree that Niambi would have got if she had lived. This contention has no force. My former decision makes it clear that the plaintiffs were expressly found after contest to be Niambi's heirs and as such entitled to succeed her as owners of her half anna heritable share. In that suit they also received, as her heirs and legal representatives, the income already accrued due to her for her other half anna non-heritable share the right to that part of the income ceased with her death, but the finding in her favour as to the heritable half-anna share was in law a finding in favour of her and her heirs and the plaintiffs were expressly found to be such heirs. Their title has therefore rightly been treated as *res judicata*, and Syed Kasim is throwing away money in a hopeless struggle against that title. The three appeals now before me must all fail. For the above reasons this appeal is dismissed with costs of plaintiffs respondents on appellant. Other respondents pay their own costs.

P.N./R.K. *Appeal dismissed.*

* A. I. R. 1918 Nagpur 114

STANYON, A. J. C.

Shripuja—Plaintiff—Appellant.

v.

Kanhaya Lal—Defendant—Respondent.

Second Appeal No. 87.B of 1915, Decided on 20th November 1915, from decree of Addl. Dist. Judge, Akola, D/- 22nd October 1914.

(a) Evidence Act (1872), S. 90 — Ancient document — Rule of presumption must be applied with exceeding caution.

The rule of presumption embodied in S. 90 must be applied with exceeding caution in India, where forgery and fraud are not of rare occurrence. The necessity for such caution makes it necessary to give a strict and narrow, and

not a loose and liberal, interpretation to the provisions of the law. [P 118 C1]

(b) Evidence Act (1872), S. 90 — S. 90 limits power of Court to dispense with proof of execution to ancient documents produced—Provision cannot be enlarged.

The Legislature, by the plain language used in S. 90, has limited the power of the Court to dispense with proof of the execution of documents relied on as evidence, to ancient documents produced in Court at the trial; and the Courts in India have no power to enlarge this legislative provision so as to apply it to cases clearly outside the enactment. [P 119 C2]

* (c) Evidence Act (1872), S. 90 — Law makes production of document *sine qua non* for application of S. 90.

The law makes the production of the document a *sine qua non* for the application of S. 90. [P 120 C1]

Every ancient document for which a presumption of due execution is claimed, must be produced before the tribunal which is asked to make the presumption in its favour, so as to place it in a position to see for itself whether it bears upon the face of it such indications as convince the mind that it is genuine or "ostrays from some anachronism or other inconsistency" that it is a fabrication: *Case law considered*. [P 117 C2]

(d) Evidence Act (1872), S. 90 — Custody — Strict proof is necessary—Execution and registration of sale-deed in Berar — Possession of property purported to be sold kept with vendor — Custody of deed cannot be presumed to be with vendee.

It is the duty of a party, who claims that an ancient document should be presumed to have been executed, to prove by clear evidence the fact of custody, in order that the Court may determine whether or not such custody was proper. [P 120 C1, 2]

The execution and registration of a deed of sale in Berar in favour of a person who does not take possession of the property which the deed purports to sell, but leaves it with the apparent vendor, raises no presumption that the apparent vendee ever had custody of the deed for the purposes of S. 90, Evidence Act. [P 121 C1]

(e) Interpretation of Statutes—Intention of Legislature — Effect must be given to plain language though it may conflict with intention.

In interpreting Statute Law in British India the Courts must give effect to the plain language employed by the Legislature, even if it conflicts with what they conceive to be the policy or the intention of the law. [P 119 C1]

* (f) Evidence Act (1872), S. 101 — Party unable to adduce evidence — Still it is not relieved against necessity of giving legal proof.

While the law of evidence is designed to render the utmost assistance in the discovery of the truth, it does not relieve against the necessity of giving legal proof any party who may be unable to adduce evidence. [P 119 C1]

* (g) Evidence Act (1872), S. 90 — Every legislative exception must be literally and stringently construed — Interpretation of Statutes.

It is one of the canons of interpretation that every legislative exception to a general rule of

law must be literally and stringently construed, and that there is no justification for extending it by analogy to include cases not reasonably within the purview of the language employed.

[P 181 G 1]

J. Mittra and Bipin Krishna Bose—for Appellant.

F. W. Dillon and R. B. Oka—for Respondents.

Judgment.—The facts of this case are given in detail in the judgment of the lower appellate Court, but a synopsis of them is necessary to appreciate the questions of law involved in this appeal. The property in dispute is a house in the Akola District of West Berar which once belonged to one Ratanchand, who has now been dead for many years. The plaintiff, who represents a sect of Gujarathi Jains, having a temple to the north of the said house, claims title under a deed of sale, dated 13th February 1895, executed by Gulab Bai, the widow of Ratanchand, the allegation being that Gulab Bai continued to occupy the house after the sale as tenant of the plaintiff till July 1900 when the defendants wrongfully ejected her. The defendants represent another sect of Gujarathi Jains, having a temple to the south of the house in dispute, which thus lies between the properties of the rival litigants. The defendants' pleadings varied at different stages of the trial, but may now be stated thus: Ratanchand sold the house to one Popatlal on 14th February 1874; Ratanchand and Gulab Bai continued to hold possession as the tenants of Popatlal, rent free, upon consideration of keeping the premises in repair; and Popatlal sold the house to the defendants on 13th April 1894. The plaintiff denied the sales; he objected to Popatlal's deed of 1894 as not duly registered; he asserted that though Popatlal may have contracted to sell to the defendants in 1894, the contract fell through owing to the failure of the defendants to pay the price within the time stipulated; and he pleaded that any title Popatlal acquired by his alleged purchase in 1874, was extinguished by the adverse possession of Ratanchand and his widow and heir, from 1874 to 1900. The suit out of which this appeal has arisen was filed on 13th August 1907. It was decided by the first Court on 6th December 1911 and by the lower appellate Court on 22nd October 1914. Both Courts concurred in dismissing the suit,

and the plaintiff has made the present appeal.

In its judgment the lower appellate Court has set out the findings of the first Court in these words:

(1) "That the sale-deed, dated 13th February 1895, executed by Gulab Bai in favour of the plaintiff was proved; (2) that the defendants could give secondary evidence of the transfer in favour of Popatlal, as Popatlal was dead and his son stated that he could not find the sale-deed; (3) that the sale-deed of Popatlal being 30 years old and its copy having been produced its genuineness was presumed (4); that Ratanchand executed the sale-deed and sold the house to Popatlal on 14th February 1874; (5) that Ratanchand till his death and after him his widow Gulab Bai occupied the house as tenants of Popatlal; (6) that Gulab Bai had no title to transfer the house to the plaintiff."

In these findings the lower appellate Court concurred. It also recorded further findings as given below:

(7) That the occupation of Gulab Bai extended without interruption till the defendants ejected her in 1900; (8) that the deed of 1894 executed by Popatlal was duly registered; (9) that there was no agreement fixing a time for payment of the price by the defendants to Popatlal, and payment was duly tendered though acceptance was refused at the time of registration; (10) that non-payment of the purchase-money did not invalidate the sale.

In accordance with these findings, and certain other findings on technical objections which require no mention here the plaintiff's appeal was dismissed by the lower appellate Court.

In second appeal the objections taken may be summarised in these words:

1. That the defendant's title-deed of 1894 was not registered; 2. That their failure to pay the price vacated the contract to sell. 3. That the possession of Ratanchand and Gulab Bai should have been held adverse to Popatlal. It will thus be seen that no objection was taken to the procedure of the Courts below in applying S. 90, Evidence Act, to this case; but as it seemed to me that my decision of the appeal might be materially affected by a consideration of that matter I gave full opportunity to the parties to argue the point, and advantage having been taken of it, I am competent under O. 41, R. 2, Civil P. C. to rest my decision upon the conclusion which I may form in respect to the law connected therewith.

It will be seen that the title set up by the defendants primarily rests upon proof of the fact that on 14th February 1874 Ratanchand sold the house in dispute to Popatlal. The allegation is that the sale was effected by a deed duly registered. The original of that deed should now be in the hands of the defendants. It has not been produced, and in the pleadings the defendants made no statement as to what had become of it. It is now admitted that the deed was never delivered by Popatlal to the defendants. The defendants called Senlal (D. W. 11), the son of Popatlal, as a witness. He was adopted as a son by Popatlal's widow after Popatlal's death, which took place in 1903. He was asked to produce the sale-deed of 1874, and a rent note said to have been executed by Ratanchand. He said he could not find them. He had evidently never seen them. This has been accepted in the Courts below as sufficient to prove that the original sale-deed has been lost. Kanhayalal (P. W. 11), is one of the defendants. He was evidently called to prove that there was an agreement between Popatlal and the defendants regarding payment of the consideration of the sale of 1894. In the course of his testimony this witness made the following statements:

"The house in dispute originally belonged to Ratanchand * * * Popatlal sold the house to me 15 or 16 years ago. As Popatlal held a sale-deed of the house and other property, I took the sale of the house from him * * *. The sale in favour of Popatlal by Ratanchand was not executed in my presence. I saw the deed for the first time when Popatlal executed the sale in my favour * * *. The original sale-deed by Ratanchand in favour of Popatlal may be with the latter. The rent note referred to in that sale-deed is not with me. It was with Popatlal."

This is all the available evidence on the record relating to the original other than can be obtained from Ex. D. 2, which is a certified copy of the copy of the original retained by the registering officer. This copy was obtained from the registration office by the defendants in 1907, obviously for the purposes of this suit. The endorsement upon the copy proves that an original was presented for registration by Popatlal on 14th February 1874, that execution of the original was admitted by a person identified to be Ratanchand Hirachand, Guzrathi of Balapur in the Balapur taluk of the Akola District, and that the document was duly registered. It is also fair to presume that

the original document was returned to the custody of the person who produced it, though there is no entry to that effect in the registration record now before me. It will be remembered that Ex. D-2, is not a copy of any part of the original document. It is a copy made in 1907 of a copy made from the original deed and its endorsements at the time of registration in 1874. It is to such facts that the Courts below have applied S. 90, Evidence Act, and have presumed not only that Ratanchand, the owner of the house in dispute, executed and registered an original in the terms set out in Ex. D-2, but also that he thereby actually sold everything which the document purports to transfer to Popatlal. It is very obvious that there has been some confusion between secondary evidence of a lost original admissible under S. 65, Evidence Act, and a presumption under S. 90 of that Act in favour of the lost original based upon a copy thereof, and I wish to make it clear that I am now dealing only with the question of the applicability of S. 90 of the enactment. That section is worded thus:

"Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document which purports to be in the handwriting of any particular person, is in that person's handwriting, and in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested."

Explanation—Documents are said to be in proper custody if they are in the place in which and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable."

This explanation applies also to S. 81. I am alive to the danger of paraphrasing an enactment, and I have no intention of doing so in the present case when I say that the section requires in the most unambiguous language the presence of three conditions to bring it into operation, namely: (1) a document which purports or is proved to be 30 years old; (2) its production before the Court; and (3) its appearance from "proper custody" as defined in the section.

This provision of the law deals with an instance of what is sometimes called "real" evidence—that of which the tribunal itself is the original percipient

witness. The Judge sees for himself that the appearance of the document, its paper ink, phraseology, handwriting and other things indicative of age are consistent with the claim that it is not less than 30 years old; and he then exercises his discretion in two matters, namely (1): as to the propriety of the custody from which the document is produced, and (2) as to the genuineness of the document. It is a fundamental rule of the law of evidence that in all cases the best evidence must be given and it is a rule which the legislature and the Courts jealously safeguard. It is simply an amplification of the obvious maxim that if a man wishes to know all that he can know about any matter, his own senses are to him the highest possible authority. If a 100 witnesses of unimpeachable character were all to swear to the contents of a sealed letter, and if the person who heard them swear opened the letter and found its contents were different, he would conclude, without the intervention of any conscious process of reasoning at all, that they had sworn what was not true. It is in obedience to this fundamental rule that "hearsay" is treated as practically synonymous with "irrelevant" for the purposes of the law of evidence. Now S. 90, Evidence Act, embodies an exception to the hearsay rule which has become established by judicial decisions in England, and in no way enlarges the scope of the exception recognized and laid down by the English Courts. It is therefore expedient to give some consideration to the English law on the point. The following remarks, taken from Taylor on Evidence, Edn. 10, are instructive and sufficient for our purpose:

"Another conclusive presumption made by the law is that in favour of the due execution of ancient deeds and wills. When these instruments are 30 years old, and are unblemished by any alterations, they (as it is said) prove themselves; their bare production is sufficient and the subscribing witnesses are conclusively taken to be dead * * *. But it must appear that the instrument comes from custody, which (even though it is not in point of law strictly proper) affords a reasonable presumption in favour of its genuineness; and that it is otherwise free from just ground of suspicion * * * (S. 87). The presumption in their favour, if they come from the proper custody, and purport to be 30 years old is not confined to deeds and wills but extends equally to letters, entries, receipts, settlement certificates, and indeed to all other written documents; and in such cases the signatures and handwriting need not be proved. The rule is founded on the great difficulty, nay impossibility,

of proving the handwriting of the party after such a lapse of time. (S. 88). * * * A third exception to the general rule by which hearsay evidence is rejected, exists in favour of ancient documents (by which is meant documents more than 30 years old), when they are tendered in support of ancient possession. These are often the only attainable evidence of ancient possession, and therefore the law yielding to necessity allows them to be read on behalf of persons claiming under them, and against persons in no way privy to them. This species of proof demands careful scrutiny, for, first, its effect is to benefit those from whose custody they have been produced, and who are connected in interest with the original parties to the documents, and next, the documents are not proved, but are only presumed to have constituted part of the *res gestæ*.

Forgery and fraud are however matters comparatively speaking, of rare occurrence, and a fabricated deed generally betrays, from some anachronism or other inconsistency, internal evidence of its real character. The danger of admitting these documents is, consequently, less than might be supposed. It is more expedient to run some risk of occasional deception, than to permit injustice to be done by strict exclusion of what, in many cases, would turn out to be highly material evidence. On a balance of evils, this kind of proof has, subject to certain qualifications, for many years past been admitted. (S. 88). Before it is especially taken to ascertain the genuineness of the ancient documents produced; and then may in general be shown, prima facie, by proof that they come from the proper custody. (S. 89).

The leading case on the subject of proper custody is *Bishop of Meath v. Marquess of Winchester* (1), in which the character and description of custody were clearly defined by Tindal, C. J., and S. 90, Evidence Act, is obviously intended to reproduce as far as possible the principles laid down by that eminent Judge in respect of what is proper custody for the purposes of the section. It is manifest from the above quotation that the idea of making a presumption of execution in favour of ancient documents not produced or tendered in evidence is foreign to the English law, and that it is apparently assumed that every ancient document for which a presumption of due execution is claimed, must be produced before the tribunal which is asked to make the presumption in its favour, so as to place it in a position to see for itself whether it bears upon the face of it such indications as convince the mind that it is genuine, or "betrays from some anachronism or other inconsistency" that it is a fabrication. I have been unable to find any English case in which a Court was asked to make a presumption in favour of an

(1) [1826] 3 Bing (n. c.) 183=3 Scott, 561 132 E. R. 280.

ancient document which it does not see. It has repeatedly been held, and the soundness of the decision cannot be questioned that the rule of presumption embodied in S. 90, Evidence Act, must be applied with exceeding caution in India, where forgery and fraud cannot be said to be of rare occurrence: *Phool Bibee v. Goor Surun Doss* (2), *Uggrakant v. Hurro Chunder* (3), *Trailokia Nath Shurno Chingoni* (4), *Raikunt Nath v. Lukhun Majhi* (5), *Timangavda v. Rangangavda* (6), reported at p. 94 as a Note appended to *Hari Chintaman v. Moro Lakshman* (7). The relevant passage is at p. 98. It may be said that such decisions merely lay down a rule of caution and do not affect the scope of the enactment. It seems to me however that the necessity for such caution makes it necessary to give a strict and narrow, and not a loose and liberal, interpretation to the provisions of the law. Moreover, it is one of the canons of interpretation that every legislative exception to a general rule of the law must be literally and stringently construed, and that there is no justification for extending it by analogy to include cases not reasonable within the purview of the language employed. It seems to me that S. 90, Evidence Act, can apply only to documents produced before the tribunal invited to make the presumption which is allowed by the section in favour of them, and that it has been wholly misapplied in the present case. There is however authority against this view, and it is necessary to examine it. The first case is *Khetter Chunder Mookerjee v. Khetter Paul Sreeterutno* (8), which was decided by a single Judge. In that case a will was allegedly executed more than 30 years before the suit and was proved to have been lost.

A copy was tendered in evidence. Wilson, J., held that under S. 65, Evidence Act, the copy was admissible to prove the contents of the will: and that under S. 90 of the same enactment execution of the will could be presumed. The learned Judge's reasons for this ex-

traordinary extension of the latter section are given in these words:

"Under the section the execution of a document produced from proper custody, and more than thirty years old, need not be proved, if the document 'is produced.' I do not think the use of these words limits the operation of the section to cases in which the document is actually produced in Court. I think that as the document has been shown to have been last in proper custody, and to have been lost, and is more than thirty years old, secondary evidence may be admitted without proof of the execution of the original."

The concluding passage seems to confuse the grounds for admitting secondary evidence with the grounds for presuming execution of the original. The dictum seems with due respect to be wholly irreconcilable with the plain meaning of the words of S. 90 and it is unsupported by any authority, English or Indian, dealing with presumptions relating to ancient documents. It cannot be claimed that a document which is lost is produced: nor can it be said in reason that a document which is proved to have existed is produced. Therefore the decision treats the words "is produced" as superfluous. It makes no pretence of giving them an extended meaning. In *Ishri Prasad Singh v. Lalli Jas Kunwar* (9) the document in question was a petition made to a Collector on 28th September 1831. This was held to have perished with the records of the Collectorate destroyed during the Mutiny of 1857. A certified copy granted on 20th October 1831, or less than a month after the original was filed, was produced in Court in proof of the original. It was held that the copy was admissible as secondary evidence, which cannot be questioned. It is also manifest that S. 90 applied to the copy itself since it was more than 30 years old that is, it could be presumed to be what it purported to be—a copy duly certified of an original document retained in a public record. There remained the question of a presumption under S. 90 in favour of the unproduced original. The learned Judge wrote:

"Under S. 90 we may presume that the document was duly executed. . . . To this it was objected that S. 90 does not apply so as to warrant the presumption in question where the original document is not produced in Court, and in support of this argument great stress is laid upon the word 'produced' in the section."

The dictum of Wilson, J., in the Calcutta case above examined was then referred to and the judgment proceeds:

(9) [1900] 22 All 294.

(2) [1872] 13 W. R. 485.

(3) [1881] 6 Cal. 209.

(4) [1883] 11 Cal. 539.

(5) [1882] 9 C. L. R. 425.

(6) [1878] P. J. (Bom.) 240.

(7) [1887] 11 Bom. 89.

(8) [1890] 5 Cal. 886.

"Although the matter is not free from doubt, we think that we should follow this ruling."

Here again we have no analysis of the subject. In a particularly strong case, upon the production of a certified copy, itself more than 30 years old, of an original forming part of a public record, the learned Judges yielded to the temptation of brushing aside what was the law in favour of what they considered ought to be the law for the purpose of doing justice in that particular case and they could give no better reason for that course than that another Judge had previously strained the law in the same way. No attempt was made to adjust the view taken to the language of the section. In a case of admitted doubt the Judges elected to follow the course which seem to them to be most consistent with truth and justice in the particular case before them. The ruling cannot be accepted as an authority upon an interpretation of the section. The fact that the original in this case was in fact filed in a Court would not satisfy the requirements of the section. The law demands the production of the document after it has become an ancient document. The above decisions were quoted with approval in *Sawan Singh v. Karam Lal* (11), where the learned Judge reproduced the concluding passage in the judgment of Wilson, J., already quoted above with a similar contention of secondary evidence and presumption under S. 90. The learned Judge wrote:

"To rule otherwise would, in my opinion, be to misunderstand the policy of the Legislature. The obvious intention of S. 90, Evidence Act, is not to make it too difficult for persons relying upon ancient documents to utilize these documents in proving their cases and if the section is not to be applied in cases where the original is lost that policy is not fully carried out for when the original is lost it is doubly difficult for the party concerned to prove the execution and handwriting and so on."

With due respect I would urge first that in interpreting statute law in British India the Courts must give effect to the plain language employed by the legislature even if it conflicts with what they conceive to be the policy or the intention of the law and next that while the law of the evidence is designed to render the utmost assistance in the discovery of the truth it does not relieve against the necessity of giving legal proof any party who may be unable to adduce

evidence. If the argument of the learned Judge were carried to its logical conclusion it would amount to this that where a party is unable to prove his claim ipso facto it must be presumed to have been proved. I am unable to assent to any such proposition and I again point out that no attempt is made to find support for the view taken by the Punjab Court from any words appearing in the section itself. In *Anpithara Pollar v. Gopal Panikhar* (11) the Madras High Court refrained from extending any aid to the point but in *Ponnambalal Parapattan v. Santaran Nair* (12) a Division Bench following the Ceylon and Allahabad cases held that the presumption as to the genuineness of an ancient document under S. 90, Evidence Act, can be applied even where the original is not produced but only a copy is produced. The judgment in the latter case on the question under discussion is in these terms:

"Whether the Court should presume the genuineness of the document is a matter that depends on the special circumstances of each case and is not governed by the circumstances proved in regard to the missing document." It is thus the learned Judge was right in adhering to the principle laid in presuming that the document is genuine."

The document was filed in a public record and destroyed when the record was eliminated and a certified copy was produced in proof. So the case somewhat resembled the Allahabad case. But here as in the other cases the learned Judges lay down a rule for which they make no attempt to find any support in the language of the enactment. In all the above cases the Judges were a law to themselves. They did not interpret but legislated and with due respect I am unable to follow them. It seems to me indisputable that the legislature by the plain language used in S. 90, Evidence Act, has limited the power of the Court to dispense with proof of the execution of documents relied on as evidence to ancient documents produced in Court at the trial and that the Courts in India have no power to enlarge this legislative provision so as to apply it to cases clearly outside the enactment. Moreover even if such a course were permissible, it seems to me a most unwise and unsafe precedent to lay down that upon a pro-

(11) [1902] 25 Mad. 674.

(12) [1911] 12 I. C. 453.

duction of a copy the Court may presume that some document it has never seen was in fact an ancient document was executed and attested by the persons whose names appear in the copy and was in proper custody when lost. Such a precedent would strike at the very root of the rule of caution above laid down. It would be easy to say that presumptions based on copies in the absence of originals would be confined to special cases such as that before the Allahabad Court in the ruling above quoted and that the Courts must be trusted to act with due discretion. I cannot take that view. Once the precedent were laid down it would be followed in all manner of cases and become a substantial aid to fraud and forgery. It is however not necessary to labour the point as I am clear that the law makes the production of the ancient document at the trial a *sine qua non* for the application of S. 90.

For the above reasons I hold that the Courts below erred in applying S. 90, Evidence Act, in this case and as their judgments were influenced by presumptions which in law they were not competent to make they are open to reversal by this Court: *Grant v. Byjnath* (13).

But even if S. 90, Evidence Act, had been applicable upon the production of a copy, what evidence is there that the original deed of 1874 was in the custody of Popatlal at any time, even suppose we believe every word stated in regard to it by the defendant Kanhayalal (P. W. 11)? He says that Popatlal "held a sale-deed of the house." This may be merely a statement of what Popatlal told him. He also says that he "saw the deed for the first time when Popatlal executed the sale-deed" in his favour, but this does not show where and with whom the deed was at the time. It may be said that the evidence is vague because it was badly recorded and that the witness may reasonably be taken to have intended to convey that he saw the deed in the possession of Popatlal and satisfied himself that Popatlal had a title to pass at the time when the purchase of 1894 was made from him. But is it justifiable to presume not only that an ancient document is genuine but also that its custody must have been proper though the evidence relating to such custody is uncertain? It is the duty of a party who claims that an ancient docu-

ment should be presumed to have been executed to prove by clear evidence the fact of custody in order that the Court may determine whether or not such custody was proper. In the present case custody should have been with the defendants. The lower appellate Court gets over that by stating that

"it is not always that the purchaser takes the title-deed from his vendor in these parts of the country."

a statement for which there is no support to be found in any part of the evidence on record and which is not the rule where the vendor has at hand and produces his title deed at the time he makes his sale, as Popatlal is said to have done in this case. But suppose that the custody of Popatlal after 1894 was a proper custody for the purposes of S. 90 aforesaid. I am clear that the evidence on record is legally insufficient to prove the fact of such custody. It was said that ordinarily a title deed presumably delivered by the registering officer to the person who presented it for registration may further be presumed to have remained in that custody subsequently. I should not be prepared to make that presumption in regard to any such document in Berar. It is a matter of common knowledge, of which I am entitled to take notice that the people of Berar habitually execute and cause to be registered the most formal instruments which either represent no real transaction at all or give a wholly false colouring to the real agreement between the parties. As against the executors of such deeds it is no doubt the policy of the law to hold them bound by the writing, but for a collateral purpose, such as a presumption that the custody of a deed of sale must have been with the vendee the execution, registration and delivery of the deed by the Registering Officer afford no safe basis especially where as here there are circumstances which are contra-indicative of any delivery of the deed. Ex. D 2 may be taken as good secondary evidence of the contents of the original deed, and the registration endorsement may be taken as some evidence of the execution thereof: *Gangamoyi Debi v. Trailuckhya Nath* (14)—though I do not understand that case to rule that the endorsement is sufficient by itself to prove execution. But one of the most common forms of fictitious

transactions in Berar is that by which an owner of property by the simultaneous execution of an apparent deed of sale and an apparent rent note or lease counterpart—no lease being executed—transforms himself into the apparent tenant of another.

Exhibit D-2 proves that the original purported to sell the dwelling house of Ratanchand and some unspecified movable property valued at Rs. 5 for Rs. 500 to Popatlal. It then recites that the vendor continues to occupy the house as the tenant of the vendee in accordance with the terms of a separately executed rent note. This rent note is also not forthcoming. There is not a shred of evidence beyond the recital that it was ever executed. Such recitals, like those as to delivery of possession, are habitually false or representative of a promise or intention never carried out. It is an admitted fact that Popatlal was a near relation of Ratanchand. It is also admitted, or at any rate well proved, that Popatlal never had physical possession of the house for a single day, that Ratanchand continued to use and occupy it as before, and that after his death, more than 12 years before the suit, his widow, Gulab Bai, succeeded to such possession and occupancy exactly as if by inheritance. Neither ever paid a rupee as rent to Popatlal or to the defendants. These being the circumstances, no Court would be justified in law in presuming that in 1894, when he executed the deed of sale in favour of the defendants, Popatlal had custody of the original deed executed in his favour twenty years before, even if it could be safely assumed that the Registering Officer returned the deed to him after registration.

My decision, therefore, amounts to this: (1) That no presumption can be made under S. 90, Evidence Act, 1872, as applied to Berar, in favour of any document unless such document is itself produced before the Court invited to make the presumption; (2) the execution and registration of a deed of sale in Berar in favour of a person who does not take possession of the property which the deed purports to sell but leaves it with the apparent vendor, raises no presumption that the apparent vendee ever had custody of the deed for the purposes of the above section. It follows from this that the foundation of the title relied on by

the defendants fails, and that the plaintiffs are entitled to succeed. Two other points were pressed on behalf of the appellant, and I will merely state them. It is an admitted fact that the defendants have never paid the price of the house to Popatlal or to his representatives, and that they have not filed the same in Court or made any deposit of it. The deed of sale was executed by Popatlal on 13th April 1894; it was presented for registration by the defendants on 13th August 1894 before a Sub-Registrar whose original power to register expired on that day. Popatlal's attendance was subsequently secured by the issue of process. He appeared on 12th October 1894 and repudiated the deed on the ground that the agreement was that the price of the house was to be paid within one week of the execution of the deed, and as this was not performed, the sale had fallen through. The vendees offered to pay the price before the Sub-Registrar but Popatlal refused to receive it. The Sub-Registrar then registered the document. There is no evidence whatever to show that he obtained the sanction of the Registrar to do so after expiry of the four months to which his own jurisdiction extended. On these facts the conclusions for the appellant are:

(1) That the deed of 1894 is in law unregistered; (2) that the alleged sale to defendants remains a disputed agreement. It is not necessary to decide these points. The appeal is allowed. The decrees of the Courts below are reversed and the plaintiff will be given a decree for possession of the house in dispute. The defendants must pay and bear all costs throughout.

P. N. R. K.

Appeal allowed.

A. I. R. 1918 Nagpur 121

Drake-Brockman, J. C.

Mahomed Yacub—Applicant.

v.

Secretary, Municipal Committee, Nagpur—Opposite Party.

Criminal Revn. No. 42 of 1913, Decided on 25th March 1913, from order of Mag., First Class, Nagpur, D/- 13th February 1913 in Criminal Case No. 54 of 1913.

(a) C. P. Municipal Act (1903), S. 139—Daily fine for continuing breach—Punishment must relate to period anterior to Magistrate's order and not in future.

The daily fine which may be imposed under S. 189 must relate to a period anterior to the

Magistrate's order of conviction. There cannot be punishment under that section for a future breach: 6 C. P. L. R. 32, *Foll.* [P 122 C 1, 2]

(b) C. P. Municipal Act (1903), S. 66 (1) and (3)—Delay by the Committee in passing order on notice under S. 66 (1) indicates sanction to construct.

Under S. 66 (3), C. P. Municipal Act, delay in passing orders on a valid notice given under S. 66 (1) of the Act may, if followed by a failure to reply to a written reminder, lead to a conclusion that the proposed building has been absolutely sanctioned. [P 122 C 1]

Order.—The applicant has been fined Rs. 5 for failing to remove an upper storey added to his house in the town of Nagpur without the sanction of the Municipal Committee. The notice to remove allowed only one day for removal, which on the face of it is an unreasonably short period. But apart from this the applicant pleaded before the trying Magistrate that he applied to the Municipal Committee for permission to build. In the face of this plea the trying Magistrate should have inquired and placed on record details of the application relied on. Under S. 66 (3), C. P. Municipal Act 1903, delay in passing orders on a valid notice given under S. 66 (1), *ibid.*, may, if followed by failure to reply to a written reminder, lead to a conclusion that the proposed building has been absolutely sanctioned. As pointed by the learned District Magistrate, it is impossible from the trying Magistrate's meagre record to ascertain exactly what the defence set up was, much less to determine whether it is valid or not. Moreover the trying Magistrate is wrong in thinking that it suffices by way of giving reasons for conviction as required by S. 263, Criminal P. C., to state the bald fact that a notice to remove was disobeyed. That fact being found, it remains to add, as required by Cl. (h) of the last cited section, "a brief statement of the reasons therefor."

The sentence passed is also illegal. It requires the applicant to pay Rs. 1 per diem "until he removes the unsanctioned building," besides mulcting him in the fixed sum of Rs. 5. There is nothing in S. 139, Municipal Act, to justify such an order. That section lays down that in the case of a continuing breach a fine may be imposed for every day after the first during which the breach is proved to have persisted in. It is clear therefore that the daily fine which may be imposed must relate to a period anterior to the Magistrate's order of conviction. There

cannot be punishment under the section for a breach still in futuro. The decision in *Empress v. Gangaram* (1), though based on S. 97, C. P. Municipal Act 1889, is in point and should have been followed by the trying Magistrate. The conviction and sentence are set aside and there must be a fresh trial at which the accused person's defence will be set out in such details as to enable this Court, if again moved in revision, to understand the nature of that defence and to decide whether in spite of it the accused is liable to punishment for not removing the upper storey objected to by the Municipal Committee. The trying Magistrate's attention is directed in this connexion to *Emperor v. Bhikia* (2). His omission to examine the complainant has already been brought to his notice.

P. N./R. K. *Retrial ordered.*

(1) [1893] 6 C. P. L. R. 32.

(2) [1900] 13 C. P. L. R. 171.

A. I. R. 1918 Nagpur 122

DRAKE-BROCKMAN, A. J. C.

Bijaram—Applicant.

v.

Secretary, Municipal Committee of Nagpur—Non-Applicant.

Criminal Revn. No. 230 of 1914 Decided on 7th November 1914 against judgment and finding of Mag. First Class, Nagpur, in Criminal Case No. 33 of 1914 D/- 29th August 1914.

C. P. Municipal Act (1903), S. 152—Service of notice—Attestation of report by unofficial person is not necessary.

The law of service of notices contained in S. 152 does not require the report of service of notice to be attested by any unofficial person.

[P 123 C 1]

Order.—The applicant has been fined Rs. 20 under S. 139, C. P. Municipal Act 1903, for disobeying a direction given him by the Committee to alter and repair his privy. His defence was simply that he received no notice. The prosecution examined two witnesses, viz., the Sanitary Inspector and a havildar employed by the Committee, who deposed that the applicant refused to receive the notice which was consequently affixed in his presence to his house. It is now objected that independent persons, of whom the havildar deposed that some were present, should have been examined and that the Magistrate was wrong in disbelieving the defence witnesses called to show that the havildar

about two months before the date (27th April last) of the alleged service tried to extort bangles worth Rs. 4 from the applicant without payment and failing joined in getting up this case. The Magistrate was mistaken in thinking both witnesses for the defence to be the servants of the applicant, but even if it be conceded that the havildar bore him a grudge, there seems to be no sort of ground for disbelieving the Sanitary Inspector against whom nothing specific is alleged. The law regarding service of such notices is contained in S. 152, Municipal Act and does not require the report of service to be attested by any unofficial person.

The fine is complained of as excessive, but it is well within the maximum limit imposed by S. 139 of the Act and the size and the style of the applicant's latrine indicate him to be a person of some standing. I decline to interfere. The application is rejected. The Magistrate's attention is directed to the ruling of this Court in *Hamulnaray v. Chhindwara Municipality* (1). His record should have shown that the notice served on the accused was issued under proper authority.

F.N. 1117. *Applicant's request 2.*

(1) (1910) G.N. L. R. 518 (C. 111).

A. I. R. 1918 Nagpur 123

DRAKE-BROCKMAN, J. C.

Gulzarsha Fakir — Accused — Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 115 of 1915. Decided on 13th July 1915, from judgment of Addl. Sess. Judge, Wardha, D/- 21st May 1915.

Criminal Trial—Conviction—Moral conviction of guilt is not sufficient.

A finding based on a theory not merely unsupported by, but opposed to, the direct evidence available is bad in law. Similarly a moral conviction of guilt is no sufficient foundation for a verdict of guilt, unless it is based on substantial facts which lead to another reasonable conclusion than that the person charged is guilty: 5 W. R. 23 Cr. Appr. [P. 121 C. 1]

Judgment.—The appellant Gulzar Shah, a Mahomedan aged about 40, along with Godria Kunbi, aged about 20, was tried by the Additional Sessions Judge, Wardha, on a charge of raping Kisni Loharin, aged 25 years. Both were acquitted of that charge, but the appellant alone was convicted of having indecently

assaulted Kisni with intent to outrage her modesty and sentenced under S. 354, I. P. C., to rigorous imprisonment for six months.

In an exhaustive judgment the learned Judge has given convincing reasons for holding that Kisni's story is untrue. Both the assessors held the same view, and further gave it as their opinion that no indecent assault was committed. In convicting the appellant under S. 354 the Additional Sessions Judge has been greatly influenced by the difficulty of explaining, in the defence set up, how an entirely false story came to be told by Kisni to the constable at her village the same night and again to the Sub-Inspector next day at noon.

There can be no doubt that Kisni started from Almur on the evening of Saturday the 20th March last. She sat with the appellant in his cart while Godria drove. Her account of how she came to do this has been rightly disbelieved. As to Gulzar there is perfectly credible evidence to support his story that his own object was to bring kuter from Eranwari, a village two miles from Almur. Eranwari contains a shrine of the goddess Boli and Gulzar says that Kisni took a lift in his cart to go there. No evidence whatever is forthcoming to show that Kisni reached Eranwari that evening. On the other hand, Walla Khatik and Aba Simpi (P. Ws. 3 and 2) support Kisni in her story that she returned to Almur with them from a spot only 1 1/4 miles from that village. Aba went to that spot on hearing a woman's cry for help, but saw no act amounting to an offence being committed: both Kisni and Gulzar were arranging their clothes and the former alleged that Gulzar had dishonoured her majhi izzat ghetli; whereupon he scolded Gulzar, who without speaking got into his cart and drove on with Godria towards Eranwari. Walla professes to have seen Gulzar on Kisni, but on this point he is undoubtedly lying: according to him Aba on coming up said nothing to anyone and Gulzar drove off at once towards Eranwari. Neither man lends any support to Kisni's allegation that Godria held her hand while Gulzar had connexion with her.

The Additional Sessions Judge has believed Aba's evidence in the main. Nevertheless he has come to a conclusion as to what happened in the cart, which

is not supported by Aba's account of how Kisni described the incident immediately after its occurrence. According to that account Gulzar dragged Kisni out of the cart. The learned Judge's finding is :

"Gulzar began taking liberties with Kisni. She resented it, not because her morals were all correct or because she was unaccustomed to such treatment, but because there was another man in the cart. Even depraved woman have the ideas of decency. Gulzar, knowing her past history, did not expect an opposition from her and counted too much upon her loose character. Kisni, not liking the liberties which Gulzar was taking, got down. He too got down after her and began to lay his hands on her. She raised a cry and Walia and Aba arrived. Gulzar does not appear to have done anything more than this or gone beyond an ordinary indecent assault."

Now even Kisni herself did not suggest at the trial that any liberty was taken with her in the cart beyond preventing her from getting out. She deposed that she jumped out and was followed by Gulzar. That any violence was used or impropriety attempted in the cart seems to me most improbable, in view of the fact found by the Judge that Gofria was there and that by mere accident, not by design connected with any evil intention of Gulzar towards Kisni. If a finding not supported by positive evidence is to be adopted, it may very plausibly be urged that Walia, in his search for his lost sheep, came suddenly on Kisni and Gulzar in a compromising position and that Kisni invented her story to excuse herself. That Walia and Kisni are anything but strangers to each other is shown by Aba and believed by the Additional Sessions Judge.

Having given all the evidence my careful consideration, I conclude that it would be unsafe to uphold the conviction under S. 354, I. P. C., based as it is on a theory not merely unsupported by, but opposed to, the direct evidence available. The Additional Sessions Judge seems to have acted upon moral conviction that the appellant must have done something improper and thus to have been led into punishing him for a definite offence without being really able to indicate a definite act established by satisfactory evidence and constituting that offence. As remarked by Macpherson and Glover, JJ., in *Queen v. Sorob Roy* (1), a moral conviction of guilt is no sufficient foundation for a verdict of guilty, unless it is based on substantial facts which lead to no

other reasonable conclusion than that the person charged is guilty. The appellant is accordingly acquitted and will forthwith be set at liberty.

P.N./R.K.

Appeal allowed.

A. I. R. 1918 Nagpur 124

DRAKE-BROCKMAN, J. C.

Bala—Defendant—Applicant.

v.

Vithu—Plaintiff—Non-Applicant.

Civil Revn. No. 286 of 1914, Decided on 7th November 1914, from decree of Small Cause Court, Judge, Wardha, D/- 23rd July 1914.

(a) Interpretation of Statutes—Statute providing special remedy—Common law remedy not expressly excluded—Person suing is entitled to elect to pursue either remedy.

In cases where a statute provides a special remedy for a right or liability already existing, unless the statute contains words which either expressly or by necessary implication exclude the common law remedy, the person suing has his election to pursue either that or the statutory remedy. [P 125 C 1]

(b) Cattle Trespass Act (1871), S. 22—Suit for damages for illegal seizure of cattle is not barred—Onus lies on defendant to show that seizure was justifiable.

In a suit for damages for illegal seizure of cattle the onus lies on the defendant to prove that the seizure was justifiable in law. [P 125 C 1]

Such a suit is not barred by reason of Ch. 5, Cattle Trespass Act, 1871, R. 279; 16 Cal. 159, *Foll. 2 C. L. R. 314, not Foll.* [P 125 C 1]

M. R. Bobde—for Applicant.

Judgment.—This application arises out of a suit brought on the Small Causes side of the Sub-Judge's Court at Wardha to recover damages for the illegal impounding of the non-applicant's cattle. The learned Judge threw on the defendant the burden of justifying the admitted seizure and confinement of the cattle and disbelieving the evidence adduced to prove that the animals when seized were eating hay belonging to the defendant's employer decreed the claim. This Court is asked to interfere on three grounds, which may be briefly stated thus:

(1) The burden lay on the plaintiff to prove the illegality he alleged. (2) The suit is barred by reason of Ch. 5, Cattle Trespass Act, 1871. (3) The defendant's witnesses should have been believed. The first contention is rested on S. 101, Evidence Act, which runs as follows:

"Whoever desires any Court to give judgment as to any legal right or liability dependent on its existence of facts which he asserts, must prove that those facts exist."

Now it is true that the plaintiff has included in his plaint a statement that the seizure of his cattle was illegal. His story is that when taken they were lying under a tree in the village jungle. Prima facie to deprive a man of his property by disturbing his possession is to do him a legal wrong and so to give him a cause of action in tort. To use the words of the Privy Council in *Rogers v. Rajendro Dutt* (1), such an act "prejudicially affected the plaintiff in some legal right." The defendant sought to justify the seizure in the manner already stated, and had no evidence been given on either side, the defendant, who in substance stated the affirmative, would have failed, S. 102, Evidence Act being applicable. I hold therefore that the case was correctly laid by the lower Court.

Upon the second point the authorities are opposed to the applicant's contention. I refer to *Nomaz Mollah v. Lall Mohun Tegadger* (2) and *Shuttrughen Das Coomar v. Hokena Showtal* (3). In the former the provision of law considered was S. 14, Act 3 of 1857 (an Act relating to trespasses by cattle), but the terms of that section correspond closely with those of Ch. 5, Cattle Trespass Act, 1871. *Aslem v. Kalla Burzi* (4), the only case which favours the applicant, was not apparently argued before the High Court, a consideration which weighed with the Judges who decided the later Calcutta case above cited. The applicant relies on *Jagannath v. Khuba* (5), where however the Statute to be considered creates a liability not existing at common law and gives also a particular remedy for enforcing it. The present case belongs to an entirely different class, which consists of cases where a special remedy is provided for a right or liability already existing. In the latter class, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy. This general rule finds expression in S. 91, Civil P. C., which lays down that Courts shall have jurisdiction to try all suits of a civil nature ex-

cepting suits of which the cognizance is either expressly or impliedly barred. It was applied in *Krishna v. Reade* (6), where it was held that the summary remedy provided by Act 9 of 1861 does not bar a suit by a Hindu father to recover possession of his minor son alleged to be illegally detained by the defendant, a view which was also taken by Broughton, J., in the earlier case of *In the matter of the petition of Kashi Chander Sen* (7). I would also refer to the comparatively recent decision of a Full Bench of the Madras High Court in *Zamindar of Ettappapuram v. Sankarappa Reddiar* (8), which affirms the correctness of the following general principle laid down in an earlier Full Bench decision:

"When a statute is confirmatory of a pre-existing right the new remedy is presumed as cumulative or alternative unless an intention to the contrary appears from some other part of the statute."

With regard to the difficulty noticed in *Aslem v. Kalla Burzi* (1), namely that Ch. 7, Cattle Trespass Act, 1871, reserves the right of filing a civil suit only in the case specified, I think the Legislature clearly intended to make the special remedy afforded by the Act in that case cumulative, while leaving the remedy under Ch. 5 as merely an alternative one. There remains the merits of the applicant's defence. As to these I have to observe that the person who took the animals to the pound, viz., the defendant, himself did not enter the witness-box, while his witnesses admittedly did nothing to prevent the trespass by the plaintiff's cattle though working close by. The lower Court had the great advantage of noticing the demeanour of those witnesses and I am not prepared to upset his decision that they had been tutored. The application fails on all points and is dismissed without notice to the opposite party.

P.N./R.K. Application dismissed.

(6) [1886] 9 Mad. 31.

(7) [1852] 8 Cal. 266.

(8) [1904] 27 Mad. 483.

A. I. R. 1918 Nagpur 125

BAITEN, A. J. C.

Emperor.

v.

Maroti Teli—Opposite Party.

Criminal Revn. No. 209 of 1917, Decided on 20th November 1917, from order of Sess. Judge, Wardha, D/- 30th October 1917.

(1) [185-61] 8 M. L. A. 103.

(2) [1871] 15 W. R. 279.

(3) [1889] 16 Cal. 150.

(4) [1878] 2 C. L. R. 344.

(5) [1909] 5 N. L. R. 176=4 I. C. 795.

Court-fees Act (1870), S. 19, Cl. (17)—Petition of appeal by prisoner presented by pleader is exempted.

A petition of appeal presented by a prisoner not personally but through his pleader is exempted from court-fees under Cl. (17), S. 19.

[P 126 C 1]

Judgment—This is a reference by the Sessions Judge under S. 438, Criminal P. C., questioning the propriety of an order by the District Magistrate returning to the prisoner's counsel an appeal presented on behalf of a prisoner in jail on the ground that the appeal petition was not stamped with a court-fee stamp. The District Magistrate was called upon to show cause why his order should not be set aside and why he should not be directed to dispose of the appeal according to law with reference to Cl. 17, S. 19, Court-fees Act. The section and clause read together provide that

"nothing contained in this Act shall render chargeable with any fee a petition by a prisoner or other person in durance or under restraint of any Court or of its officers."

The District Magistrate supports his order as follows:

"Interpreting the clause strictly I am of opinion that a petition by a counsel on behalf of such a person is not a petition by him but one on his behalf."

It is the practice of this Court to accept petitions, whether appeals or other applications, presented by counsel on behalf of a prisoner without any court fees stamp, on the authority of Cl. 17, S. 19, Court-fees Act. In *Kali Prasad Banerji v. Gisborne and Co.* (1), it was held that the clause applied to a petition presented by a prisoner not personally but by his *vakil*. This supports the practice of this Court, and the order of the District Magistrate was in my view erroneous. The order of the District Magistrate is set aside. He will admit the petition of appeal and dispose of it according to law.

P.N./R.K. *Order set aside.*

(1) [1884] 10 Cal. 61.

A. I. R. 1918 Nagpur 126

FINDLAY, OFFG. A. J. C.

Nanakram—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 51 of 1918, Decided on 23rd April 1918, from order of First Class Magistrate, Khandwa, D/- 22nd February 1918.

Criminal P. C. (1898), S. 403 (1)—First trial void ab initio owing to absence of com-

plaint—Fresh trial is not barred under S. 403 (1).

The phrase "has once been tried by a Court of competent jurisdiction" in S. 403, sub-S. (1), Criminal P. C., is not one which limits the application of the provision to reasons affecting the nature or ordinary powers of the Tribunal. It is wide enough to cover a case where the first trial was ab initio void owing to the absence of a complaint. [P 128 C 1]

In such a case therefore S. 403 (1) is no bar to a fresh trial of the accused: 26 *Mad* 308, *Diss. from*; 29 *All* 293, *Foll.* [P 128 C 2]

Gupta—for Applicant.

G. P. Dick—for the Crown.

Order—The applicant Nanakram Agarwala applies for revision of the order, dated 22nd February 1918, of Mr. Gokul Parshad, First Class Magistrate, Khandwa, allowing a complaint of the Subordinate Judge to proceed against the applicant under S. 209 read with S. 109, I. P. C. It will be convenient to trace the earlier history of the present case. In Civil Suit No. 71 of 1915 the Subordinate Judge found that Nanakram had committed offences under Ss. 193 and 463, I. P. C. The Subordinate Judge accordingly took proceedings under S. 476, Criminal P. Code: the trying Magistrate found that an offence under S. 209 read with S. 109, I. P. C., had been committed and convicted the applicant accordingly. Thereafter an application on the revisional side was made to this Court and *Prideaux, A. J. C.*, held that as no sanction for the prosecution of the applicant under S. 209 had been obtained and as the matter reached the Magistrate in the form of a complaint and not as a sanction, S. 195 (5) Criminal P. C., was not applicable and the trial was bad. It was further pointed out that, where there has been no complaint under S. 195, Criminal P. C., as regards the offence of which the applicant has been guilty, the absence of a complaint is not a mere curable irregularity but the trial is bad ab initio. *Prideaux, A. J. C.*, accordingly set aside the conviction and the sentence. Thereafter the Subordinate Judge, Khandwa, filed a complaint under Ss. 209 and 109, I. P. C., and the applicant was again put on his trial as a result of the order of the First Class Magistrate, dated 22nd February 1918, which is the subject of the present revision application.

This application, as presented, disclosed two main grounds for revision but the second one was not pressed and I am concerned only with the first which is

to the effect that S. 403, Criminal P. C., was a bar to a fresh trial. It may, first of all, be pointed out that Prideaux, A. J. C., did not in terms acquit the applicant; all he did was to set aside the conviction and sentence. I do not think however that there is here involved anything more than a question of mere terminology. There could have been no discharge of the accused, a charge having been framed, and although the actual term was not used, the order of Prideaux, A. J. C., is, for all purposes, equivalent to an acquittal of the applicant. That this is so, is also clear from another point of view. The High Court acting under S. 439, Criminal P. C., may exercise the powers conferred on a Court of appeal under S. 423, and the latter provision contemplates in an appeal from a conviction the reversing of the finding and sentence and the acquittal or discharge of the accused. There is, in short, no infernaliste power conferred by which the Court of appeal may set aside a finding and sentence and yet not acquit the accused, thus leaving closed to him the benefit which S. 403, Criminal P. C., accordingly confers.

I pass from this preliminary matter to the far more important question involved in this case. Assuming that the order of Prideaux, A. J. C., was an acquittal or some thing equivalent thereto, does S. 403, Criminal P. C., bar the fresh trial? The learned counsel for applicant has urged in this connexion that the various decisions which are quoted in the Magistrate's order as authority for his proceeding with the trial were for the most part inapplicable, and it has been urged in particular that the words "who has once been tried by a Court of competent jurisdiction" in S. 403, sub S. (1), must have reference to the character and status of the Court and not to any extrinsic circumstance which may render the first trial bad, as in this case the absence of a complaint did. Considerable stress has been laid in this connexion on the decision of Sundara Aiyar and Ayling, JJ., in *Ganapathi Bhatta v. Emperor* (1). In this case the accused had been convicted under S. 211, I P. C., but the conviction had been quashed by the High Court on the ground that an offence

under S. 182 and not under S. 211 had been committed and no sanction in respect of the former offence had been obtained. After a fresh sanction had been obtained, a fresh prosecution was initiated but the above Justices held that it was barred under S. 403 (1), Criminal P. C. The learned standing counsel, on behalf of the Crown, has pointed out correctly enough that the Madras case is distinguishable from the present one, in that the question involved in the Madras decision was one of want of sanction while in the present case there was the fundamental and fatal flaw of the absence of a complaint on which the whole subsequent proceedings should have been based. The absence of a sanction under S. 195, Criminal P. C., is curable under S. 537, ibem, but the absence of complaint is a fatal flaw and vitiates the trial ab initio. All the same the language of the two Justices at page 314 (of 26 *Mad*) of the report suggests that even in the present case they would have been prepared to hold that S. 403, sub-S. (1), is a bar to the fresh trial for the ratio decidendi of the judgment is to be found in the opinion that the question of competent jurisdiction referred to in sub-Ss. (1) and (4), has reference only to the character and status of the tribunal and not to the absence of any condition essential and precedent to the institution of proceedings before the tribunal. That the absence of a complaint would come under the latter category is clear enough. If however I am correct in supposing that the Madras decision referred to goes as far as I think it does I am with all deference unable to accept the opinion of the learned Justices concerned as one to be followed implicitly. While the question of competency of jurisdiction referred to in sub-Ss. (1) and (4), S. 403, will in the great majority of cases have reference only to the character and status of the tribunal, yet in my opinion the language of the provision is wide enough to apply and to be intended to apply, to cases like the present where there has been a fatal fault ab initio in the trial and where in consequence, the trial has been radically bad. This view has been taken by Knox, J., in *Hasain Khan v. Emperor* (2) in which case he held that as there had been no

(1) [1914] 26 *Mad*. 305=19 I. C. 310=11 Cr. L. J. 244.

(2) [1917] 32 *All*. 207=39 I. C. 630=18 Cr. L. J. 546.

permission of a Registering Officer under S. 83, Registration Act, 1908, for the initiation of a prosecution that prosecution was bad or in other words the Court had no competent jurisdiction and a fresh trial lay in spite of the provisions of S. 403, Criminal P. C. Unfortunately the learned Justice has not in the decision quoted discussed in detail the question of law involved.

It may be of interest to look very briefly at the matter from a more fundamental point of view. What is the underlying principle of S. 403, Criminal P. C. This provision is undoubtedly an attempt to give statutory expression to the principle of *autrefois* convict and *autrefois* acquit. The Legislature has attempted to secure that a man who has once been tried and acquitted for an offence shall not be again put on trial for the same offence if he was "in jeopardy" at the first trial. Now for an accused so to have been "in jeopardy" there are other essential and precedent conditions besides the mere status and character of the tribunal. Two obvious ones are that the complaint or indictment must have been a good one and the trial must have been on the merits. If the language of the learned Justices in the Madras decision referred to above were to be interpreted strictly, it would probably be impossible to put on his trial again under that interpretation of the law a man who had once been acquitted although clear proof was forthcoming that the tribunal had been bribed by him to acquit him and that there had been no trial on the merits. Now looking to the language of S. 403, sub-S. (1), it seems to me that the phrase "has once been tried by a Court of competent jurisdiction" which occurs therein is not one which limits the application of the provision to reasons affecting the nature or ordinary powers of the tribunal. The phrase is in my opinion, wide enough to cover also a case like the present where the first trial was *ab initio* void owing to the absence of a complaint. If the contrary were the case I should have expected to find that the language of the provision would have been more limited and specific.

Now in the present case what is the position? This Court has found it necessary to set aside the original trial as a fundamentally bad one. The Magistrate had had in reality no jurisdiction to try

the man at all because of the fundamental defect in the case, the want of complaint. The applicant, in short so long as he was detained in custody or on bail under the first conviction was in this position under what was in reality a faulty authority, for there had been no real and good trial and a fortiori there was no good conviction the Magistrate in the first Court not having been seized of the case at all. In the present case therefore I am of opinion for the reasons, given above that S. 403, Criminal P. C., is no bar to the retrial of the applicant, for the simple reason that the first Court was not a Court of competent jurisdiction to try him. The application for revision is accordingly dismissed and the criminal proceedings in the Magistrate's Court may go on.

P.N./R.K. *Application dismissed.*

A. I. R. 1918 Nagpur 128

MITTRA, A. J. C.

Madhorao—Plaintiff—Applicant.

v.

Abdul Gafur—Non-Applicant.

Civil Revn. No. 114 of 1915, Decided on 21st June 1916, against judgment and decree of Small C. C. J., Drug, D/- 30th January 1915, in Suit No. 546 of 1914.

Tort — Malicious Proceedings — Illegal seizure — Onus is on defendant to show that seizure was legal.

In a suit for damages for wrongful seizure of cattle the burden is on the defendant to prove that the seizure was legal. [P 129 C 1]

M. R. Bobde—for Applicant.

G. P. Dick—for Non-Applicant.

Judgment.—The plaintiff sues for damages for wrongful impounding of his cattle by the defendant. The latter admits the seizure, but pleads that he was justified in law as he found the cattle grazing in his jungle. The lower Court has found that there is no satisfactory evidence to show that the cattle were grazing in the defendant's jungle. It also found that the plaintiff has failed to prove that the seizure took place when the cattle were grazing in the plaintiff's jungle and therefore dismissed the suit. The defendant's costs were disallowed as he failed to prove his allegation. The sole question is whether the burden of proof lies on the plaintiffs to prove that the seizure was illegal or whether it is for the defendant to justify his seizure. The applicant for revision relies on an unreported ruling

of this Court: *Bala v. Vitlu*, Civil Revision No. 286 of 1914 (1), which supports the view that it was for the defendant to justify the seizure. I entirely agree with the view taken by Sir Henry Drake Brockman in the latter case. I may point out that this is not a case of tort based on absence of legal process where an improper order has been procured from a competent authority. In such a case the burden lies heavily on the plaintiff to establish his case. This is an instance of self help in abatement of nuisance which the law allows. But the party taking the law into his own hands must justify his act, just as under the Penal Code the burden of proof lies on the party relying on the right of private defence. To hold otherwise would be contrary to principle. On the finding of the lower Court, the plaintiff is entitled to a decree for Rs. 19,12-0. The decree of the lower Court is set aside and a decree for Rs. 19,12-0 with costs in both Courts will be passed. I allow Rs. 16 as pleader's fee.

V R/R K. *Decree set aside.*
I. 44 I O 237.

* A. I. R. 1918 Nagpur 129

STANYON, A. J. C.

Renuka and others—Plaintiffs—Appellants.

v.

Onkar and others—Defendants—Respondents.

Second Appeal No. 80.B of 1914, Decided on 27th October 1914, against decree of Addl. Dist. Judge, Akola, in C. A. No. 111 of 1913, D/- 11th November 1913.

* (a) Civil P. C. (1908), S. 96 (3), and O. 23, R. 3—Every decree incorporating compromise under O. 23, R. 3 is not *ipso facto* consent decree—it may deal with only part of subject matter of suit.

Every decree which has incorporated an agreement compromise or satisfaction ordered to be recorded under O. 23, R. 3, Civil P. C., is not *ipso facto* "a decree passed by the Court with the consent of parties" within the meaning of S. 96 (3) of the Code. It may deal only with a part of the subject-matter of the suit or it may be a contested agreement, compromise or satisfaction which has been the subject of an issue, trial and decision by the Court. [P 130 C 2]

(b) Civil P. C. (1908), S. 96—Sub-S. (3) is limited to cases where parties invite Court to pass particular decree and Court acts accordingly.

The right of appeal generally given against all decrees by S. 96, sub-ss. 1 and 2, Civil P. C., is only withheld by sub-S. (3) in the case of decrees

passed with the consent of parties. Sub S. (3) is limited to cases where the parties invite the Court to pass a particular decree and the Court acts accordingly. [P 130 C 2]

(c) Civil P. C. (1908), S. 96 (3)—Decree based on finding against consent of one party is not consent decree.

A decree based on a finding arrived at by the Court against the consent of one party, to the effect that the matter in dispute has been compromised, is not a decree passed with the consent of parties and S. 96 (3) has therefore no application to it. [P 131 C 11]

(d) Civil P. C. (1908), O. 23, R. 3—Alleged compromise acted on by defendant pleaded as bar to suit—Dismissal of suit Decree is not under O. 23, R. 3.

Where an alleged compromise said to have been fully acted on by the defendant is pleaded in bar of a suit, and the Court holding that the plea is established dismisses the suit, the decree pronounced is not a decree under O. 23, R. 3. [P 131 C 11]

M. R. Dixit—1st Appellants.

M. H. Bhabha—for Respondents.

Judgment—It is necessary to state the facts of this case. Defendant 1 Onkar was also the defendant in a previous suit brought by the plaintiffs *Mt. Renuka, Mt. Surji and Mt. Radhi*. That suit reached this Court in the form of Second Appeal No. 121 B of 1912, which was filed by Defendant Onkar on 29th April 1912. On 17th August 1911 the plaintiffs filed the present suit against Onkar and Hanwadi and *Praxman* was subsequently added as a defendant 3. On 19th July 1912, after the manner of litigation in Berar the suit was still in a preliminary stage, no issues having been framed when the pleader for Onkar made the following statement before the Munsif:

"The matter in controversy between the parties has been compromised out of Court between plaintiff and defendant 1 between 17th June 1912 and 6th July 1912. There was an appeal pending between the present plaintiffs and defendant 1. It was agreed that defendant 1 should withdraw the appeal and the plaintiffs should withdraw this suit. Acting on this compromise defendant 1 withdrew his appeal about one month back. The suit can not therefore proceed."

To this the plaintiffs' pleader replied:

"There was no compromise like the one alleged by defendant 1."

The Munsif framed the following issue:

"Whether the suit has been compromised out of Court, as alleged by defendant 1."

Four witnesses were examined for the defendants, but Onkar himself did not venture into the box. One of the witnesses was the husband of the plaintiff *Renuka*. He denied that there had been any compromise of the suit. The other three witnesses supported the story of the defendant. The plaintiffs *Radhi and*

Sarji gave evidence that no compromise had taken place, though Radhi admitted that a proposal had been made to and refused by her. The Munsif held—as I shall hereafter show upon a material misapprehension of evidence—that the case had been compromised, and he dismissed the suit on 25th November 1912. He passed no decree in terms of the compromise as pleaded, but held that as a result of the agreement out of Court the suit could not proceed and he therefore dismissed it. Against this decree the plaintiffs appealed to the District Court, the appeal being filed on 16th April 1913. Meanwhile Second Appeal No. 121-B of 1912 in this Court had been pressed to a conclusion. No application was ever made to withdraw it. Onkar had engaged counsel who appeared on 28th January 1913 and argued it, the plaintiffs also appearing by counsel in response to it. The appeal was dismissed with costs on the same day, and a copy of this Court's judgment with the records was returned to the District Court in February 1913. It so happened that the Judge of first appeal in that case was Mr. Dighe, who also tried the first appeal in the present case. It was pointed out to him in vain that the whole foundation of the alleged compromise, namely that the defendant Onkar should first withdraw Second Appeal No. 121-B of 1912 and that he had done so was a falsehood. Mr. Dighe wrote:

"Whether the defendants have before the Judicial Commissioner's Court acted according to their part of the contract or not is not the gist of the point for our determination."

He concurred with the Munsif's findings in his usual superficial style—overlooking the patent errors to which I shall presently draw attention—and dismissed the appeal. The plaintiffs have now made this second appeal. A very intelligent and plausible argument was advanced on behalf of the respondents that no second appeal lies in this case. It was urged that every decree under O. 23, R. 3 is a "consent decree" within the meaning of that term under S. 96, sub-S. (3), Civil P. C., 1908. It was pointed out that O. 43, R. 1 (m), provides for an appeal against an order recording an agreement of compromise, and contended that this would be superfluous if an appeal was intended to be allowed against the decree based on such a com-

promise. It was further suggested that sub-S. 3 of S. 96 aforesaid was a substitute for that part of S. 375 of 1882 Code which enacted that a decree based on a compromise should be final. From this position it was argued that the appeal to the District Court must be taken to have been an appeal under O. 43, R. 1 (m), against the order recording the compromise, and no second appeal lies against the decree in that appeal. I am of opinion that this argument though specious is unsound. In the first place, every decree which has incorporated an agreement, compromise or satisfaction ordered to be recorded under O. 23, R. 3, is not ipso facto "a decree passed by the Court with the consent of parties." It may deal only with a part of the subject-matter of the suit or it may be a contested agreement, compromise or satisfaction which has been the subject of an issue, trial and decision by the Court.

If the legislature had intended that every decree made in pursuance of O. 43, R. 3, should be final, it would have repeated the provisions of S. 375 of the 1882 Code to that effect. Under that section there was a conflict of opinion as to whether compromises made out of Court, but afterwards repudiated could be made use of as the basis of a final decree under that section. The Allahabad High Court held that they could not be so used. The other High Courts held that they could, but introduced a rule of practice allowing appeals against findings in disputed cases: see *Bandhu Bhagat v. Shah Muhammad Taqi* (1), *Brojodurlab Sinha v. Ramnath Ghose* (2), *Sridharan v. Pura-mathan* (3) and *Samibai v. Premji* (4). The legislature has now decided to allow suits to be disposed of on all agreements, compromises and satisfactions proved, whether disputed or admitted, but it has removed the provision that all decrees based thereon shall be final. The right of appeal generally given against all decrees under S. 96, sub-Ss. (1) and (2), is only withheld by sub-S. (3) in the case of decrees passed with the consent of parties. The words are clear. It is the decree that must have the consent of the parties.

1. (1892) 14 All 350.
2. (1897) 24 Cal 903.
3. (1900) 23 Mad 101.
4. (1896) 20 Bom 304.

A restrictive provision like this must be strictly construed. It is limited to the case where the parties invite the Court to pass a particular decree, and the Court acts accordingly. That may be—it generally is—a case under O. 23, R. 3. But this enactment has now been extended to cases where the decree may be one based on a finding arrived at by the Court very much against the consent of one party. That could not be described as a decree passed with the consent of the parties. If the present case can be regarded as one falling under O. 23, R. 3, it is of that kind and S. 95 (3) has no application to it.

But it seems to me that the case is not one under O. 23, R. 3. The Court was not asked to record and make an order to record the terms of any agreement, nor was any decree made to the effect that if defendant 1 withdraw his second appeal the suit should stand dismissed. An alleged compromise, said to have been fully acted on by the defendant Onkar, was pleaded in bar of the suit. The plea was held established and the suit was dismissed. Such a decree cannot properly be described as one made under O. 23, R. 3. For all these reasons, I have no doubt that this appeal lies, and I proceed to dispose of it. The judgments of the Courts below cannot be sustained. They are as obviously erroneous as they are patently unjust. The finding of fact by the first Court that the withdrawal of Second Appeal No. 121-B of 1912 was a fact admitted was a total misapprehension. There is no such admission anywhere. It was expressly denied in the pleadings and by two of the plaintiffs in the witness-box. The statement of Ramka's husband (D. W. 3) to the effect that "only the appeal pending in the Nagpur Court was compromised" is not an admission at all, as the witness is not an agent of the plaintiffs, and it does not amount to a statement that the appeal had been withdrawn. We know as a fact now beyond dispute that the Munsif, who correctly appreciated the alleged compromise to mean that the withdrawal of this suit depended on the previous withdrawal of the appeal, was deceived by the false statement that the appeal had in fact been withdrawn about a month before defendant 1 sought specific performance of the plaintiffs' alleged part of the agreement, namely the withdrawal of the suit.

The agreement pleaded was that defendant 1 should withdraw the appeal and the plaintiffs should withdraw the suit, and this suggests the order in which the reciprocal promises were to be performed. Any doubt on the point is cleared up by Parashram (D. W. 2), who says that the arrangement was that the Nagpur appeal should first be compromised and then this suit.

The Munsif also held the exception of a raziinama in this suit to be proved by the evidence of Tripathi (D. W. 1), who admitted on reference to his register that the raziinama he wrote on 17th June 1912 was in connexion with another suit altogether, his evidence being thus totally irrelevant. The Munsif's decision is thus wholly vitiated by his misapprehension of facts and his use of irrelevant evidence. He was misled; but the decision of the lower appellate Court is much worse. Its finding that the withdrawal of the second appeal was immaterial indicates a total misapprehension of the terms of the compromise pleaded and oblivion as to S. 33, 31 and 34, Contract Act 1872, and S. 21 (b), Specific Relief Act, 1877, as respectively applied to Benar. The appeal is affirmed; the decree of the lower appellate Court is reversed and the case is remanded to that Court with directions to allow the first appeal and reverse the decree of the Munsif as wrongly made, and remand the suit to the first Court under O. 41, R. 23, for a decision on the merits. The lower appellate Court will also grant the appellants the usual refund of court-fees. A similar refund will be granted to them in this Court. Defendant 1, Onkar, will pay and bear all the other costs in the two appellate Courts. The costs of the suit will follow the event.

P.S. R.K.

Case remanded.

A. I. R. 1918 Nagpur 131

Drake-Brockman, J. C. AND
PRIDEAUX, A. J. C.

Hasnu—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 64 of 1915, Decided on 11th May 1915, from judgment of Sess. Judge, Nagpur, D/- 23rd April 1915.

Criminal Trial—Confession is ordinarily evidence for as well as against prisoner and is to be taken together—Evidence incompa-

tible with part may be relied on in preference to that part.

The ordinary rule is that a confession is evidence for the prisoner as well as against him and must be taken altogether. But it is only where no other evidence is forthcoming that this can be pressed to the extent of requiring that no part can be accepted as true without accepting the whole: 25 W. R. 15 Cr. and 25 W. R. 23 Cr. *Foll.*

[P 133 C 2]

If other evidence incompatible with a part of the confession is on record, it may be relied on in preference to that part.

[P 133 C 2]

G. P. Dick—for the Crown.

Judgment.—The appellant Hasnu Musalman, aged 25 years, has been convicted and sentenced to death for the murder of Karnia Dhangar, both the assessors considering his guilt established. Karnia belonged to mouza Aundha and on the afternoon of Sunday 20th December last was grazing his goats in the adjoining village of Tironja. He was undoubtedly beaten to death that afternoon though his body was not found till the next morning. The first information (Ex. P 1) was laid by the kotwar of Aundha (P. W. 11) at Warora, 20 miles distant, on the evening of 21st December. The Circle Inspector (P. W. 19) and the Sub-Inspector (P. W. 18) started at once for the spot, which they reached before dawn on 22nd December. That evening they received information from Arkia Gond (P. W. 6) which led to Hasnu being arrested just two days later at Ratnapur, where he was found to have Rs. 17 odd on his person. At the same time Arkia was arrested at Tironja, he was sent next day to Warora for remand, but no order seems to have been passed regarding him till 31st December when the Tahsildar, a Magistrate of the Second Class, by warrant addressed to the local Sub-Inspector, ordered his detention in custody till 4th January when he was to be produced before the Subdivisional Magistrate, Warora. Meanwhile on, 28th December Hasnu had been produced before the last mentioned Magistrate at Nimdala, 19 miles from Warora, where he made a confession (Ex. P. 7). In a note recorded on the back of his memorandum in English of the confession, the Subdivisional Magistrate traced the movements of the police with Hasnu from arrest to production before him. It seems that Hasnu had been brought via Chanda and Warora and at the latter place had been remanded by the Tahsildar, but sent on to have his confession

recorded. The Tahsildar acted so far in accordance with the standing order in para. 1, part 2, of Criminal Circular 17, but the police who had taken part in the investigation were improperly allowed to form part of the escort which conducted Hasnu from Warora to Nimdala, and we must here express a hope that the District Magistrate will take steps to prevent recurrence of such an irregularity. The Magistrate who recorded Hasnu's confession began the commitment inquiry on 4th January and concluded it on 10th February. He discharged Arkia for reasons which he stated as follows:

"None of the deceased's property was found on him and the axe he had in his hand all that day is free of blood. He no doubt was with Hasnu the whole day, because they are both servants of Paishambar. There is no evidence he was with Hasnu when the murder was committed. He says he stayed behind for a call of nature and reached the scene of murder as soon as he could after hearing the dying man's cry as did Gania. This is just possible."

Now Hasnu in his confession of 28th December, which when read again to him on 8th February he had admitted to be true, stated that Arkia committed the murder, while Gania Govari had deposed before the committing Magistrate that he ran up on hearing a cry for help and found Karnia dying with both Hasnu and Arkia beside him. In such circumstances the Magistrate would, in our opinion, have done better to commit both the accused.

Examined in the Sessions Court Hasnu reported the story of the murder and the disposal of the dead man's property which he told on 28th December and 8th February. In his grounds of appeal to this Court however he denies all knowledge of the murder and alleges that the gold earrings which he got converted into a ring and then sold at Warora on 23rd and 24th December, as related by Shamsher Khan, Srihari and Ragho (P. Ws. 12-14), were handed over to him by Arkia and Gania (P. Ws. 6 and 5). He describes Arkia and Gania as his servants, but they are not really so. Arkia is a field-servant employed by Paighambar Khan with whom Hasnu his son-in-law lives. Gania is a grazier who looks after the goats of the patel and others. The appellant does not explain why Arkia and Gania together made over the earrings to him, or why if they did so he took the unusual course of

first converting them into a ring and then selling the ring.

Both the assessors as well as the Sessions Judge believed Gania (P. W. 5), and it is noteworthy that both Hasnu and Arkia have all along described him as coming last to the scene of the murder, while there is no suggestion that Gania had an axe with him, though each of the others admittedly carried such a weapon. This witness, moreover, told his story to the police the day after their arrival, i.e., before Hasnu was arrested and the murdered man's earrings traced. In the Sessions Court he improved on his deposition before the Committing Magistrate by stating that he saw a blow struck as he ran up; this addition may be untrue, and his evidence must also be discounted on account of his failure to report to the village authorities at once; nevertheless we agree with the Sessions Judge and the assessors in accepting his story as in the main trustworthy. There seems to be no adequate reason for this man to be made a party to the murder, especially when so little was to be got by it, though Hasnu and Arkia were sufficiently connected to make a conspiracy between them alone intelligible. That Karnia was with Hasnu and Arkia on the afternoon of the murder is shown by independent and uncoloured evidence, namely, that of Tania, Kanba and Goma (P. Ws. 2-4.)

It is clear then that both Hasnu and Arkia, each with an axe in his hand, were besides the murdered man immediately after the fatal blows were struck and while he was still alive. One of these axes (at in evidence II) is reported by the Imperial Serologist to be stained with human blood. The report is defective in that it does not state where the stains were detected, but from the evidence of the mukaddam (P. W. 17) we gather that one was on the blade and two on the handle of II on 23rd December. The appellant is wavering as to whether II is the axe he carried on 20th December, but looking to all the evidence including Arkia's, we think it must have been. The mukaddam shows that Arkia gave up the other axe (K) as his first and that II was found later. The Circle Inspector (P. W. 19) also deposed that the axe first given up was claimed by Arkia and that the one afterwards discovered was stained. The Sessions Judge thought the axe H might have been stained after the murder

and before its recovery by the police, or that the stains referred to by the Imperial Serologist may not be those noticed by the mukaddam and the Circle Inspector: he also suggests in his judgment that the stains might have been caused in the mortuary where Karnia's corpse was examined by the Sub-Assistant Surgeon, whose evidence unfortunately could not be obtained at the trial. There is certainly some improbability in the theory that Hasnu left his axe unwashed, if he used it on Karnia, for the prosecution put forward a witness Mt. Maini (P. W. 7) to show that he washed himself soon after the murder in a tank never used by bathers. On the whole we consider it safer to ignore the blood-stains for the purpose of deciding whether the appellant is innocent or guilty.

Turning to the appellant's confession, we have no doubt of its truth in so far as it admits disposal by him of the murdered man's ornaments. The question we next have to consider is whether we should nonetheless reject, as the Sessions Judge has done, that part which makes out that Arkia did the killing without the connivance or assistance of the appellant and handed over the proceeds to him as soon as he came up. The ordinary rule is that a confession is evidence for the prisoner as well as against him and must be taken altogether. But it is only where no other evidence is forthcoming that this can be pressed to the extent of requiring that no part can be accepted astray without accepting the whole: see *Goloke Chander Choudhary v. Magistrate of Chittagong* (1) and *Queen v. Sonabollah* (2). If other evidence incompatible with part of a confession is on record, it may be relied on in preference to that part: see *Reg. v. Amrita Gopianda* (3). Now in the present case we know that although Gania ran to the spot on hearing the victim's cry, he found both Hasnu and Arkia already there. It is therefore most unlikely that Hasnu had been following Arkia and only came up after the crime had been committed; also that the earrings had already been made over to Hasnu when Gania arrived. Nor can we believe that Arkia with his master's son-in-law close behind him would have fallen upon Karnia unless he knew for certain

1. (1876) 25 W R 15 Cr.

2. (1876) 25 W R 23 Cr.

3. (1873) 10 B H C R 497.

that his act was approved. In this connexion it has to be remembered that Karnia too had an axe and was not more than 40 years old also, that the medical evidence (Ex. P-10) shows a great number of blows to have been struck and so favours the hypothesis that the deceased had two assailants, not one only. Some weight, too, must be attached to the possession by the appellant of all three earrings, though possibly Arkia may have thought such articles would be more safely disposed of by his employer's son-in-law than by himself. The appellant and Arkia had spent the afternoon together cutting down a tree, and so are not likely to have been appreciably apart when both followed Karnia. Each adopts the obvious line of declaring that he lagged behind the other. But, we think that the facts all taken together are incompatible with the appellant's story that he had no concern with the murder. If he did not commit it single handed as alleged by Arkia, he must have joined in planning it and assisted at least by his presence in its commission. In either case we think his conduct to present no such extenuating feature as would justify refusal to confirm the capital sentence passed by the Sessions Judge.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1918 Nagpur 134 (1)

STANYON, A. J. C.

Damadaji—Plaintiff—Appellant.

v.

Martand and another—Defendants—Respondents.

Second Appeal No. 715 of 1909, Decided on 17th March 1910, from decree of Addl. Dist. Judge, East Berar, D/- 4th August 1909.

Grant—Perpetual but transferable—Issue of fresh sanad to transferor after transfer is ineffective.

Where a transferable grant in perpetuity has been made in favour of one person who has transferred the same to a third person, no subsequent sanad in favour of the transferor or any other person can legally be issued so as to constitute a fresh grant, unless the transfer can be avoided.

[P 134 C 2]

M. R. Dixit—for Appellant.

J. Mitra—for Respondents.

Judgment.—I am unable to see any sign of life in this appeal. There is a clear finding of fact that prior to the issue of the second sanad in the names of both appellant and Chimnaji, a previous sanad had been granted more than a

quarter of a century previously in favour of Chimnaji only, who was separate from his brother Punjaji, the father of appellant. Chimnaji mortgaged this severalty and had lost it by foreclosure absolute before the second sanad was obtained, whether owing to fraud or error, because it is manifest that where a transferable grant in perpetuity has been made in favour of one person who has transferred the same to a third person, no subsequent sanad in favour of the transferor or any other person can be legally issued so as to constitute a fresh grant, unless the transfer can be avoided. Moreover, plaintiff's case is not one of fresh but of an original joint grant and as to this the finding of fact is against him. An 1899 sanad in favour of two persons is no evidence that an 1872 sanad in favour of one person was intended for two. The appeal is dismissed with costs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1918 Nagpur 134 (2)

DRAKE-BROCKMAN, J. C.

Gambhir Chand—Applicant.

v.

Secretary, Municipal Committee, Nagpur—Opposite Party.

Criminal Revn. No. 24 of 1915, Decided on 6th March 1915, from order of Asst. Commr. and Mag., 1st class, Nagpur, D/- 3rd November 1915, in Criminal case No. 253 of 1914.

(a) C. P. Municipal Act (1903), S. 159—Complaint is not necessary in respect of each accused tried jointly.

A complaint has to be made as required by S. 159 in order to enable to Court to take cognizance of an offence punishable under the Act. But once cognizance has been legally taken of an offence, the Magistrate is seized of the whole matter as to all other accused whose guilt may appear during the trial of the case.

[P 135 C 1]

(b) Master and Servant—Master is criminally responsible for acts of servant when servant acts under his authority.

A master is criminally responsible for the act of his servants if those acts are shown to have been done with his co-operation or under his authority: 8 C P L R 19 *Foll.* [P 135 C 1]

Order.—In this case the accredited prosecutor of the Nagpur Municipal Committee complained against one Narain for introducing within octroi limits dutiable goods without paying the tax leviable thereon. The Magistrate, on hearing Narain's statement taken at the commencement of the trial, joined the present applicant as an accused and even-

tually convicted and fined the latter, as Narain's employer who had caused Narain to introduce the goods. It is objected here that no complaint had been laid against the applicant as required by S. 159, C. P. Municipal Act, 1903, and that his protest against being tried jointly with Narain was improperly disregarded. With regard to the first contention I observe that a complaint has to be made as required by S. 159 of the said Act in order to enable a Court to "take cognizance of an offence punishable under the Act." This provision however does not oust the operation of the principle applied in *Sarwa v. Emperor* (1) that once cognizance has been legally taken of an offence the Magistrate is seized of the whole matter as to all other accused whose guilt may appear. That principle was very recently applied by a Division Bench of the Calcutta High Court in *Dedar Bux v. Syama pada Malakar* (2). I hold therefore that the Magistrate must be taken to have acted on the complaint against Narain and to have been justified in so doing. The joint trial of the two men is legalised by S. 239, Criminal P. C., and in conceding that the alleged protest was lodged, I cannot think the Magistrate was bound to order separate trials. The matter is a petty one and it is difficult to conceive a case in which joint trial would be proper if this is not one.

On the merits I see no reason to interfere. The application does not impeach the Magistrate's finding that the applicant is Narain's employer and there is positive evidence of that relation. That a master is criminally responsible for the acts of his servants if those acts are shown to have been done with his co-operation or under his authority was recognised in *Local Government v. Lakhmi-chand* (3). In the present case the applicant and Narain were in the same tonga shortly after the latter removed the bag from the station and the applicant, instead of offering to pay duty when stopped, tried to induce the octroi peon to release the goods. The Magistrate evidently disbelieved the tongawala, for he writes that the story of how the applicant entered the tonga at the Cotton Market is inherently improbable. In

this connection I would observe also that the Cotton Market is only a few yards from the railway station. I decline to interfere. The application is rejected.

P.N./R.K. *Application rejected.*

A. I. R. 1918 Nagpur 135

DRAKE-BROCKMAN, J. C.

Abdul Sattar—Applicant.

v.

Secretary, Municipal Committee, Nagpur—Opposite Party.

Criminal Revn. No. 11 of 1915. Decided on 16th February 1915, against order of Asst. Commr. and Mag. First Class, Nagpur, in Criminal Case No. 128 of 1914, D - 12th October 1910.

(a) C. P. Municipal Act (16 of 1903), S. 86—Notice to erect latrine—Directions as to nature and position of latrine must be given.

It is clear from the language used in sub-S. (1) of S. 86 that a notice under that section is itself to contain the directions as to the nature and position of the required latrine. [P 126 C 1]

(b) C. P. Municipal Act (1903), S. 86—Committee cannot delegate authority to individual officer to give directions in notice.

The law does not contemplate delegation to an individual officer of the power to give the necessary directions, though the Committee are at liberty to guide themselves by the advice of any expert in their employ. [P 126 C 1]

P. S. Kotwal—For Applicant.

R. R. Mulay—For Respondent.

Order.—The applicant for revision owns a chāl in the town of Nagpur and has been convicted and fined under S. 139, C. P. Municipal Act, 1903, for disobeying a notice issued to him under S. 86 (1), *ibid.*, which required him to erect a latrine for the tenants occupying the rooms in the said building. Certain technical objections taken in the application for revision have been shown by the learned District Magistrate in reporting on the case to be groundless. The only point which now falls to be considered is that the notice was invalid for want of particulars regarding the manner in which the Committee desired the latrine to be provided. The direction given is to apply to the Health Officer of the Municipality and to erect a latrine in accordance with such order as he may give. The power conferred on the Committee by sub-S. (1), S. 86, of the Act is thus described in that provision: to require the owner of any building to provide, in such manner as the Committee directs, any privy . . . which should, in the opinion of the Committee, be provided for the building or the land appurtenant thereto. In my opi-

1. (1913) 9 N L R 65=19 I C 946.

2. A I R 1914 Cal 801=24 I C 954=41 Cal 1013.

3. (1895) 8 O P L R 19.

nion it is clear from the language used that the notice itself is to contain the directions of the circumstances deemed appropriate.

The law does not contemplate delegation to an individual officer of the power to give the necessary directions, though the Committee are of course at liberty to guide themselves to a decision by the advice of any expert in their employ. As pointed out in *Ramdularay v. Chhindwara Municipality* (1), a Municipal Committee must keep rigidly within the limits of the authority entrusted to it. In the present case, moreover, the time allowed for moving the Health Officer and erecting a latrine was only 10 days, a period which might easily prove insufficient for securing the necessary directions from that official. I hold that the Committee should have formulated and included in their notice specific directions as to the nature and position of the required latrine and that for want of these the notice issued is bad in law. The conviction and sentence in the applicant's case are accordingly set aside and the fine (if paid) will be refunded. I would add in conclusion that the trying Magistrate has entirely ignored the defence that the applicant has on his own land no site on which to erect a latrine. If this be the fact, the Committee will have to provide a site and the notice under S. 86 (1), if again issued, should show the position selected.

P.N./R.K. Conviction set aside.

1. (1910) 6 N L R 53=6 I C 431.

A. I. R. 1918 Nagpur 136

PRIDEAUX, A. J. C.

Jaiwanti—Applicant.

v.

Ramrao—Non-Applicant.

Criminal Revn. No. 42-B of 1916, Decided on 17th June 1916, from order of Sub-Div. Mag., Amraoti, in Misc. Case No. 150 of 1915, D/- 9th December 1915.

(a) Criminal P. C. (1898), Ss. 145 (4) and 148—Local enquiry—Result of, becomes part of proceeding—Power of deputy to hold local enquiry cannot be delegated.

Where in a proceeding under S. 145 a local inquiry is directed to be made, the result of the local inquiry becomes a part of the proceeding and the party affected by it is entitled to be made acquainted with the result thereof and should be given an opportunity of rebutting the report. A Magistrate deputed to hold a local enquiry under the provisions of S. 148 (1), should hold the enquiry himself and should not delegate it to somebody else. [P 136 C 2; P 137 C 1]

(b) Criminal P. C. (1898), Ss. 145 and 439—Opportunity not given to parties to adduce evidence—Magistrate's order is without jurisdiction—High Court has power to interfere

A High Court cannot ordinarily interfere in revision under Ss. 435 and 439 with proceedings under Ch. 12 of the Code, but it has power to interfere where the subordinate Court has passed an order without giving the parties an opportunity of calling evidence, and has thus acted without jurisdiction: 34 Cal. 840, *Foll.*

[P 136 C 2]

K. K. Gandhe—for Applicant.

S. K. Barlingay—for Non-Applicant.

Order.—The procedure adopted by the Magistrate who had tried this case is contrary to the provisions of S. 145 (4), Criminal P. C. The local enquiry directed was made by the Naib Tahsildar, a Third Class Magistrate, and not by the Tahsildar, the First Class Magistrate; but on this ground alone I would not interfere. The order-sheet shows the parties put in their written statements on 30th August 1915, on which date the case was adjourned to 16th September 1915 for the Tahsildar's report. This was not returned by that date and the order passed then ran:

"No local enquiry papers have been received from the Tahsildar, Amraoti. Parties told not to attend this Court as the result of this case will be made known to them through the Tahsildar. Put up on 30th September 1915."

This order is written by some clerk and initialed by the Magistrate. There are three similar adjournment orders written by a clerk, the last being of 15th November 1915. It is: "Put up on 30th November 1915." The next order apparently passed without notice to the parties is the final order of 9th December 1915, directing that Ramrao was entitled to possession of the field No. 16 of suit. When the local enquiry had been made and the result reported, it became part of the proceedings, and the party affected by it was entitled to be acquainted with the result thereof and should have been given an opportunity of rebutting the report. In the present case it is clear that applicant has had no opportunity of calling the evidence contemplated by S. 145 (4), Criminal P. C. I know of the ruling laying down that a High Court cannot interfere in revision under Ss. 435 and 439 with proceeding under Ch. 12, Criminal P. C., but it is settled law that this Court can interfere where the subordinate Court has acted without jurisdiction, and it seems to me that in the present case I must hold following *Kolha*.

Koer v. Muneswar Tiwari (1), that the order passed without giving a party an opportunity of calling evidence is without jurisdiction, and as such I have power to set it aside. I do so and direct that the Magistrate will come to a fresh decision after giving the parties an opportunity of adducing evidence. I may add that in these cases a Tahsildar, deputed to hold a local enquiry under the provisions of S. 148 (1), Criminal P. C., should not pass on the enquiry to his Naib. He has not legally the power to do so. Many Naib-Tahsildars are now Third Class Magistrates and they can be employed for this purpose by the Magistrate trying the case direct. A local enquiry should not as a rule, be directed on matters which may be proved by evidence, such as actual possession. It is the business of the Magistrate to record this himself.

P.N. R.K. *Order accordingly.*

(1907) 34 Cal 640 (6 Cr L J 162).

A. I. R. 1918 Nagpur 137 (1)

KOTWAL, A. J. C.

Tukaram—Convict—Applicant.

vs.

Emperor—Opposite Party.

Criminal Revn. No. 102 of 1918, Decided on 14th May 1918.

Penal Code (1860), S. 353—Person assaulting on police constable not acting with written order is not guilty under S. 353—**Criminal P. C. (1898), S. 160.**

The accused, on being asked by a police constable to accompany him to the Sub-Inspector without a written order from the latter under S. 160, Criminal P. C., assaulted the constable.

Held: that the constable was not acting as a public servant engaged in the discharge of his duty, and that in view of the accused was not guilty of an offence under S. 353 of the Penal Code.

(P 187 C 2)

N. K. Vaidya—*for Applicant.*

Order.—Two grounds were urged in the revision: first, that on the evidence it should have been held that the accused did not assault the constable. The learned Magistrate has considered the evidence with some care and I see no reason for departing from the practice of this Court of not interfering in revision on questions of fact. The evidence, if believed is sufficient for a finding that the accused assaulted the constable. The second point urged is that as the constable was asking the accused Tukaram to go with him to the Sub-Inspector without a written order from the latter under S. 160, Cri-

iminal P. C., he was not, when assaulted, acting as a public servant engaged in the discharge of his duty as a public servant and the conviction under S. 353, I. P. C., is wrong. I agree with this contention and alter the conviction to one under S. 352, but maintain the sentence which under the circumstances is not excessive. Criminal Revisions No. 103 and 104 of 1918 are argued with this application and will be governed by this finding.

P.N. R.K.

Conviction altered.

* A. I. R. 1918 Nagpur 137 (2)

PRINCELY, OFFG. A. J. C.

Emperor.

vs.

Chhotu—*Accused.*

Criminal Revn. No. 222 of 1918, Decided on 1st November 1918, reported by Sess. Judge Wardha.

* Criminal P. C. (1898), Ss. 423, 562—**Accused released under S. 562—Revision—Sentence of imprisonment or whipping cannot be passed.**

Sentence—The principle that sentence has been imposed. Therefore, where an accused is released on bond probation under S. 562 of the Code, the Magistrate cannot substitute a sentence of imprisonment or of whipping in revision. A. I. R. 1911, All. 523 F.L. (1918 C. 1).

G. P. Dhol—*for the Crown.*

M. Y. Shari—*for Accused.*

Order.—This case has been reported under S. 148, Criminal P. C. by the District and Session Judge, Wardha. The accused Nurkhan was convicted by the Sub-divisional Magistrate, Wardha, of an offence under S. 380, I. P. C. viz., the theft of a silver necklace from the person of a child. He was released under S. 562, Criminal P. C. no substantive sentence being imposed. The District and Session Judge represents that the case was one in which a sentence of whipping or imprisonment should have been imposed. Notice was issued to the accused to show cause why such an order should not be passed. He has been represented by counsel who has shown such cause and the standing counsel has appeared in support of the reference. The case is very clear one. The accused entered the house where the child was asleep at noon and removed the necklace from her person; there were, it may be mentioned, no adults in the house at the time. I see no reason to doubt the soundness of the conclusions arrived at by the trying Magistrate and the Sub-divisional Magistrate on the questions of fact involved in the case, nor would it be the

custom of the Court to do so in such a reference as the present.

Counsel for accused however relies on *Emperor v. Ghasite* (1), in support of his position that a sentence of imprisonment or whipping cannot be imposed in the present case. That decision, if accepted, no doubt concludes the present case, but the learned Government Advocate has argued that the learned Judge who was responsible for the above decision has overlooked provisions of S. 435, Criminal P. C. On the whole however I am of opinion that S. 439 pre-supposes that a sentence has been imposed: it is no doubt an unintentional omission of the legislature that no specific provision has been made in that section by a use like the present but until this omission has been supplied, I think this Court is debarred from interfering. That the accused should escape on what is after all a technicality is perhaps regrettable, for an offence of this nature committed on a defenceless child doubtless merited a substantive sentence. The learned standing counsel also urged that the offence amounted to robbery and that therefore the order under S. 562, Criminal P. C. was in any case wrong. I am unable however on the evidence to hold that the necessary constituents of the offence of robbery are present: no hurt or wrongful restraint was caused or threatened to be caused to the child. In the circumstances therefore I decline to interfere. Let the proceedings be returned accordingly.

P.N./R.K. *Proceedings returned.*

1. A I R 1914 All 543=26 I C 635=37 All 31.

A. I. R. 1918 Nagpur 138

KOTWAL, OFFG. A. J. C.

Pilaji—Applicant.

v.

Darya and others—Non-Applicants.

Criminal Revn. No. 74 of 1918, Decided on 29th May 1918, from order of Subdivisional Magistrate, First Class Sansar.

(a) Criminal P. C. (1898), Ss. 145 and 147—Inquiry under S. 147—Order without giving parties opportunity to produce evidence is without jurisdiction.

An inquiry under S. 147, has to be made in the manner provided by S. 145 of the Code and the Magistrate conducting such inquiry must receive the evidence of the parties. Failure to give an opportunity to the parties of calling evidence affects the jurisdiction of the Magistrate: *A.I.R. 1918 Nag. 136 Foll.* [P 138 C 2; P 139 C 1]

(b) Criminal P. C. (1898), S. 147—Order affecting persons not parties to proceeding is without jurisdiction.

Section 147, contemplates an order to be passed between parties to the proceedings only. An order affecting persons who are not parties to the proceedings is not within the purview of the section and is therefore liable to be set aside as affecting jurisdiction. [P 138 C 1]

K. K. Gandhe and *S. K. Barlingay*—for Applicant.

K. V. Deosker—for Non-Applicant.

G. P. Dick—for the Crown.

Order.—The order of the Subdivisional Magistrate under S. 147, Criminal P. C., must be set aside on two grounds affecting jurisdiction first that he failed to receive the evidence of the first party before making the order against him; second that the order is not one within the purview of S. 147 inasmuch as it is not an order between the parties to the proceeding.

As to the first ground the order sheet shows that the parties put in their written statement on 19th November 1917, and 30th November 1917 was fixed for hearing evidence. On that day two witnesses for the first party and five for the second were present but owing to the other work the case was adjourned to 1st December 1917. The day's order sheet runs thus:

"*Pillaji* by Mr. Mishra and the parties No. 2 in person and by Mr. Trivedi. Arguments of both parties heard and it is decided to go for spot inquiry. Their witnesses be discharged at present. Case for 5th January 1918. Put up on 3rd January 1918."

The next entry in the order sheet dated 20th December 1917, is as follows:

"The spot was inspected on my way today. *Pillaji's* son was present and all the accused also. Settlement papers were seen in this connexion. The case is for 5th January 1918 here. Parties were asked to be present here."

On 5th January 1918 the order sheet runs thus:

"*Pillaji* present in person and only *Kishan* and *Yeshwant* are present for the other party. Order passed. Police informed."

An inquiry under S. 147, has to be made in the manner provided by S. 145 and the Magistrate must receive the evidence of the parties. It is clear from the entries in the order-sheet reproduced above that the Magistrate failed to receive the oral evidence of the parties. The first party had obtained against three of the second party a decree of the civil Court which had considered the settlement entry and he might have succeeded on the same evidence in convincing the Subdivisional

Magistrate that the settlement entry was not justified or conclusive. As regards the District Magistrate's remarks that the order of the Settlement Officer was incorporated in the village administration papers which appear to have been signed on 10th May 1917, it appears from the record of this case (see leaves Nos. 18, 19 and 20) that the entry was made by the Revenue Inspector in the wajibularz on 27th or 28th September 1917. Failure to give an opportunity to the parties of calling evidence affects jurisdiction [*Mt. Jaiwant v. Ramrao* (1)]. As regards the second ground the Magistrate's order is as follows:

"This is a case under S. 147, Criminal P. C., started on the police report. It is alleged that a dispute over the right of way over field No. 232/1 of Pillaji exists between Pillaji on one side and Dasrya, Kishan, Jago son of Narsu and Jago and Praja sons of Nago and Bapuji on the other side. The dispute is about the right of way to the platform of Maroti during the time of pola for one day. (2) The parties filed their written statements. I went over to see the spot along with the Patwari and find according to the new settlement mist that the right of way exists in favour of the villagers during pola. In fact this application is regarding the dispute over it between Pillaji and the whole village. (3) The documentary evidence specially the settlement record clearly proves that Pillaji has no right to restrain the public or the second party as named above from proceeding to the Maroti platform on the pola day. If his crops are damaged by the bullocks that day he has his right of action for damages against individuals liable for them. (4) Accordingly I order Pillaji not to restrain any person on pola day to carry his bullocks to pay homage to the Maroti platform through his field No. 232/1, unless the same is prohibited by the civil Court in due course as it is clear that the villagers did exercise the right on the last pola day also except Dasrya, Kishan and Jago and Govinda who are restrained by the civil Court."

I cannot take this to be an order between the parties of the proceedings in view of the passages underlined (italicised) by me. S. 147 does not contemplate an order like the one passed in this case. I set aside the order of the Subdivisional Magistrate dated 5th January 1918 and direct that the Magistrate take such evidence as the party may wish to adduce and then pass a proper order. I may add that it is advisable to draw up a final order separate from the judgment or order dealing with the merits of the case on the lines of Form No. 24, Sch. 5, Criminal P. C.

P.N./R.K.

Order set aside.

A. I. R. 1918 Nagpur 139

KOTWAL, OFFG., A. J. C.

Shyad Lal—Accused.

v.

Emperor—Opposite Party.

Criminal Appeal No. 19 of 1918, Decided on 7th June 1918, against judgment of Sub-divisional Magistrate, Akola, in Criminal Case No. 10 of 1918, D- 10th April 1918.

(a) Criminal P. C. (1898), S. 234.—Several persons tried jointly—S. 234 does not apply.

The joint trial of several accused persons for two or more separate offences is illegal. S. 234 applies only to offences committed by a single person. It is not applicable when several persons are tried jointly under S. 230 of the Code.

[P 140 C 1]

(b) Criminal P. C. (1898) S. 239—Distinct offences not part of same transaction—Trial of, is not permissible under S. 239.

Section 239 is the only section of the Code which refers to a trial of more persons than one jointly, but it does not authorise such trial for two or more distinct offences unless they form part of the same transaction or unless one is the actual offence and the other or others are offences of abetting or attempting that offence.

[P 140 C 1]

G. P. Dick—for the Crown.

Judgment.—Two separate challans were filed by the police against three persons named Chand Khan, Sayad Lal and Umar Khan charging them with offences under S. 457, I. P. C. in the houses of Govind Rao (P. W. 6) and Draupadibai (P. W. 7) respectively. The offence in Govind Rao's house is said to have been committed on some day between 12th and 19th February 1912 in Draupadibai's house between 16th and 19th of the same month. Two separate cases were registered in the Magistrate's Court, No. 10 in respect of the offence in Govind Rao's house and No. 11 in respect of that in Draupadibai's house.

The order-sheets of 8th March 1918 in the two cases are as follows:

Case No. 11

"All the accused are present. The offence of this case and the one of case No. 10 are of one and the same kind and against the same accused. The two offences will therefore be tried together under S. 234, Criminal P. C. For further orders see order sheet of case No. 10."

Case No. 10

"Accused produced. Public Prosecutor represents the Crown. Mr. Sircalkar defends Chand Khan and Mr. Pingle and Mr. Pandey defend Sayad Lal. Five witnesses for prosecution examined and discharged. It is now 5-15 p. m. The remaining witnesses will be bound in Rs. 10 each. This case and the offence mentioned in Case No. 11 are of the same kind and against the same accused alleged to have been committed

within one year. The two cases will therefore be tried together under S. 234, Criminal P. C. Accused remanded to jail custody. Case for 14th March 1919. The articles in evidence be kept with Nazar. On and after this date all the proceedings are recorded in case No. 10 only."

After the prosecution case was over Chand Khan was examined and discharged and charges with two heads in respect of two offences were framed against Sayad Lal and Umar Khan. These two have been convicted. Sayad Lal has been sentenced to suffer rigorous imprisonment for five years and Umar Khan to 2½ years for each offence. The two sentences on each accused have been ordered to run concurrently. The two Accused have filed separate appeals and this judgment will govern both. It is clear that the trial of the three accused jointly for two separate offences is illegal and the convictions must be set aside. The Magistrate purports to act under S. 234, Criminal P. C., but that section applies only to offences committed by a single person. It is not applicable when several persons are tried jointly under S. 239; see *Budhai Sheik v. Emperor* (1) and *Emperor v. Balwantsingh* (2). S. 239 is the only section which refers to a trial of more than one person jointly, but it does not authorise such trial for two or more distinct offences unless they form part of the same transaction or unless one is the actual offence and the other or others are offences of abetting or attempting that offence. The two offences in the present case are not, and the learned Magistrate has rightly not treated them as committed in the same transaction. I set aside the convictions of Sayad Lal and Umar Khan. It will be open to the prosecution to take such further proceedings against the accused as they may think proper, and in this connexion I would draw attention to the remarks at pp. 77 and 78 in *Emperor v. Balwant Singh* (2) cited above as to the courses open to the prosecution if they wish to take further proceedings.

P.N./R.K. *Conviction set aside.*

1. (1906) 33 Cal 292.

2. (1908) 4 N L R 71.

A. I. R. 1918 Nagpur 140

STANYON, J. C.

Emperor.

v.

Rai Singh and another—Accused.

Criminal Revn. No. 100-B of 1916, Decided on 1st November 1916. Report made by Sub-Judge, West Bihar.

(a) Criminal P. C. (1898), Ss. 107 and 112—Security for breach of peace—Denial by accused—Absence of proof—Order demanding security is illegal though accused are willing to furnish.

A Magistrate called upon the accused under S. 112 to show cause why they should not furnish security to keep the peace under S. 107, on the ground that they were members of an unlawful assembly which passed a mosque with loud music and which intended to cause a breach of the peace by repeating the procedure. The accused denied these allegations, but expressed their willingness to execute bonds to keep the peace. Thereupon the Magistrate directed them to execute bonds for Rs. 100 to keep the peace for one year.

Held: that the order was illegal, inasmuch as the accused denied every allegation on the basis of which they were considered liable to furnish security and no evidence was taken to prove those allegations; 35 Cal. 674; 34 Mad 139; 38 Mad. 330 and A.I.R. 1914 All. 546, *Foll.*

[P 141 C 1, 2]

(b) Criminal P. C. (1898), S. 537—Provision of law disregarded—It is not mere irregularity but illegality.

A disregard of the express provisions of law is not a mere irregularity which can be condoned or remedied, but an illegality and the Court cannot maintain or overlook an illegal order upon any ground of administrative convenience; 25 Mad. 61 (P.C.), *Foll.* [P 141 C 1]

P. S. Kotwal and Ghate—for Non-Applicant.

Judgment.—This case has been reported under S. 438, Criminal P. C. 1898, as applied to Bihar by the Sessions Judge of West Bear. The facts are these. A Magistrate of the 1st Class at Akola made an order under S. 112 of the said Code, declaring that two Hindus namely, Rai Singh and Daolat, had allegedly been members of a procession which contrary to established usage, had passed by a Musalman mosque on 31st July 1916 accompanied by loud music and that they apparently intended to cause a breach of the peace by repeating this procedure at the coming Pola festival. The same order called upon Rai Singh and Daolat to show cause why they should not furnish security under S. 107 of the same Code. In answer to this Rule the said persons appeared before the Magistrate, who asked them to show cause. Rai Singh and Daolat denied having been

members of the procession of 31st July 1916, expressed their readiness to observe the custom of stopping clamorous music while passing the mosque, denied that they had any intention of disturbing the peace on the Poladay, added that they are willing to execute a bond to convince the Magistrate of their peaceful intentions. Thereupon the Magistrate directed Rai Singh and Daulat each to execute a bond in Rs. 100 to keep the peace for a year. The learned Sessions Judge reports this order as illegal. A Rule issued to the District Magistrate, in response to which he candidly admits the irregularity of the order, but asks that it may be maintained as expedient.

I have every sympathy for the view put forward by the learned District Magistrate, and I fully appreciate the difficulties which sometimes arise from Hindu musical processions going past Musalman mosques and the advisability of doing nothing to weaken the hands of the executive by undue interference with preventive action upon technical grounds. But as pointed out by the Supreme Tribunal in *Subrahmanya Ayyar v. King Emperor* (1), the disregard of express provisions of law is not a more irregularity which can be condoned or remedied, but an illegality and this Court cannot maintain or overlook an illegal order upon any ground of administrative convenience. The provisions of the Criminal Procedure Code are clear enough as to the procedure which must be followed where an accused person disputes the truth of the information laid against him, but if it is necessary to supplement the eventually published judicial interpretation of it, that requirement can be satisfied by referring to *Ram Chandra Haldar v. Emperor* (2), *Palaniappa Asory, In re* (3), *Prathipati Venkatasami v. Emperor* (4) and *Mul Chand v. Emperor* (5). The accused denied every allegations upon the basis of which they were considered liable to furnish security and not a shred of evidence was taken to prove them. A Magistrate cannot enter into a compromise with an accused person for the purpose of disposing of a

criminal case. Criminal liability arises out of acts and intentions which, if not admitted, must be legally proved.

That is not an abstruse proposition of law, it is an obvious rule of common sense. Suppose these two persons having been brought before the Magistrate accused of assault or theft had denied the offence, but added that they were willing to undergo conviction in token of their innocence, would the Magistrate have been justified in convicting them, even for the purpose of dealing with them as first offenders and realising them on probation of good conduct? Obviously not. Yet that is very like what he has done in this case. He has convicted them without evidence of acts and intentions which they denied. The order was absolutely illegal and cannot be sustained. For the above reasons the order directing Rai Singh and Daulat to execute security bonds is set aside and the bail or bonds executed by them are discharged.

P.N./N.K.

Order set aside.

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PRIDEAUX, A. J. C.

Emperor

v.

Hanuman—Accused.

Criminal Revn. No. 15 of 1915, Decided on 18th February 1915, by Sess. Judge Chhatigarh Divn.

(a) Criminal P. C. (1898), S. 207, 347—Offence exclusively triable by Sessions Judge—Commitment by Magistrate empowered under S. 30 to try—Commitment is not illegal merely because Committing Magistrate is empowered to try.

The commitment of a case triable exclusively by the Court of Session is not illegal merely because the Committing Magistrate is himself empowered under S. 30 Criminal P. C. to try the case. [P 142 C 1]

(b) Criminal P. C. (1898), S. 207, 347—"Ought to be tried" explained.

The words "ought to be tried" in Ss. 207 and 347 must be read with S. 254 of the Code. [P 142 C 2]

(c) Criminal P. C. (1898), S. 207—Magistrate under S. 207 can commit cases triable by him for proper reasons.

Under S. 207 a Magistrate who is competent to commit to the Court of Session can commit to that Court cases triable exclusively by that Court and cases which in his opinion ought to be tried by that Court: 24 Cal. 429 and 4 Bom. L. R. 85, Full. [P 142 C 2]

(d) Criminal P. C. (1898), S. 215—Commitment is bad if made because accused has been committed in another case.

A commitment, however, made on the sole ground that the accused has been committed in another case is bad in law. [P 142 C 2]

1. (1902) 25 Mad 61=28 I A 257 (P C).

2. (1905) 35 Cal 671.

3. (1911) 24 Mad 139=6 I C 692.

4. (1907) 30 Mad 340.

5. A I R 1914 All 516=26 I C 653=37 All 30.

G. P. Dick—for the Crown.

Order.—This case has been reported by the Session Judge, Chhatisgarh Division, for quashing a commitment. A Rule having issued the learned District Magistrate shows cause as follows; (a) The committal of a case triable exclusively by the Court of Session does not become ipso facto illegal merely because the Magistrate is empowered under S. 30, Criminal P. C. (b) That some High Courts have even gone so far as to hold that where an accused is charged as this accused with two offences, one of which he was competent to try and the other he was not, the proper course is committal, *Empress v. Ramanand* (1). (c) It has also been held that a commitment should not be quashed on the ground that the Sessions Judge on perusal of the record found the case triable by a Magistrate of 1st Class, *Empress v. Mallu Shah* (2). (d) That in the present instance the two offences with which the accused is charged, murder and arson, were practically part of the same transaction and some of the witnesses are the same in both cases. The Committing Magistrate had therefore, some grounds for considering that the accused would be to some extent embarrassed by a trial in different Courts. In conclusion, however the District Magistrate admits that he has no practical objection to offer to the quashing of the commitment.

It goes without saying that the committal of a case triable exclusively by the Court of Session is not illegal merely because the Magistrate is empowered under S. 30, Criminal P. C., and it may be admitted that there may be cases where an accused charged with two offences, one triable by a Magistrate the other by a Judge, should properly be committed to the Sessions for the trial of both. It may be conceded that it would be improper to quash a commitment merely on the ground that the offence the accused is charged with is triable by a Magistrate, for a Sessions Court can try any offence under the Indian Penal Code (S. 28, Cr. P. C.). There can be nothing to prevent a Magistrate committing even a summons case for good reasons. It has been held that under S. 207, Criminal P. C.

"A Magistrate who is competent to commit to the Court of Session can commit to that Court both cases triable exclusively by that Court and

cases which in his opinion ought to be tried by that Court."

Queen Empress v. Kayemullah Mandal (3). In a warrant case the Magistrate is bound by the provision of S. 254, that is, when he is of opinion that the accused has committed an offence triable under Ch. 21 which he is competent to try and which he can adequately punish, he shall proceed to charge the accused, but if the Magistrate considers that he cannot adequately punish the accused there is nothing to prevent him committing the case. The words "ought to be tried" of Ss. 207 and 347, Criminal P. C., it has been held, must be read with S. 254 of the Code. Thus a case which the Magistrate is not competent to try should be committed; also one in which in the Magistrate's opinion he cannot inflict adequate punishment: *King-Emperor v. Pema Ranchod* (4). In the case before me the accused, one Hanuman, has been committed to the Court of Session for an offence under S. 436, I. P. C., by the 1st Class Magistrate, Bilaspur, a Magistrate empowered under S. 30, Criminal P. C. It is said the accused set fire to a house and that immediately after doing so, went to another house and wounded a woman who has since died of her wounds. Accused has, in a separate case before the same Magistrate, been charged under S. 302, I. P. C., and committed for trial to the Sessions Court. The only reason given by the Magistrate for the commitment in the arson case is that the same accused has been committed in the murder case. The Magistrate does not say that the fine and sentence which he can impose will not be adequate to meet the ends of justice. The commitment made on the sole ground that the accused has been committed in another case is bad in law. I accordingly quash the commitment of the accused in this case and direct that the First Class Magistrate, Bilaspur, do proceed with the trial of the accused and complete it according to law.

P.N./R.K. *Commitment quashed.*

3. (1897) 24 Cal 429.

4. (1902) 4 Bom LR 85.

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PRIDEAUX, A. J. C.

Akbar Ali—Accused.

v.

Emperor—Opposite Party.

Criminal Revs. Nos. 258 and 259 of 1918, Decided on 29th November 1918,

1. (1883) A W N 199.

2. (1892) 22 P R 1882 Cr.

Criminal P. C. (1898), S. 350 — Witnesses should be re-examined when case is transferred from one Magistrate to another.

Section 350 is applicable to a case which has been transferred from the Court of one Magistrate to that of another. It is not restricted to cases in which Magistrates succeed each other in their offices. 15 C. P. L. R. 66; 17 C. P. L. R. 159; and 1 N. L. R. 187; *Diss. from*, 35 Cal. 457; 32 Mad. 218, 39 Cal. 781 and 40 All. 307, *Foll.*

[P 143 C 2]

P. S. Kotwal—for the Accused.

Order—Akbar Ali and Mohammad Ali applicants in Criminal Revisions Nos. 258 and 259 of 1918, have been convicted in the same trial by a 1st Class Magistrate of Wardha each for an offence under S. 323 I, P. C. and sentenced each to the payment of fine. The cases commenced on a complaint on the 22nd April 1918 in the Court of the Tahsildar and 2nd Class Magistrate, Wardha. After the examination of three witnesses for the prosecution, the case was transferred by order of the District Magistrate to the Court of the 1st Class Magistrate. He proceeded with the case on 11th June 1918, without re-examining the witnesses already examined by the 2nd Class Magistrate, and on 29th June 1918 convicted the accused. An application purporting to be under S. 350 (b), Criminal P. C., was presented to the District Magistrate and was rejected by him. The legality of the order of transfer is not questioned, but it is contended that S. 350, Criminal P. C., does not apply to the case, as that section is limited to cases, in which Magistrates succeed each other in their offices, but does not apply to a case like the present where the transfer is by the District Magistrate from one Magistrate to another. In support of this contention, and it is the only one raised in argument, I am referred to *Emperor v. Kasim* (1), *Emperor v. Gokal* (2) and *Ladya v. Emperor* (3). These cases unquestionably support the view relied on by the applicant's learned Counsel. With all respect to the Judges who decided those cases, I find myself unable to accept their views. In recent years there are cases of other High Courts in which the opposite view had found acceptance. I may mention *Mohesh Chandra Saha v. Emperor* (4), *Palaniandy Gounden v. Emperor* (5), *Kudrutullah*

v. Emperor (6) and the recent case of *Ram Dass v. Emperor* (7). I hold that S. 350 is applicable to a case like the present which has been transferred from the Court of one Magistrate to the Court of another and it is not restricted to cases in which Magistrates succeed each other in their offices. It is not contended that applicants have in any way been prejudiced by a portion of the evidence against them having been recorded by the Magistrate who did not finish the case. I dismiss both applications.

P. N. R. K. Application dismissed.

6 (1912) 39 Cal 781=14 I C 311.

7 (1918) 40 All 307=14 I C 682.

* A. I. R. 1918 Nagpur 143

BATTEN AND KOTWAL, A. J. Cs.

Mt. Tani—Accused.

v.

Emperor—Opposite Party.

Criminal Appeal No. 52-B of 1918, Decided on 19th June 1918, from judgment of Sess. Judge, East Berar, D/- 11th May 1918, in Sess. Trial No. 5 of 1918.

(a) Criminal P. C. (1898), S. 342—S. 342 is mandatory.

The provisions of S. 342 are mandatory and non-compliance with them vitiates the trial.

[P 146 C 2]

(b) Criminal P. C. (1898), S. 342—Object of section stated.

The object of S. 342 is (1), to communicate to the accused, to the full extent that may be found necessary in each particular case, what is alleged against him in the evidence for the prosecution; (2) to ascertain from him what explanation or defence, in law or in fact, he wishes to put forward in respect thereof.

[P 145 C 2]

(c) Criminal P. C. (1898), S. 342—Accused ignorant—His attention should be directed to vital parts of evidence against him.

Where the accused is an ignorant person who cannot be expected to know or understand what particular parts of the evidence are, or are likely to be considered by the Court to be, against him, it is necessary that his attention should be directed to all the vital parts of the evidence against him.

[P 146 C 1, 2]

(d) Criminal P. C. (1898), S. 342—Mere general question to accused is not enough.

It is not a sufficient compliance with the provisions of S. 342 to ask an accused the general question: "Have you anything more to say in this case or?" "you have heard the prosecution witnesses against you, what have you to say?"

[P 146 C 1, 2]

G. R. Pradhan and C. B. Parakh—
for the Accused.

G. P. Dick—for the Crown.

Judgment.—The appellant *Mt. Tani* has been convicted and sentenced to death for the murder of *Mt. Jakhai*, her mother-in-law, and *Mt. Bulki*, a cousin

1 (1902) 15 C P L R 66.

2 (1904) 17 C P L R 150=1 Cr L J 1056.

3 (1905) 1 N L R 187=2 Cr L J 820.

4 (1908) 35 Cal 457.

5 (1909) 32 Mad 218=1 I C 54.

of her husband, on 27th March 1918 by administering dhatura poison. Tani lived in Mouza Dhamangaon, but as that village was infected with plague she was at the time of the alleged crime living with her husband Venkati (P. W. 6) and Mt. Jakhai in a hut outside the village. Mt. Bulki occupied an adjacent hut with her mother Poonji (P. W. 8) and her two daughters, the elder of whom is Mt. Jani, (P. W. 7) The 27th March 1918 was shimga or Holi day. About an hour after Jakhai had taken her evening meal she had an attack of giddiness and pain in her stomach which became distended, and she felt difficulty in speaking and began to scatch at her clothes and the ground on which she lay; later she became speechless and unconscious and died shortly after midnight. A short time before Jakhai died, Bulki who had taken her meal at the same time as Jakhai and had eaten some of the puranpoli which formed part of Jakhai's meal also developed similar symptoms and died a little after sunrise on 28th March 1918.

The following questions arise for consideration: What was the cause of the sudden illness and death of Jakhai and Bulki? If poison, who administered it and how? P. W. 6 and P. W. 7 describe the symptoms exhibited by the two women before they died. There can be no doubt about this part of their evidence; they could not have invented the symptoms. P. W. 5, the Sub-Assistant Surgeon, says that these symptoms are symptoms of dhatura poisoning. Chemical examination showed the existence of a substance having the properties of dhatura in the stomach viscera of Jakhai and in the stains on her choli and the taiban on which she was lying after she was taken ill. Traces of arsenic were also found in the stomach viceras of both Jakhai and Bulki. There is no reason to discredit this evidence and it must be held that the deaths of these women were due principally, at any rate, to dhatura poison. The Investigating Police Officer had from the very beginning suspected dhatura poison as the probable cause of the deaths and had worked for a clue upon that suspicion. The viscera of the two deceased women were not forwarded to the Chemical Examiner until the case came up for hearing before the Magistrate and the report of the examination reached the Sessions Court after

the trial had begun on 6th May 1918. The Police had thus no information about the existence of arsenic in the viscera before their investigation was closed, otherwise they would have sought for some clue with regard to the arsenic also. It is regrettable that under the present arrangements as to chemical examinations and the rules as to transmission of articles to the Chemical Examiner, it is practically impossible for the Police to have early information as regards the results of chemical examination.

The Officiating Sessions Judge has also omitted to question the Sub-Assistant Surgeon examined as P. W. 5 in his Court, whether his post mortem examination disclosed any indication of arsenical poisoning or whether any of the symptoms described by the witness could be ascribed to such poisoning. Probably the deaths were due in a minor degree to the effect of arsenic also.

The evidence on which the prosecution rely to prove that the poison was administered by the appellant is as follows. P. W. 7, Jani's statement is to the effect that on the evening of 27th March 1918, while Mt. Jakhai was sitting in Bulki's hut, the appellant brought food for herself and Jakhai in two separate plates. Bulki also brought her food in a plate and the three sat outside Bulki's hut to take their meals. Some puranpoli formed part of the food in Jakhai's plate. Jakhai, while eating the puranpoli, remarked that it tasted bitter. The appellant explained that it was due to the puran (the sweetened dal filling) having been burnt in the making. Bulki ate some of the puranpoli from Jakhai's plate. The evidence of Poonji (P. W. 8) to the same effect may be left out of consideration as it is admittedly hearsay. P. W. 6, (Venkati), P. W. 7, (Jani) and P. W. 8 (Poonji) were questioned with a view to prove that it was the appellant who had cooked the food brought by her for Jakhai and herself. Their evidence is not of much value, as none of them states that he or she saw the appellant cooking the food. P. W. 1 (the investigating Police Officer), P. W. 4 (Laxman Patwari), P. W. 9, (Shanker) and P. W. 10 (Raghupat Patwari) state that the appellant pointed out a rubbish heap in which she had concealed some capsules of dhatura fruits and produced them from the heap in their presence.

Ganpat, P. W. 2, states that on the Sunday preceding Holi day (Wednesday) the appellant had asked him where she could get dhatura leaves for application to her throat which was paining. We think it unlikely that the appellant did not know where dhatura plants were to be found in the village, and it appears to us improbable that she questioned this witness as he deposed she did. The accused was examined by the Committing Magistrate and the Sessions Judge, and we transcribe below both her examinations in extenso:

Q. You have heard the prosecution witness against you: what have you to say?

A. I know nothing about the allegations made out against me.

Q. Was Mt. Jakhai related to you?

A. Mt. Jakhai was my mother-in-law as well as my father's sister.

Q. Was she living with your husband?

A. She was living with me and my husband since I was married.

Q. Do you know how Mt. Jakhai met with her death?

A. I don't know how Jakhai died.

Q. Who ordinarily cooks food for the inmates of your house?

A. Ordinarily I used to cook food but on festival days Mt. Jakhai used to cook the food. On the occasion of the last shingra or Holi day Mt. Jakhai had cooked the food. I had brought water from the well and supplied her fuel on the shingra day.

Q. Whether the deceased Jakhai used to quarrel with you?

A. No. She never quarrelled with me and she used to treat me properly. My husband used to quarrel with me.

Q. Do you know Mt. Bulke?

A. Yes. She was my husband's cousin sister.

Q. Where did she live?

A. She used to live with her mother in a separate hut close to mine and in the same field in which we were living.

Q. Do you know how Bulki met with her death?

A. I do not know how she met with her death.

Q. Have you got anything more to say?

A. My mother-in-law used to treat me properly. When my husband left me for two years she brought me back from my parents. I have to say nothing more

except that my husband and my aunt-in-law Poonji had suggested to me to say that I mixed dhatura with the food, but in fact I did nothing and know nothing about it.

Before the Sessions Judge:

Q. Is the statement made by you in the lower Court and now read out to you correct and is it true?

A. Yes, that statement is correct and true.

Q. What have you to say about the evidence of Jani and Ganpat that the puranpoli had a somewhat bitter taste and that you had gone out for dhatura seeds? Is it true that the three took their meals together?

A. Yes, what Jani said about myself, Bulki and Jakhai having taken food together on shingra evening in front of Bulki's hut is correct. There was no talk then about puranpoli having tasted bitter.

Q. Ganpat says that he saw you going to bring dhatura leaves. Is this true?

A. No. Ganpat speaks false. He never met me nor did I speak to him that I was going to bring dhatura leaves.

Q. What have you to say about the evidence for the prosecution that you used generally to quarrel with Jakhai and that there was a quarrel on the day previous to shingra?

A. There never has been a quarrel between her and myself.

Q. Can you say how Jakhai and Bulki died?

A. I do not know. My mother-in-law died and I was seated taking hold of her. I do not know how Bulki died. I was sitting near Jakhai at that time.

Q. Have you anything more to say in this case?

A. I have nothing else to say.

In our opinion the examination of the appellant has been defective and there has been no practical compliance with the provisions of S. 342, Criminal P. C., the object of which, as explained in *Emperor v. Katay Kisan* (1), is to:

(1) communicate to the accused to the full extent that may be found necessary in each particular case, what is alleged against him in the evidence for the prosecution; and (2) ascertain from him what explanation or defence, in law or in fact, he wishes to put forward in respect thereof.

1. (1903) 17 C. P. L. R. 113.

The most important part of the prosecution evidence is that of Jani, which is directed to proving the administration by the appellant of the food containing the poison. Jani's evidence shows that the appellant brought the food in two plates, she gave one plate to Jakhai, and Jakhai and Bulki who ate the food from that plate died. She herself ate from the other plate and nothing happened to her. These circumstances are very much against the accused. It was necessary therefore in our opinion to examine the accused and take her explanation with regard to them in detail. The appellant should have been asked the following questions or such of them as became necessary in view of her answers to previous questions: Whether she brought the food for herself and Jakhai; whether she brought it in two separate plates; whether she gave one plate to Jakhai; whether there was puranpoli in the plate; whether Jakhai and Bulki ate the puranpoli and other food from that plate; whether she herself ate from the other plate; whether there was puranpoli in that plate and whether she ate that puranpoli. She should have been told that under the circumstances stated above presumptions arose that Jakhai and Bulki must have died of eating the food in the plate brought by her for Jakhai, and that the poison must have been put into the food by her, and she should have been asked whether she had any explanation to offer in this connexion or as to why Jakhai and Bulki died under these circumstances while nothing happened to herself.

It is contended by the learned Standing Counsel for the Crown that when an accused person is asked the general question: "Have you anything more to say in this case," as the Sessions Judge in the present case, or "you have heard the prosecution witnesses against you, what have you to say," as by the Committing Magistrate, there is a sufficient compliance with the provisions of S. 342, Criminal P. C., as it is open to the accused in answer to such questions to explain all matters which appear to be against him in the evidence, even though his attention has not been drawn to them by specific questions. It is possible that under certain circumstances—as in the case of an accused person of advanced education and information—such a question may be

deemed a sufficient compliance with the provisions of S. 342, but in this case, as in most cases, the accused is an ignorant person who cannot be expected to know or understand what particular parts of the evidence are, or are likely to be considered by the Court to be, against her; and it was necessary that her attention should have been directed to all the vital parts of the evidence against her. Even where an accused person is capable of understanding what circumstances appear against him, when several details of the evidence form the subject of this examination he may be led to think that other details on which he has not been examined have not been considered to be of any importance by the Court, and he may think it unnecessary to offer any explanation in respect thereof. We consider that the provisions of S. 342 are mandatory and non-compliance with them vitiates the trial: *Ghulla v. Emperor* (2), *Emperor v. Savalya Aima Pastyia* (3). We set aside the conviction and sentence and direct a re-trial. The Sub-Assistant Surgeon should now be questioned in connection with the arsenic found in the viscera of the two deceased women. In concluding this judgment we express our strong disapproval of the course followed by the investigating police officer in connection with the arrest of the accused in this case. He commenced the investigation at 3 p. m. on 28th March and closed it for the day at 12 midnight. All this time was taken up with the examination of witnesses in connection with the inquest on Jakhai's body. At the end of the record of this day's proceedings the investigating Police Officer writes:

"Suspicion which arises is that death was due to the poison caused by dhatura seeds."

The examination of the witnesses, one of whom was Mt. Tani, shows that he suspected her of having administered the poison. He then commenced the inquest on Bulki and examined Tani a second time. This inquest and the investigation were closed at 3 a. m. on 29th March 1918 with these remarks:

"As the woman's death has been caused with dhatura seeds I sent the corpse to Morshi for post mortem examination."

It is clear that the investigating officer had the fullest justification for arresting Tani at 3 a. m. on 29th March 1918. So far

2. (1918) 44 I C 184=1 P R 1918 Cr.

3. (1907) 9 Bom L R 356.

as he was concerned there was no doubt left that Tani had committed the offence. She was however not formally arrested till 6.30 p. m. on 31st March 1918. Why she was not arrested earlier appears from the case diary No. 2 for 29th March 1918. The investigating officer writes therein at p. 47:

"I will not register the crime under S. 302, I. P. C., until I get a reply from the Sub-Assistant Surgeon; and as the remand of police custody would not be obtained consequent on the arrest of Tani, but another of jail custody would be granted, I therefore postponed her arrest on the ground that it may not impede all those necessary particulars which are to come to light in future."

It is again clear from this that the investigating officer then considered that Tani should be arrested, but he refrained from doing what he knew he should have done because, if he did so, she would be removed from his custody. If he had arrested the accused and thought it necessary to have her in his custody for a longer time than the 24 hours prescribed by S. 61, it was open to him to get an order under S. 167 from the Magistrate for further detention in police custody, he would have had to give reasons for asking for such an order. Apparently he considered that he had none. In these circumstances we consider that his deliberate failure to make a formal arrest was nothing but a circumvention of the salutary provisions of the Criminal Procedure Code with regard to the custody of accused persons by the police. We purposely use the expression "formal arrest" because it is difficult to believe that Tani was free from all restraint, or that she was not practically under arrest before 6.30 p. m. on 31st March 1918, when she is regarded to have been arrested. On 29th March 1918 the investigating police officer left Dharmangaon at 9 a. m., and went to Rohankhed to investigate into another case, and returned to Dharmangaon at 3 p. m. Had he left Tani free during that time? In view of the evidence available to him at 3 a. m. on 29th March 1918 he would have been very wrong if he had allowed her after that time to be free to go about as she pleased.

P.N./R.K. *Conviction set aside.
Retrial ordered.*

A. I. R. 1918 Nagpur 147

KOTWAL, OFFG. A. J. C.

Krishnayya—Accused—Applicant,

v.

Emperor—Opposite Party.

Criminal Revn. No. 77 B of 1918, Decided on 4th June 1918 from order of Sess. Judge, First Bench, D. 20th April 1918 in Criminal Appeal No. 46 of 1918.

Criminal P. C. (1895), S. 224—Offences against different individuals by one person can be tried together.

The conviction of an accused person at one trial for three different offences committed against three different persons is not illegal.

Section 231, Criminal P. C., is not limited to cases where the offences have been committed against the same person. [1917 C 2]

Order.—I see no reason to interfere in revision. Grounds Nos. 2 and 4 are a repetition of grounds Nos. 1 and 3 of the memorandum of appeal before the appellate Court and have been properly dealt with by that Court. The first ground urges that the three sets of misappropriation having been committed against three different persons the conviction of the appellant at one trial for all of them is bad and *Empress of India v. Marari* (1) is relied on. The case has been distinguished from *Mann Mina v. Empress* (2) and also in *Sri Bhagwan Singh v. Emperor* (3). The present case is analogous to *Queen-Empress v. Juala Prasad* (4). S. 234, Criminal P. C., is not, in my opinion, limited to cases where the offences have been committed against the same person; see also *Chitradhari Misser v. Emperor* (5). There is no substance in ground No. 3. The judgment of the appellate Court gives the points for determination, its decision thereon and the reasons for its decision quite fully and clearly. I do not see any illegality or impropriety in the appellate Court's decisions. The sentences are not severe. This application is dismissed.

P.N./R.K. *Application dismissed.*

(1) [1841] 4 All. 147.

(2) [1833] 9 Cal. 371.

(3) [1900] 2 I. C. 319.

(4) [1881] 7 All. 174.

(5) [1916] 43 Cal. 13=29 I. C. 668.

A. I. R. 1918 Nagpur 148 (1)

KOTWAL, OFFG. A. J. C.

Keshao—Plaintiff—Appellant.

v.

Mansha—Defendant—Respondent.

Second Appeal No. 102-B of 1917, Decided on 4th February 1918, from decree of Addl. Dist. Judge, East Berar, D/- 5th January 1917, in Appeal No. 304 of 1916.

Berar Land Revenue Code (1896), S. 79 (2) —Annual tenancy covers tenancy from year to year—Notice to quit in tenancy for one year is not necessary—Transfer of Property Act (1882), S. 111-A.

The expression "annual tenancy" as used in S. 79 of the Berar Land Revenue Code is meant to cover a tenancy from year to year only and not a tenancy lasting for a year only. No notice by either party to a contract of tenancy for one year is therefore necessary to determine the tenancy. [P 148 C 2]

V. D. Sathaye—for Appellant.*A. C. Roy*—for Respondent.

Judgment.—The plaintiff, an *ijardar* of a village in Berar, filed this suit on 25th April 1916 to eject the defendant from two fields, on the ground that they had been leased to him in writing for one year from 1st April 1915 to 31st March 1916, and the defendant has refused to vacate the fields on the expiry of the term. The defendant admitted that he had held on lease the above fields in 1915-1916, but he pleaded that the lease was an oral one. He further alleged that he was holding the same fields then on another lease for one year, viz., 1916-17, and the plaintiff had, therefore, no right to eject him. Both the lower Courts have found that the defendant held the fields in 1915-16 on an oral lease and that the alleged lease for 1916-17 is not proved. The first Court decreed the plaintiff's claim, but the lower appellate Court has dismissed it on the plea raised by the defendant in appeal that the plaintiff was bound to give notice to quit under S. 79 (2) of the Berar Land Revenue Code before he could be ejected. It has overruled the plaintiff's contention that the lease in suit is not an annual tenancy such as is contemplated by S. 79 of the Berar Land Revenue Code. The point, therefore, for determination is whether the expression "annual tenancy" used in that section applies to a lease for a single year. The term "annual tenancy" may have two meanings, viz., "tenancy from year to year," and if you give the word "annual" one of its dictionary meanings, viz., lasting for a year (as an

annual plant or annual ticket), "a tenancy for a single year."

I think there are strong reasons against holding that the expression "annual tenancy" in S. 79 (2) was meant to cover a tenancy for one year only. Apart from the fact that it is a somewhat unusual use of legal language to speak of tenancy for one year only as an annual tenancy, the general rule of law with regard to notice to quit in connexion with tenancies is that no such notice is necessary to determine a tenancy for a fixed period as a demise for a year: see Woodfall's Law of Landlord and Tenant, Edn. 19, p. 403, and cases cited therein, and the T. P. Act, 4 of 1882, S. 111-A. If therefore, the expression "annual tenancy" is held to include a tenancy for a year, it would be attributing to the legislature an intention of derogating from the general law and of interfering with the freedom of contract, for a notice to quit cannot be taken to have been contemplated by the parties to a tenancy for a year as the contract itself virtually provides for its determination. In such a case it would be unreasonable and unjust to one of the parties to allow the other to insist upon a notice before the tenancy can be determined. Any construction which leads to such unreasonableness or injustice should be avoided: see Maxwell on the Interpretation of Statutes, Edn. 5, p. 372. I hold that S. 79 (2) of the Berar Land Revenue Code does not apply to a tenancy for a year and no notice by either party to the contract is necessary to be given to the other before the tenancy can be determined in such a case. The appeal is allowed with costs.

P.N./R.K.

*Appeal allowed.***A. I. R. 1918 Nagpur 148 (2)**

MITTRA, A. J. C.

Baliram—Plaintiff—Appellant.

v.

Ganpat—Defendant—Respondent.

Second Appeal No. 334 of 1917, Decided on 12th September 1918, against decree of Special Addl. Dist. Judge, Akola, D/- 27th April 1917.

Civil P. C. (1908), O. 6, R. 17 and O. 23 R. 1—Plaintiff cannot be allowed to amend pleadings or to withdraw from suit with liberty to bring fresh suit at stage of second appeal.

Plaintiff brought a suit for a declaration that a certain sale-deed executed by his father was a bogus transaction. At a later stage the plaintiff

was amended so as to include a claim for possession of the property sold. Both the trial Court and the Court of first appeal held that consideration had passed for the sale and dismissed the suit. In second appeal it was sought to impeach the sale on the ground that it was not for antecedent debt or for legal necessity and was, therefore, not binding on the plaintiff.

Held: that at such a late stage of the proceedings the plaintiff could not be allowed either to amend his pleading or to withdraw from the suit with liberty to bring a fresh suit.

[P 149 C 1]

V. V. Chitale—for Appellant.

Judgment.—This second appeal arises out of a suit for a declaration that a sale-deed dated 5th December 1910 executed by the plaintiff's father Parashram in favour of the defendant's father was a bogus transaction. At a later stage the plaint was amended so as to include a claim for possession of a half share of the property sold. It may be noted that in a previous litigation between the defendant's father and the plaintiff's uncle Krishna it has been decided that Parashram had only a right to convey a half share in the field. Now both the Courts below have held that the transaction in favour of the defendant's father was not a bogus transaction and that there was consideration for the sale. The suit has therefore been dismissed. In second appeal it is contended that the sale by the father was not for an antecedent debt nor for legal necessity. This is a point which the plaintiff never raised in the Courts below. Having regard to the fact that the plaintiff originally came into Court with a relief for a declaration based upon a particular ground, it is not competent to him now to insist upon the invalidity of the sale-deed upon grounds not raised before. There is scarcely any suggestion that the property was joint ancestral property in which the plaintiff had a right by birth. After four years of litigation I cannot allow the plaintiff either to amend his pleadings or to withdraw from the suit with liberty to bring a fresh suit. It is argued that recent decisions have pointed out that a father has no power to sell ancestral family property except for legal necessity or for what is strictly an antecedent debt. The Privy Council decisions cite with approval the Full Bench ruling of the Allahabad High Court in *Chandraden Singh v. Mata Prasad* (1), a case which was followed in 1913 by the Judicial Commissioner in

1. (1909) 31 All 176=1 L C 479.

Hira Ram v. Udha Ram (2). I am therefore unable to accede to the prayer that either the pleadings should be allowed to be amended or that the plaintiff should be given liberty to bring a fresh suit. The appeal is, therefore, dismissed. There will be no order for costs, as the respondent appears in person.

P.N./R.R.

Appeal dismissed.

2. (1913) 2 N D R 74=19 L C 441.

A. I. R. 1918 Nagpur 149

BATTEN, A. J. C.

Gandelal Hazardal—Defendant—Appellant.

v.

Manjee Sonar—Plaintiff—Respondent.

Second Appeal No 363 of 1917, Decided on 16th July 1918, against the decree of Dist. Judge, Nagpur, in C. A. No. 132 of 1916, D/- 16th April 1917.

Civil P. C. (1908), S. 47, & O. 21 Rr. 58 & 63—Objection by stranger dismissed on ground that he was party to suit—Appeal does not lie—Regular suit to establish right is maintainable—Test is whether claim of objector is adverse to claims of real judgment-debtor.

Where in execution of a decree a person who claims that he was not a party to the suit prefers an objection to the attachment of certain property in the capacity of a stranger to the suit and the objection is dismissed on the ground that he was a party to the suit, no appeal lies against the order dismissing the objection, but it is open to the objector to file a regular civil suit to establish his right to the property attached.

[P 150 C 1]

In such case the test is whether the claim as laid by the objector is adverse to the claims of the real judgment-debtor, and an objector claiming under a paramount title is not deprived of his ordinary remedy of a regular suit merely because his objection is dismissed on the ground that he is held to be a party to the suit.

[P 150 C 2]

M. V. Joshi and V. V. Chitale—for Appellant.

B. K. Bose, V. Bose and Eraksha—for Respondent.

Judgment.—Appeal by the defendant. The facts out of which this appeal arises are briefly these. The defendant in 1907 filed a suit in the Court of Small Causes, Bombay, for the price of goods sold, the defendant in the suit being described as Mannalal Ramebandra residing in Bombay. An ex parte decree for Rupees 1,710-8-0 was passed. In execution the judgment debtor was arrested and imprisoned, and then released as his subsistence allowance was not paid. The Bombay decree was transferred for execution to the Court of the District Judge

Nagpur, and the jewelry of the present plaintiff-respondent Manji son of Diparam was attached. He lodged an objection under R. 58, O. 21, Sch. 1, Civil P. C., on the ground that he was not a party to the suit and that the jewelry was his. The Additional District Judge dismissed the objection, holding that the objector was a party to the suit. The objection was dismissed as the executing Court held that the objector was a party to the suit, since the debtor in the suit was a firm of which the objector and his brother Ramchandra were the partners. The respondent has brought the present suit to recover from the decree-holder the money which he paid in satisfaction of the decree to get his jewelry released from attachment. The learned Sub Judge held that the respondent was not a party to the suit, the person against whom the decree had been passed being his brother Ramchandra in his individual capacity, and decreed the respondent's claim.

In appeal the learned District Judge upheld the decree, taking the same view as to the facts. It was also contended in first appeal that the suit was barred by the rule of res judicata, it having been decided in the execution proceedings that the respondent was a party to the suit and that the remedy of the objector was by way of appeal from that decision. The learned Divisional Judge held that the dismissal of the objection was not a decision under S. 47 Civil P. C., of question arising between parties to the suit, and that a separate suit lay under R. 63, O. 21. The first ground of appeal to this Court is that the executing Court having held that the respondent was a party to the suit, that finding, not having been appealed against is conclusive. It is argued that the executing Court was bound to determine whether or not the objector was a party to the suit, and its decision that he was such a party is a decision that the question was one between the parties to the suit within the meaning of S. 47, and not having been appealed against is a final decision. I am of opinion that the view taken by the Divisional Judge is correct. There is no reported case exactly on all fours, but in *Upendra Nath Kalamuri v. Kusum Kumari Dasi* (1) it was held that an objection made by a shebait of a deity, against

whom a decree had been passed as shebait, that the property attached was his private property, was not an objection by a party to the suit as such within the meaning of S. 47, and an appeal did not lie against the order on the objection.

If the same individual can claim to be regarded as having two capacities in one of which he was not a party to the suit, a fortiori a person who claims that he was not a party to the suit can make an objection in the capacity of a stranger to the suit. The test is laid down at p. 450 (of 42 Cal) of the case cited, and is whether the claim laid by the objector is adverse to the claims of the real judgment-debtor. The nature of the proceedings is to be judged by the claim of the objector, and an objector claiming under a paramount title is not deprived of his ordinary remedy merely because his objection is dismissed on the ground that he is held to be a party to the suit. The second ground of appeal calls in question the concurrent finding of both the lower Courts that the decree was against Ramchandra individually. This appears to be a finding of fact, binding on this Court. It is argued by the learned advocate for the appellant that the interpretation of a decree is a question of law. In any case I am of opinion after studying the record that the decision of the lower Courts is indubitably correct. Whatever the nature of the suit that the appellant should have brought or intended to bring, the suit and decree were actually against the individual Ramchandra. The appeal is dismissed with costs.

P.N./R.K.

Appeal dismissed.

A. I. R. 1918 Nagpur 150

Drake-Brockman, J. C.

Dipchand—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 133 of 1918, Decided on 18th July 1918, to revise judgment and finding of Sub-Div. Mag., First Class, Damoh, D/- 28th May 1918, in Summary Trial Case No. 53 of 1918.

Criminal P. C. (1898), S. 260 (1), Cls. (d) (i) — Summary trial for serious offences though legal is inappropriate.

A Magistrate is not authorized to split up an offence so as to give himself jurisdiction over the parts which he would not have had over the whole, thereby depriving the accused of his right to appeal. 4 Cal. 1st, Fell. [P 151 C 1]

Clause (i), S. 260 (1), Criminal P. C. must be read with Cl. (d), which only permits a summary

trial for theft under S. 380, I. P. C. where the value of the property stolen does not exceed Rs. 50. [P 151 C 1]

The offence of house-breaking by night under S. 457, I. P. C. accompanied by a theft of property worth more than fifty rupees, cannot legally be tried summarily under S. 260, Criminal P. C. [P 150 C 1]

Summary procedure in cases of serious offences even though legal is inappropriate. 13 C. P. L. R. 17, *Foll.* [P 151 C 2]

G. L. Subhedar—for Applicant.

Order.—The applicant for revision has been summarily tried and convicted by a Sub-Divisional Magistrate of the 1st Class for an offence of house-breaking by night punishable under S. 457, I. P. C. An unappealable sentence of three months' rigorous imprisonment has been passed. The first information was laid on 7th March last, the informant giving at the same time a list of stolen property which he valued at Rs. 127-7-0. On 16th April he gave a supplementary list, including articles valued at Rs. 50-9-0. The total value of the stolen property was, therefore Rs. 178. The case was clearly one which could not legally be tried summarily. It is true that under Cl. (i), S. 260 (1), Criminal P. C. offences under S. 457, I. P. C. may be so tried, but that clause must be read along with Cl. (3), which only permits a summary trial for theft under S. 380 where the value of the property stolen does not exceed Rs. 50. The principle applicable is akin to the general one that a Magistrate is not authorised to split up an offence so as to give himself jurisdiction over the parts which he would not have had over the whole, thereby depriving the offender of his appeal: see *Empress v. Abdul Karim* (1).

The District Magistrate who was called upon to show cause why the conviction and sentence should not be set aside has admitted that the procedure adopted was illegal and no other point is now pressed before me. The proceedings of the Magistrate are set aside and the applicant will be re-tried in the manner laid down in Ch. 21, Criminal P. C. for the trial of warrant cases. He has already been transferred to the under-trial ward and will remain there till the re-trial is concluded. As stated in my order of 28th ultimo, I am not prepared to allow him bail. The attention of the Sub-Divisional Magistrate should be directed to this Court's Criminal Circular No. 1—20 and

1. (1879) 4 Cal 18,

also to the decision in *Empress v. Bhikia* (2). Summary procedure in this case even if legal, would have been inappropriate, inasmuch as the offence committed was a very serious one, a house having been broken into while the owner along with most of his fellow-townsmen had evacuated the place owing to plague. The record contains no basis for a finding that the house-breaking was committed by night and that being so a conviction under S. 457, could not have been sustained.

P. N. R. K. *Conviction set aside.*
2. (1909) 13 C. P. L. R. 17.

A. I. R. 1918 Nagpur 151

FINDLAY, OFFG. A. J. C.

Balwant and another—Defendants—Appellants.

v.

Tulsibai—Plaintiff—Respondent.

Second Appeal No. 172 of 1917, Decided on 11th April 1918, against decree of Dist. Judge, Wardha, Dt. 15th December 1916, in C. A. No. 230 of 1916.

Civil P. C. (1908), Ss. 16 and 20—Suit for recovery of joshipan income is one relating to immovable property.

A suit for the recovery of joshipan income is a suit relating to immovable property. [P 151 C 2]

Therefore, where a suit is brought for the recovery of joshipan income in respect of villages some of which are situated within, and the others outside, British India, the plaintiff can get a decree only in respect of the income accruing from the villages situated within British India.

[P 152 C 1]

M. V. Joshi—for Appellants.

G. S. Lule—for Respondent.

Judgment.—On this appeal coming on for hearing the learned counsel for the appellants has admitted that he cannot press grounds 1, 2 and 4 of the petition of appeal. As regards ground 3, however, it has been urged that the lower appellate Court as well as the first Court had no jurisdiction to pass a decree regarding the Berar villages. The learned District Judge in dealing with this question has expressed the opinion that the suit, in the form it was brought, was saved by S. 20, Civil P. C., and that S. 16 *idem* had no application. On this point, however, I think, the lower appellate Court was clearly wrong. A suit like the present for joshipan income is clearly a suit relating to immovable property: vide *Appanna v. Nagia* (1), *Keshav v. Vinayak* (2).

1. (1881-82) 6 Bom 512.

2. (1899) 23 Bom 22.

and *Krishnaji v. Gajanan* (3). The last paragraph of the head-note to the third case quoted might at first sight appear to be in favour of the respondent in this connection and not of the appellants, but reference to the judgment will show that this is not so. Moreover, it must be remembered that "property" as used in S. 16, Civil P. C., means property situated in British India, and the villages with which we are largely concerned in the present suit are situated in Berar which is not British India. To my mind the suit clearly falls under S. 16 (a), Civil P. C., and it follows that no decree could be given in the present instance so far as the Berar villages are concerned.

I may, however, point out that there is an even more fundamental consideration involved in the present instance. The present suit has been brought for the purpose of the determination of certain rights or interests in the joshpan villages named in the plaint. Several of these villages are situated in Berar and the remainder in the Wardha district of the Central Provinces. The Code of Civil Procedure as in force in Berar is a different creation entirely, although its context happens to be practically the same, from the Code of Civil Procedure in force in Central Provinces. In the latter instance this statute has effect by virtue of legislative sanction, while in the case of Berar the Code of Civil Procedure as applied to Berar only has force in the foreign jurisdiction order. The Code of Civil Procedure as in force in British India has not been modified in any respect which would permit of a suit like the present being brought in respect of immovable property partly situated in British India and partly situated outside these limits. In the circumstances the suit was undoubtedly wrongly conceived. It follows, therefore, that the plaintiff-respondent can only obtain a decree in respect of the joshpan income from the Central Provinces villages.

The next point urged has been that the interest should have been disallowed in view of the fact that the appellants were under a bona fide impression that a woman could not perform the duties of a joshi. I do not, however, think that this contention is entitled to succeed. It was the duty of the present appellants to have paid up the balance of dues which the plaintiff-respondent was entitled to

receive. If the appellants desired to question the right of a female carrying out the duties of joshi, it was open to them to do so by a regular suit. The respondent had in the meantime had no use or profit from the money due and in the circumstances I think it was only reasonable to allow interest. It follows that the plaintiff-respondent will obtain a decree only in respect of the Central Provinces villages. This decree on the findings arrived at by lower Courts, which have not been questioned here except on the point of interest already dealt with, will amount to Rs. 135.10.0 and the first Court's decree will be modified. The parties will bear proportionate costs in all Courts.

F.N./R.K.

Decree modified.

A. I. R. 1918 Nagpur 152

BATTEN, OFFG. J. C.

R. B. Tikekar—Accused — Applicant.
v.

Piareylal—Complainant — Non-Appl-
licant.

Criminal Revn. No. 42 of 1918, Decided on 29th April 1918, against the order of Magistrate, 1st Class, in Criminal Case No. 176 of 1917, D/- 26th January 1918.

(a) Penal Code (1860), S. 504—Insult with intention to provoke breach of peace is cognate with offence of assault than of defamation—Barrister is not privileged if his conduct is calculated to provoke assault.

An intentional insult with intent to provoke a breach of the peace is an offence more cognate to the offence of assault than to the offence of defamation. A barrister cannot claim privilege in the case of an assault, nor can he claim any privilege if his conduct is calculated to provoke an assault. [P 154 C 1]

(b) Criminal P. C. (1898), S. 439 — High Court in revision can re-examine evidence if there are prima facie grounds for doing so.

A High Court, as a Court of Revision, has power to re-examine the evidence if there are prima facie good grounds for doing so, especially where the accused has been given a non-appealable sentence and has no means of vindicating his character except in revision. [P 154 C 1]

*H. S. Gour, G. L. Subhedar and Bal-
want Rao*—for Applicant.

G. P. Dick—for the Crown.

Order.—The applicant, *R. B. Tikekar*, a barrister at law, practising at Damoh, has been convicted under S. 504, I. P. C. and sentenced to a fine of Rs. 25 or in default to simple imprisonment for a fortnight. The sentence is not appealable and he has, therefore, applied in revision to this Court. The fine has been paid and the punishment is a light one.

but the conviction is a serious stigma on a barrister-at-law, and as a result of it steps were in contemplation against him under the Legal Practitioners Act. On the death of one Ramju Nai mutation proceedings took place before the Tahsildar of Hatta in respect of his malik makbuza plot. One of the claimants was Pammi, or Param, a nephew of the deceased, and the counter-claimants were the deceased's son's wife Mr. Rajrani and her second husband Manhgoo. On 13th September last the Tahsildar was holding a judicial inquiry into the case; Manhgoo Nai was represented by a Mukhtyar, Narbada Prasad, and Param by the applicant, his counsel. Two witnesses were examined on that date on behalf of Manhgoo, the first being the complainant Piareylal Nai and the second Bhawani Nai. Piareylal's allegation is that the barrister asked Piareylal the name of the grandfather of Manhgoo and Piareylal said that he did not know it. Thereupon the barrister said to the witness in a threatening tone:

"Why will you not give this information, you pig? If you don't give it I will give you a kick with my boot."

It is also alleged that the Tahsildar himself, the presiding officer of the Court, said to the witness: "You are not a Nai but a Chamar." The witnesses for the complainant are the complainant Piareylal himself, his mukhtyar, Narbada Prasad, the aforesaid Bhawani, one Pakco Nai (a witness for Manhgoo in the mutation case who was not examined on that day) and Manhgoo's wife Mt. Rajrani. The applicant entirely denied the truth of the allegations against him, and called in his defence Mr. Narayan Rao, the Tahsildar who was the presiding officer in the Court, a Tahsil peon, one Gangadhar Rao, (a Mulguzar who had another mutation case in the Tahsildar's Court that day), and Jawahar Singh, the Mulguzar of Barda who was present in the Tahsildar's Court in connexion with the war loan. The proceedings were being held at Hatta. All these witnesses entirely denied the truth of the complainant's story. The Magistrate, Khan Sahib Ishtiaq Ali, says that in the ordinary course he would have believed the Tahsildar, "but for his selfish motive, his personal interest in the accused and his prejudice against the complainant."

He says:

"Mr. Narayan Rao's admission of accused's

fault in open Court and his failure to take notice of it, and lastly his own unbecoming dealings with Piareylal would simply reflect shameful discredit on him (Mr. Narayan Rao) and consequently for the selfishness he cannot be expected to expose himself and his friend, the accused."

Piareylal made an application to the Deputy Commissioner against the Tahsildar and the Tahsildar was told to bring witnesses in a proper manner. Piareylal also lodged a complaint of defamation against the Tahsildar and it was dismissed by Mr. Ishtiaq Ali as the complainant had not obtained sanction under S. 197, Criminal P. C. The Magistrate observes:

"Mr. Narayan Rao was fully aware of the above two cases against him, as he himself does not deny in the cross-examination before me. Under such circumstances then Mr. Narayan Rao had already become much prejudiced against Piareylal, when he on 3rd December last stood up before me to depose directly in favour of the accused. I have also remarked above about the interest of Mr. Narayan Rao in the accused. In this connexion I have to state that some time after the institution of the present criminal proceeding against the accused, Mr. Narayan Rao, accompanied by the accused Raghunath Halwant Tikedar and also a certain pleader of the Damoh Bar, repaired to Mauza Barda and saw Jawahar Singh (D. W. 4) there. The latter before me could not satisfactorily account for the joint visit to him of the trio, and the presumption therefore is that the said Mr. Narayan Rao had been trying and was anxious to get the accused out of trouble, if it could possibly be done, by getting a few mulguzars like Jawahar Singh, who would agree to speak in Court for the accused if it was necessary. For the above reasons I fail to attach any importance to the evidence of the said Mr. Narayan Rao and it is rejected in toto."

Later on the Magistrate says:

"The evidence of this witness (Jawahar Singh) is decidedly the outcome of the aforesaid visits."

The first contention of the learned counsel for the applicant is that the conduct of the accused in the prosecution of a judicial case was absolutely privileged and that he cannot be prosecuted on account of it. The whole question of absolute privilege is exhaustively discussed in para. 212 of Mayne's Criminal Law of India, Edn. 4. There is a conflict of opinion in the Indian Courts as to whether or not the English doctrine of absolute privilege applies in India and whether or not the Courts can go outside the law as laid down in S. 499, I. P. C., more specially the ninth exception thereto. The cases apply both to civil actions and to criminal prosecutions, but all the cases relate to the conduct of the counsel regarded as a defamation. I am of opinion that none of the rulings have any application to an offence under S. 504, I. P. C.

A barrister could not possibly plead privilege if he assaulted a witness, and it appears to me that an intentional insult with intent to provoke breach of the peace is an offence more cognate to the offence of assault than to the offence of defamation. A barrister cannot claim privilege in the case of an assault, nor in my opinion can he claim privilege if his conduct is calculated to provoke an assault.

The next contention for the applicant is that the conduct complained of does not amount to an offence under S. 504, I. P. C. I am unable to accept this view. Such conduct out of Court would certainly fall within the section, and I see no reason for making a distinction because the alleged insult was made by a barrister when cross-examining a witness. The law does not contemplate or take into account such conduct by a barrister as calling a witness a pig and threatening to kick him, and under S. 152, Evidence Act, the Court is bound to prevent questions put in an offensive form. The real object of the applicant is to vindicate his character on the merits of the case, and the learned standing counsel also is desirous that the case should be disposed of on its merits and not on any technical points, more especially as the conduct of the presiding officer of the Court has been called in question. The learned District Magistrate in showing cause questions the power of this Court to interfere by re-examining the evidence. There is, however, ample precedent for a High Court as a Court of revision re-examining the evidence if there are *prima facie* good grounds for doing so; more especially is this the case where the accused has been given a non-appealable sentence and has no means of vindicating his character except in revision. The learned standing counsel does not support the view of the learned District Magistrate on this point, and fully admits that there are *prima facie* grounds for examining the evidence *de novo* in this case.

I am of opinion that the Magistrate has not given good grounds for disbelieving the evidence of the Tahsildar regarding the conduct of the barrister-at-law, nor has he subjected the prosecution evidence to the criticism to which it is open. He has failed in his judgment to note that all the prosecution witnesses,

except Narbada Prasad, are related to each other and partisans of Manhgoo, and that Narbada Prasad cannot be regarded as an unbiassed witness since he appeared as the Mukhtyar of Manhgoo for whom Piareylal was giving evidence. The District Magistrate's observation that Narbada Prasad was not Am-Mukhtyar but held a special power-of-attorney for the case does not appear to me to meet the point. The following is the passage in the cross examination of the defence witness Jawahir Singh on which the Magistrate bases his allegations of conspiracy:

"Yes,—the accused had come to my village Barda in the last week of the month of Kuar last (October 1917). He had come in connexion with Girdhari Lal's case. I was also there. The reader was not present at all there. I had met the accused at Barda where he had visited us. He was accompanied by Narayan Rao Tahsildar and one more vakil, a junior man whom I can identify."

The only deduction that I can draw from this evidence is that the Tahsildar visited the witness' village on duty in connexion with the case of Girdhari Lal and that the barrister and vakil were also there in connexion with some case. I am assured that the applicant went to Barda to conduct the prosecution of Girdhari Lal under S. 342, I. P. C., before the Tahsildar who was in camp at Barda and that the other pleader appeared with him for the defence in a forest case. However this may be, the evidence does not show that the Tahsildar and the barrister and the pleader went to Barda otherwise than in the prosecution of their respective duties, and there is no justification on the record for the allegation of conspiracy made by the Magistrate. The Magistrate's observation that Jawahar Singh could not satisfactorily account for the joint visit to him of the trio is not justified by the record, since the witness was not questioned any further on the point than is shown by his answers above set out. There is no basis on the record for the description of the accused as a friend of the Tahsildar except perhaps the Tahsildar's answer, to a doubtfully correct question put to him in cross-examination, that the accused and he are both Mahratta Brahmins. It is also to be observed that the Tahsildar has been condemned unheard on the question of conspiracy. He was not asked a single

question about his visit to Barda. It is true that the Tahsildar had gone away before the witness Jawahar Singh was examined, but this would not justify the Tahsildar being condemned on a point regarding which he was not given any opportunity whatever of giving an explanation. The Magistrate is also incorrect in saying that Mr. Narayan Rao was fully aware of the two cases against him as he himself did not deny it in the cross-examination. The Tahsildar distinctly says that though he was aware of the report against him made to the Deputy Commissioner he had no knowledge of the criminal complaint of defamation, and there is no evidence and nothing on the record to show that the Tahsildar has had any such knowledge.

The Magistrate has also taken it for granted that the Tahsildar would give false evidence against a man who had made a complaint against him. On looking into the record of the mutation proceedings I find it extremely improbable that the barrister should have acted in the way he is alleged to have done. I find that at the very beginning of Piarayal's examination he stated that he did not know what was the name of Ramji's father, though he knew that Manhgo was related to Ramji. It was not in the interest of the applicant's client that Piarayal should show himself well acquainted with the relationships in the family. The less he knew the less valuable a witness was he for Manhgo, and it is difficult to believe that the barrister would wish to elicit information detrimental to his own client. I have to consider the point what object Piarayal could have in bringing a false complaint against the barrister and the Tahsildar. I find from the records that Mt. Rajrani, whose interests were the same as those of Manhgo, applied for transfer of the case from the file of the Tahsildar. It is quite probable that it was apparent to Manhgo and his friends including his Mukhtyar, Narbada Prasad, that the Tahsildar did not regard Manhgo's claim as a good one, and it is probable that the accusations made against the Tahsildar and the barrister appearing for the opposite side were made in support of the application for transfer. The mutation proceedings were as a matter of fact concluded by the

Extra Assistant Commissioner Mr. Ishtiaq Ali himself, who decided the case against Manhgo. I am of opinion that the Magistrate has been too ready to accept an accusation made by interested persons against the Tahsildar and the barrister, and has rejected the evidence of the Tahsildar on wholly insufficient grounds which are not justified by the evidence on the record. The conviction cannot be sustained. The conviction and sentence are set aside and the fine, if paid, will be refunded.

P.S. B.K. *Conviction set aside.*

A. I. R. 1918 Nagpur 155

KOTWAL, OFFG. A. J. C.

Narayandas Kundaliram Marwad—
Plaintiff—Appellant.

v.

Krishnarao and others—Defendants—
Respondents.

Second Appeal No. 471 of 1917, Decided on 2nd February 1918, from decree of Dist. Judge, Chindwara, in C. A. No. 92 of 1917, D/- 2nd August 1917.

C. P. Tenancy Act (11 of 1898), S. 41 (7)—Sub-lease of occupancy holding—Assignment of sub-lease does not require malguza or consent.

The provisions of the Central Provinces Tenancy Act require the consent of the landlord to transfer by the tenant only, and it is nowhere laid down that a transfer of a sub-lease which is valid and binding against the landlord also requires the landlord's consent. [P 156 C 1]

(b) Transfer of Property Act (1882), S. 105 (j)—Principle underlying S. 138 (j) is applicable to agricultural tenancies.

In the absence of any contract, usage or law to the contrary, the principle of S. 108 (j) will apply, although its section itself is not applicable to agricultural tenancies. [P 156 C 1]

Every one is free to contract as he pleases for the disposal of what belongs to him.

[P 156 C 1,2]

S. C. Dutt Choudhury—*for Appellant.*

Judgment.—The plaintiff is a malguzar and defendants 2 and 3 are his absolute occupant tenants. The latter sublet their field to Ganeshdas and Narsingdas for five years by a registered deed. Subsequently these sub-lessees assigned their sub-lease to defendant 1 by another registered deed. The plaintiff in this suit seeks to avoid the sub-lease and the assignment on the ground that they were without his consent and therefore voidable at his instance under S. 41 (7), C. P. Tenancy Act. Defendants 2 and 3 do not contest the suit. Defendant 1 has pleaded that the sub-lease in favour of Ganeshdas and Narsingdas was with

the plaintiff's razamandī, which means either consent or acquiescence, and that the plaintiff knew of the sub-lease on the day after its execution, when one of the sub-lessees paid him a certain debt owed to him by defendants 2 and 3. The first Court found that although no prior consent to the sub-lease such as would be sufficient to protect it from avoidance under S. 41 (7), C. P. Tenancy Act, has been proved, yet by the transaction pleaded by defendant 1 to have taken place the day after the execution of the sub-lease, the landlord has waived his right to avoid the sub-lease and dismissed the suit.

The lower appellate Court has in upholding the first Court's findings concluded with the remark that the conduct of the plaintiff in accepting money with knowledge of the sub-lease amounts to a ratification. In second appeal it is objected by the plaintiff that there neither was nor could be any ratification by the plaintiff; but I think the word "ratification" is used by the lower appellate Court more in its popular sense as meaning "confirmation or approval and sanction" than in its strictly legal significance. It is next urged that in any case the plaintiff's claim should not have been decreed so far as the assignment in favour of defendant 1 by Ganeshdas and Narsingdas was concerned, as the assignment was without the plaintiff's consent. I do not see how the assignment can be avoided. The provisions of the Tenancy Act require the consent of the landlord to transfer by the tenants only, and it is nowhere laid down that a transfer of a sub-lease which is valid and binding against the landlord also requires the landlord's consent. No such provision is to be found in Ch. 6, Tenancy Act, which deals with sub-tenants. It is not the plaintiff's case here that he had restricted the sub-tenancy personally to Ganeshdas and Narsingdas, nor is there any usage prohibiting such transfer. In the absence of any contract, usage or law to the contrary, the principle of S. 108 (j), T. P. Act, will apply, although the section itself is not applicable to agricultural tenancies. Reference may also be made in this connexion to *Raijai v. Irbhan* (1), where the general principle that every one is free to contract as he pleases for the disposal of

what belongs to him is referred to and accepted.

A provision requiring the consent of the landlord does not, in a case like the present, seem necessary to carry into effect the intention, which may underlie the provisions of the Central Provinces Tenancy Act, of restricting in the interests of the landlords transfers of their holdings by the tenants. The appeal fails and is dismissed under O. 41, R. 21.

P.N./R.K.

Appeal dismissed.

A. I. R. 1918 Nagpur 156

KOTWAL, OFFG. A. J. C.

Bala and others—Defendants—Appellants.

v.

D. B. Ballabhdass—Plaintiff—Respondent.

Second Appeal No. 319 of 1917, Decided on 17th June 1918, against decree of Addl. Dist. Judge, Chanda, in C. A. No. 48 of 1914. D - 28th February 1914.

C. P. Tenancy Act (1898), Ch. 5—*Bhumak is not village servant but renders service to malguzar alone—Bhumak refusing to do private work of malguzar is liable to be ejected.*

A bhumak in the District of Chanda in the Central Provinces is no longer treated as a village servant but is regarded as one rendering service to the malguzar alone. His rights in the land held by him are not governed by the provisions of Ch. 5, C. P. Tenancy Act. If, therefore, he refuses to do the private work of the malguzar, he is liable to be ejected from the lands which he holds as a bhumak. [P 153 C 2]

G. V. Kukday and V. R. Pandit—for Appellants.

B. K. Bose—for Respondent.

Judgment.—The plaintiff, who is the Malguzar and Lambardar of Mouza Madhari, Tehsil Warora, District Chanda, sues the defendant for possession of two fields on the ground that they were given to one Mt. Hasi for cultivation as remuneration for doing the Malguzar's private work, that defendants 1 and 2 used to do the Bhumakai as well as the Malguzar's private work on behalf of Hasi, that Hasi died on 27th October 1912, that since 19th March 1912 the defendants have altogether ceased to do the plaintiff's work and that on account of their refusing to do his private work, on condition of doing which alone they are entitled to cultivate the land, they have no right to retain possession. The defence was that Hasi's father and after

him Hasi were the Bhumaks of the village and held the land as such, that the defendants were always ready to do Bhumak's work and are entitled to retain the fields as village service tenants. They said that they were unwilling to do the Malguzar's private work. The plaintiff denied that Hasi held the fields in lieu of her services as a Bhumak. There were a number of other pleas with which we are not now concerned. This case had come up once before in second appeal, and the lower appellate Court has after remand held that the land was originally held for Bhumaki and private service of the Malguzar, and that a Bhumak is not a village servant but a private servant of the Malguzar, and has decreed the plaintiff's suit. The main point now urged is that the defendant as Bhumaks are village service tenants and as such their rights are governed by the provisions of Ch. 3, C. P. Tenancy Act. If this ground fails it will be unnecessary to go into other points arising in the case, and the plaintiff's suit must necessarily succeed.

The point, therefore, to be now decided is, whether a Bhumak is a village service tenant. It is to be noted that the parties are themselves not quite certain as to the nature of a Bhumak's office. I find that in the pleadings and grounds of appeal the defendants have at different times suggested that they are village service tenants or occupancy tenants, and the plaintiff's pleader has in his statement of 11th July 1913 stated that a Bhumak is a village service tenant. S. 55, Tenancy Act, defines a village service tenant as

"a tenant of a holding who is recorded in the papers of the current settlement of the area in which the holding is comprised as holding his land rent-free or on favourable terms on condition of rendering village service."

Clause 9 of the wajibularz of Mouza Madhari in which the land in dispute is situated runs as follows:

"Details of land other than service land held free or at lower rents with particulars of conditions. 'Bala does the Bhumaki work on behalf of Sita and Hasi. Two fields, No. 15, area 14.10 acres, and No. 203, area 4.49 acres, total 18.59 acres, are given musafi to Hasi by the Malguzar for doing private work."

"2. Two fields, No. 16, area 11.5 acres, and No. 202, area 3.73 acres, total 14.78 acres, are given musafi to Sita wife of Krishna Gond by the Malguzar for doing private work."

The fields in suit are Nos. 15 and 203 referred to in the above clause. It seems to me *prima facie* that the fields in suit

are not of village service tenure from the very fact of their having been entered in Cl. 9 and not in Cl. 7 of the wajibularz. Again the fact that Bhumakai is mentioned together with private work indicates that it must have been regarded as private service rendered to the Malguzar; at the same time we find the express mention of Bhumakai in Cl. 9, and it may be argued that some distinction must have been understood to exist between Bhumakai and private service of the Malguzar. It is necessary under these circumstances to see what light is thrown upon the nature of Bhumakai by its previous history. Referring to Richard Jenkins' Report on the Territories of the Raja of Nagpur, 1827, we find the following description of a Bhumak at p. 76:

"The business of the Bhumak, who is a Gond, is to perform the customary worship of the boundary deities on the proper occasions, to attend on the servants of Sirpur when they visit the village, bring them water etc. He sometimes acts as a sort of peon and, armed with a sword and spear, accompanies marriage processions. He is also supposed to be a sort of magician, and to have the power of curing persons labouring under the influence of evil spirits, of charming tigers, etc. The perquisites of the Bhumak are a rupee or two annually from the group-thatch allowance, and a few pice, and two or three pails of grain from each bhargu."

In the settlement of the sixties of the Districts constituting the Nagpur Division we find in Lawrence's Settlement Report of the Bhandara District in para. 125 at p. 59 a reference to a Bhumak as a member of the general village establishment:

"The general village establishment consisted of a Patel, and of the Avkaree, known in the Decree as the Barra Bulloter. But the full establishment of 12 persons was in this district perhaps only found in Pownee. The Bhumuck or guardian of the village boundaries and attendant on Government officials out on their tours existed only in that Pargunnah; the Joshees and Garpugarees were pretty general; these three, with the Patel, Pandea, and Kotewar, were considered Government servants though they received their remuneration from the cultivators. Of the remaining five, who were exclusively paid by the villagers, the Waree or carpenter, the Khates or blacksmith, and the Malee or barber were often found, the Chumar and the Dhobee less frequently."

Further on we find in para. 129, at p. 62 a citation in extenso of the passage from Richard Jenkins' report given above. In Lucie Smith's Settlement Report of the Bhandara District in para. 277 at p. 120 we find the following with regard to village officials:

"Every village, however small, had a Mookud-dum or Patel, Kotwar, and Bhoomuk; and if of any size had also a Hawsildar, Mahajao, Waree (carpenter), and Khatee (blacksmith); while to each large village or cluster of villages there were a Fandia and Nanates Sonar; to whom were added during the latter part of the Gond rule a Joshee and in some few instances a Gar-pugaree;"

and with regard to a Bhumak at p. 121 it is stated:

"The Bhoomuk, who was always a Raj Gond, performed the ceremonies of the village god, arranged charms against tigers, kept in mind the village boundary marks, assisted in guarding the village, brought water for Government officials visiting the place, and supplied the house of the Patel with leaves for plates. He received yearly from each raiyat about a kora of grain, and generally had a field or some Mohwa trees revenue free."

It appears that in these early days the Bhumak was a village servant so far as some of his duties were concerned. In the Settlement Report of the Chanda District, 1910, the only reference to a Bhumak is to be found in para. 109 at p. 43 which refers to village service grants:

"The only point in which the present settlement records differ from those of settlement in the village service grants is that the Bhumak is now recorded as a "muafi khairati tenant and not "muafi khidmati;" the latter designation is reserved for the village servants whose tenure is controlled by Government appointment—the Kotwar, Mukaddam, Gomashia. The Bhumak is really the priest of the village community and held his land as part of his remuneration from the Malguzar; if the Malguzar prefers, he may contribute the fraction of the remuneration due from his pocket by cash grants, or, as occasionally happens, by giving the produce of certain trees to the Bhumak. The Bhumak is appointed by the village and the community jointly arranges for his remuneration."

The change appears to be in accordance with the instructions contained in para. 57 of Fuller's Central Provinces Settlement Code, which says:

"Land held rent free or at a low rent on condition of rendering service to the village will be entered in Col. 6 as Muafi khidmati. If the service is rendered to the Malguzar alone and not to the village, the land will not be entered as muafi khidmati but as muafi khairati. Land held rent-free or at a low rent by the favour of the Malguzar or under agreement with the Malguzar will also be entered as muafi khairati."

It appears from this that a Bhumak's position has undergone a change and he is no longer treated as a village servant, but is regarded as one rendering service to the Malguzar alone. The change may have been due to the fact that the services of a public nature such as attendance on Government officers and the guarding of

village boundaries originally appertaining to the office of a Bhumak are probably not made use of in these days. It thus appears that the intention of thewajib-ul-arz was to class the Bhumak as a private servant of the Malguzar, and not as a village servant. Assuming that the defendants are themselves Bhumaks they are as such private servants only of the Malguzar, and their service is not village service, and their rights are not governed by the provisions of Ch. 5, Tenancy Act. As they are bound to do the private work of the Malguzar in addition to a Bhumak's work, and they refuse to do it, they are liable to be ejected. The plaintiff's suit is rightly decreed. This appeal fails and is dismissed with costs.

P.N./R.K.

Appeal dismissed.

*A. I. R. 1918 Nagpur 158

MITTRA, A. J. C.

Binya Bai and another—Defendants—Applicants.

v.

Ganpat and another—Plaintiffs—Non-Applicants.

Civil Revn. No. 15-B of 1918, Decided on 12th September 1918, to revise the decree of Small Cause Court, Judge, Amraoti, D/- 26th November 1917, in Civil Suit No. 770 of 1917.

*Civil P. C. (1908). O. 2, R. 2—Actual and not merely constructive knowledge of right bars subsequent suit.

In order to make O. 2, R. 2, applicable to a subsequent suit, it is necessary to show that the plaintiff had at the date of the institution of the previous suit actual and not merely constructive knowledge of the right which he is seeking to enforce in the subsequent suit: 15 Cal. 800, *Foll.* [P 159 C 1]

H. S. Gour—for Applicants.

V. V. Chitale—for Non-Applicants.

Order.—On 24th June 1913 one Honia, who was the owner of Survey No. 25, leased it for two years to the plaintiffs. Subsequently Honia sold to Motilal, the predecessor-in-title of the defendant applicants, a number of fields including Survey No. 25. Criminal proceedings were instituted under S. 145, Criminal P. C., in view of disputes between Honia and Motilal regarding the possession of these fields. They were ordered to be kept under attachment and the fields were leased out by the Tahsildar. On 24th March 1916 the plaintiffs instituted Suit No. 73 of 1916 against Motilal and the heirs of Honia for a declaration that the plaintiffs were entitled to the rent of field No. 25

alleged to have been in deposit with the criminal Court. This claim was admitted by Motilal and the other defendants and the plaintiffs were given a declaration as prayed for. The present suit has been instituted against the widows of Motilal for the recovery of the amount of rent which by the previous suit it has already been declared that the plaintiffs were entitled to. The main plea of the defendants applicants is that the suit is barred by O. 2, R. 2. The Small Cause Court has overruled this plea and has passed a decree for the amount claimed. It has been found by the lower Court that the plaintiffs were not aware of the fact that the money had been paid over to Motilal prior to the institution of Suit No. 73 of 1916. Their allegation in the previous suit was that money was still in deposit, an allegation which was not denied by Motilal.

The finding regarding the plaintiffs' ignorance of the criminal Court having paid over the lease money to the defendant appears to me to be justified by the evidence on record, and I must accept this finding. It is, however, urged that the plaintiffs had notice of the payment, inasmuch as the slightest enquiry would have led to the discovery of this fact. This may be conceded. The lower Court has decided the case following a passage from the judgment of the Privy Council, and the argument before me has been practically confined to a discussion as to the meaning of the passage. In *Amanat Bibi v. Imdad Husain* (1) their Lordships say:

"the fair result of the evidence is that at the date of the former suit the respondent was not aware of the right on which he is now insisting. A right, which a litigant possesses without knowing or ever having known that he possesses it, can hardly be regarded as a portion of his claim"

within the meaning of the section in question. For the applicants it is contended that by the use of the word "aware" their Lordships were referring to cases of both actual and constructive knowledge. I do not think so, for in a subsequent passage their Lordships speak of knowing. I hold that the view taken by the lower Court is correct. Reference is made to the provisions of S. 42, Specific Relief Act, and it is urged that the plaintiffs were entitled to the consequential relief in the former suit by way of injunction, if not also by way of an order for payment of the money. This may be

true, and if the plea had been raised in Suit No. 73 the plaint would have been allowed to be amended or the suit dismissed in accordance with the provisions of S. 42. This cannot, however, in any way affect the present suit if it is not barred by O. 2, R. 2, as I have already held. The result is that the application for revision is dismissed with costs. I allow 15 rupees as pleader's fee in this Court.

P.N./R.K. *Application dismissed.*

A. I. R. 1918 Nagpur 159

KOTWAL, OFFG. A. J. C.

Mt. Rukhmi—Plaintiffs—Appellants.

v.

Kisan—Defendant—Respondent.

Second Appeal No. 304-B of 1917, Decided on 15th April 1918 from the decree of Dist. Judge, Akola, dated 2.4.1917.

Civil P. C. (1908), S. 91—Suit for removal of public nuisance by private person—Special damage must be proved.

The fact that a person suffers in a special degree experienced the inconvenience by the public arising from a public nuisance cannot be said to cause him special damage and does not give him any right to sue for the removal of the nuisance must prove that it causes him damage in a way different from the general public.

[P 159 C 1]

M. R. Bolde—for Appellant.

Judgment.—It is urged in second appeal that the lower Courts were wrong in holding that the plaintiff could not maintain the suit in respect of Panhals A and B and window C, as they did constitute a private nuisance to the plaintiff and caused him special damage. It is said that the plaintiff has to use the lane into which the Panhals A and B and the window C open more than the rest of the public, she, therefore, suffers in a special degree from the inconvenience caused to the general public by their existence. The fact that a person suffers in a special degree the inconvenience felt by the general public cannot be said to cause him special damage. It is not alleged that the nuisance is specially aimed at or intended to cause damage to the plaintiff, or that the plaintiff suffers damage in a way other than the general public. It is impossible to see how the window C can in any sense constitute a nuisance. I agree with what the lower appellate Court has said in para. 5 of that Court's judgment. The appeal fails and is dismissed under O. 41, R. 1, Civil P. C.

P.N./R.K. *Appeal dismissed.*

1. (1888) 15 Cal 800=15 I A 106 (P C).

A. I. R. 1918 Nagpur 160 (1)

PRIDEAUX, A. J. C.

Chainu—Plaintiff—Appellant.

v.

Manbodh—Defendant—Respondent.

Second Appeal No. 266 of 1917, Decided on 8th April 1918, against decision of Dist. Judge, Raipur, in Civil Appeal No. 6 of 1917, D/- 5th March 1917.

(a) Civil P. C. (1908), O. 6, R. 17—Amendment of pleadings should not be allowed after a case is closed for judgment.

Plaintiff brought a suit for possession of a site on the ground of his having been the owner of the same. The case was closed for judgment for 30th November 1916. The plaintiff applied to the Court on 25th November 1916, praying that a right of way six cubits broad should be given to him. The trial Court held that the plaintiff was not the owner of the site, but it directed the defendant to remove his hut so as to allow a right of way as claimed by the plaintiff :

Held : that the plaintiff should not have been allowed to amend the plaint after the case had closed for judgment. [P 160 C 2]

(b) Highway—Private person suing for removal of obstruction—Special damage must be proved—Tort, Nuisance.

Special damage for obstruction of a highway has to be established in a case for the removal of an encroachment on the highway : 7 C P L R 97, *Foll.* [P 160 C 2]

M. Chuckerbutty—for Appellant.*G. R. Deo*—for Respondent.

Judgment.—The plaintiff's case as stated in the plaint was that he was the owner of a site situated at Mouza Sooni-Khulan, Tasil Dhamtari, that he had lent it to the defendant to keep his husking machine on and that in 1916 defendant took exclusive possession of the site and built himself a new hut on it. Plaintiff's story as regards the ownership of this particular plot has been held not to be proved by both Courts. The case was closed for judgment in the trial Court on 23rd November 1916 it being then fixed for 30th November 1916. On 25th November 1916 the plaintiff appeared with his pleader, defendant being in person, and the pleader presented an application saying that if plaintiff's possession over the site and hut were not proved he prays that

"the way of six cubits in breadth, as it was previously, may be given to me so that I may not be put to any inconvenience in going and coming."

On this the defendant was examined ; he denied having encroached on the lane which he admitted was used by the plaintiff. He further said: "I do not want to produce any fresh evidence on this point." The Munsif thereupon framed the addi-

tional issue, "whether defendant had encroached upon the lane in question ; if so, to what extent." He found that there had been encroachment to the extent of three feet and decreed that defendant should remove his new hut so as to restore the lane to its former breadth. On appeal the District Judge, Raipur, finds that there had been no proper amendment of the plaint and that the relief given could not have been granted and looking to the time when the relief granted was asked for, finds that the first Court should have refused it and not allowed the plaintiff at the last stage of his case to make out a fresh case. He therefore allowed the appeal.

Here it is contended that the trial Court's decree as to the lane should be restored. It seems to me that the plaintiff should not have been allowed to ask for this further relief after the case had been closed for judgment. The defendant on that day was not represented by a pleader and it is doubtful if he understood exactly what the effect of his calling no further evidence meant. Various questions would have to be gone into, for instance, whether the lane was a public or a private one and if the former, what particular damage had been suffered by the plaintiff, i. e., damage beyond what was suffered by others entitled to use the same lane. Special damages for obstruction of a highway have to be established in a case of this nature : see *Bansilal Abirchand v. Atmaram Bapuji* (1). This matter must be fought out in a separate suit for I decline to allow the plaintiff to pitchfork this claim into the case at the stage he did. I, therefore, uphold the decision of the District Judge dismissing the appeal. The appeal falls and is dismissed with costs.

P.N./R.K. *Appeal dismissed.*

1. (1894) 7 C P L R 97.

A. I. R. 1918 Nagpur 160 (2)

MITTRA, A. J. C.

Karan Khan—Plaintiff—Applicant.

v.

Dangushti and another—Defendants—Non-Applicants.

Civil Revn. Petn. No. 65-B of 1917, Decided on 13th September 1918, against the decree of Sm. C. C. Judge, Darayapur, in C. S. No. 1035 of 1916, D/- 12th February 1917.

Transfer of Property Act (1882), S. 6 (c)
—Contract of service is not assignable.

A contract of service being a personal contract is not assignable before breach, as the transferee would be of a mere right to sue. [P 161 C 1]

K. V. Deskar—for Applicant.

Atmaram Bhagwant—for Non-Applicants.

Order.—Following *Abu Mahomed v. S. C. Chunder* (1). I agree with the lower Court that the contract of service was not assignable. The transfer was of a mere right to sue. It was certainly not assignable before the breach, as the contract was a personal one. After the breach the master was entitled to damages only, although the parties have named a fixed rate of damages for each day of absence from work. The petition of revision is therefore dismissed with costs. I fix Rs. 5 as pleader's fee in this Court.

P.N./R.K. *Petition dismissed.*

1. (1909) 40 Cal 413=1 L C 521.

A. I. R. 1918 Nagpur 161

Drake-Brockman, J. C.

Champat—Plaintiff—Appellant.

v.

Laxmi Narayan and another—Defendants—Respondents.

Second Appeal No. 76-B of 1918, decided on 4th September 1918, from the order of 2nd Addl. Dist. Judge, East Barer, D/ 3rd January 1918, in Appeal No. 105 of 1917.

(a) Possession—Suit for—Onus is on plaintiff to prove possession.

Where a plaintiff seeks to recover possession as upon dispossession, the burden is on him to prove possession at some time within 12 years before the commencement of the suit. [P 161 C 2]

(b) Ejectment—Suit for—Plaintiff must recover by strength of his title.

In all actions for ejectment the plaintiff must recover by the strength of his own title, not by the weakness of his adversary's. 16 C 474 (P C) and 35 All. 273 (P C) *Fell*. [P 161 C 2]

S. Ramdas—for Appellant.

P. S. Kotwal—for Respondents.

Judgment.—The suit out of which this second appeal arose was brought to recover possession of 1 acre 13-1/2 gunthas of land, which the plaintiff alleged to be at the eastern end of that portion of Survey No. 83 which he bought from one Saru (P. W. 2) by a sale-deed Ex. P-2 on 22nd November 1906. On Ex. P-2 the total area of the field appears as 28 acres 33 gunthas, but in the Record of Rights recently drawn up the figure is 29 acres 5 gunthas, of which 12 acres 17 gunthas are shown as in the plaintiff's and 16

acres 17 gunthas in the defendant Laxmi Narayan's possession. The field was originally the property of Shrawan and Dawan. Dawan was succeeded by his daughter Saru (P. W. 2) and Shrawan by a female heir named Bhini. Saru and Bhini partitioned the field sometime before 1902 and Bhini sold her share to one Mahumji, who on 13th May 1902 conveyed it to the defendant Laxmi Narayan. The allegation in the plaint is that in the month of July 1917 defendant 2 Nago Rao, who held under the defendant Laxmi Narayan, destroyed the plaintiff's crops standing on the strip of land in dispute and cultivated the land himself thus wrongfully ejecting the plaintiff.

Nago Rao put in no appearance except as a witness, for his co-defendant Laxmi Narayan pleaded that ever since his purchase he has been in possession of the land which he now holds. The Courts below have concurred in finding that the allegation in the plaint is not proved. Laying the burden on the plaintiff to show that he had been in possession of the strip claimed within the last 12 years, they found that no such possession was made out. The lower appellate Court has further come to the conclusion that the defendant has been in possession of the land in dispute ever since he purchased his part of No. 83 in 1902 and that it belongs to that part. That the field was not divided into two exactly equal parts is stated by Muhammad Bakar D. W. 3; who owned one of the adjoining fields. The claim of the plaintiff having been dismissed, he has preferred this second appeal and the only point pressed in his behalf is that inasmuch as his sale deed gives the area of the entire field as 28 acres 33 gunthas and conveys half of it (i. e.) 14 acres 16-1/2 gunthas, the burden should have been laid upon the defendant to show that he is entitled to hold more than half of the total area. No authority is cited for this proposition, which is opposed to the well settled rule that where the plaintiff seeks to recover possession as upon dispossession, the burden is on him to prove possession at sometime within 12 years before the commencement of the suit. In all actions for ejectment the plaintiff must recover by the strength of his own title not by the weakness of his adversary's, as laid down by their Lordships of the Privy Council in

Mohima Chunder Mozoomdar v. Mohesh Chunder Neoghi (1) and again in *Basant Singh v. Mahabir Pershad* (2). That the appellant's case is really rested on nothing better than the discrepancy between the areas in actual possession of the parties respectively appears from his own deposition as P. W. 7, where he admitted that though the alleged encroachment took place before the Record of Rights was prepared, he took no steps to bring his claim to the notice of the officers who made the preliminary inquiry.

It is common ground that the road to Amraoti passes through the south-eastern corner of the defendant's portion, and quite possibly this furnished a reason for dividing the field unequally at partition. However this may be, the contention of the appellant is without foundation in law. His appeal is accordingly dismissed with costs. In the lower Courts costs will be paid as already ordered.

P.N./R.K.

Appeal dismissed.

1. (1889) 16 Cal 479=16 I A 69 (P C).
2. (1913) 25 All 273=16 I C 130=19 I C 940=10 I A 86 (P C)²

A. I. R. 1918 Nagpur 162 (1)

KOTWAL, OFFG. A. J. C.

Abdullakhan—Defendant—Appellant.
v.

Abhiman and others—Plaintiffs and Defendants—Respondents.

Second Appeal No. 230-B of 1917, Decided on 22nd February 1918, from decree of Dist. Judge, Amraoti, D/30th April 1917, in Appeal No. 193 of 1916.

Berar Land Revenue Code, S. 78 (2)—Anti-ijara tenancy—Failure to Prove conditions requisite—Presumption cannot be drawn.

It is the tenant who wants to remain on the land in spite of the landlord's wishes to the contrary that has to prove the circumstances which entitle him to do so. He has, therefore, to prove, in the case of an anti-ijara tenancy in Berar, that no satisfactory evidence of the commencement of his tenancy and of the period agreed upon between the landlord and tenant for its duration is forthcoming. If he fails to do so no presumption under S. 78 (2) of the Berar Land Revenue Code can be made in his favour.

[P 162 C 2]

M. R. Bobde—for Appellant.

M. V. Joshi—for Respondents.

Judgment.—The plaintiffs sue, after service of notice to quit, defendant 2 whom they allege to be an annual tenant. Defendant 2 pleads that he purchased his field orally from one Rao, who was an anti-ijara tenant, and is not liable to ejectment. In this Court it is

argued that defendant 2 is a tenant of antiquity and is entitled to remain on the land under the provisions of S. 78 (2), Berar Land Revenue Code. The lower appellate Court has found that the origin of Rao's tenancy is not obscure, but that it commenced somewhere about 1872. This finding is not challenged, but it is argued that the defendant having carried back his tenancy to that year a presumption should be made that he was a tenant of antiquity and the burden should have been held to have shifted to the plaintiffs to prove that the defendant is not a tenant of antiquity but only an annual tenant. I do not think any such presumption can be raised and the burden shifted in consequence to the plaintiffs. It is the tenant who wants to remain on the land in spite of the landlord's wishes to the contrary that has to prove the circumstances which entitled him to do so. He has, therefore, to prove that no satisfactory evidence of the commencement of his tenancy and of the period agreed upon between the landlord and tenant for its duration is forthcoming. If he fails to do so the presumption under S. 78 (2) will not be made in his favour. Apart from this, however, the lower appellate Court has found that the defendant has not shown that he can claim under Rao, so as to take advantage of the period of Rao's tenancy, as he has failed to prove his alleged purchase from Rao 25 or 30 years ago. The notice given in this case is dated 12th November 1913 and asks the defendant to vacate by 31st March 1914, and appears to be quite proper and legal. It is to be noted that in his pleadings defendant 2 only denied that any notice was given to him. He did not plead that it was not a valid notice. The appeal fails and is dismissed with costs.

P.N./R.K.

Appeal dismissed.

A. I. R. 1918 Nagpur 162 (2)

MITTRA, A. J. C.

Mt. Chironji Kasar—Appellant.
v.

Punam Chand—Respondent.
Misc. Civil Appeal No. 34 of 1917,

Decided on 23rd August 1918.

(a) *Hindu Law—Guardianship—Mother—After remarriage mother's right is lost—Guardian and Wards Act (1890), S. 15.*

A Hindu mother's natural right to be a preferential guardian of the person of her minor children is lost by reason of her re-marriage.

though she may be appointed a guardian as any stranger, 38 Cal 862, *Foll.* [P 163 C 2]

(b) **Hindu Law — Guardian — Joint guardians can be appointed.**

There is nothing in the Hindu law which prevents the Sovereign as guardian from appointing more persons than one as guardians of the person of a minor. [P 163 C 2]

M. Bhawanishankar—for Appellant.

V. V. Chitale—for Respondent.

Judgment.—The respondent Punam Chand applied under the Guardians and Wards Act to be appointed guardian of the person of his step-sister Mt. Anandi, a minor of the age of about ten. Shortly after the death of Ganga, father of Punam Chand and Mt. Anandi, Ganga's widow Mt. Chironji re-married. The girl has been living with her mother for the last eight years in the house of Gangat, her step-father. The application was resisted by Mt. Chironji. Punam Chand, it has been explained to me, does not want to have the girl removed from the custody of her mother but claims to have the right to select a bridegroom for the girl, and in this connection he alleges that there was a betrothal in the lifetime of the father with one Bhagwan. The lower Court in its judgment appears to be under a misapprehension in stating that Bhagwan has been since married to another girl. This is denied before me, and there is no evidence to establish it. However, the point to decide is whether the half brother or the natural mother who was re-married out of the family has the preferential right to give the girl in marriage. This question has been answered by the lower Court in favour of Punam Chand, but the actual order passed does not appear to me to be a happy one. The order appoints both Punam Chand and Mt. Chironji to act as the joint guardians of Mt. Anandi, the latter being free to live with either, and directs that a husband for her shall be chosen by the common consent of both, and if they disagree, by the Court. There is no appeal by Punam Chand against the order. I have, therefore, to consider upon Mt. Chironji's appeal whether the order of the lower Court, so far as it recognizes the claims of Punam Chand, is wrong.

Under the cover of an application for the guardianship of the person the parties are really seeking a decision as to the right to give the girl away in marriage. I agree with the lower Court that the mother's natural right to be preferential

guardian of the minor's person is lost by reason of her re-marriage, though she may be appointed by the Court as any stranger; see *Ganga Prasad v. Ramasree Shahu* (1). The duty of settling a minor girl married devolves upon the male relations of the family and as the mother has ceased to be in the family by her re-marriage, the preferential right seems to be in Punam Chand. Punam Chand and his father were joint, although none does not appear to be any party properly left so far as the evidence goes. The order of the lower Court, so far as it respects the right to select a husband for her daughter, might possibly have been successfully impeached by Punam Chand if he had appealed. Mt. Chironji cannot complain of Punam Chand's rights declared by the order. It is urged that the appointment of two persons contravenes the provisions of s. 15, Guardians and Wards Act. There is nothing in the Hindu law, so far as I know, which prevents the Sovereign as guardian from appointing more than one person as guardians of the person of a minor. In any case Mt. Chironji is not aggrieved by the order passed by the lower Court. The appeal is, therefore, dismissed with costs. Rs. 10 as pleader's fee in this Court.

1918, Feb.

Appeal dismissed.

S. 1917 37 Cal 102=1918 C 163.

A. I. R. 1918 Nagpur 163

KORWAR, OFFG. A. J. C.

Madhoro—Plaintiff—Applicant.

v.

Amrit Rao — Defendant—Non-Applicant.

Civil Revn. No. 45-B of 1917, Decided on 26th January 1918, from the judgment passed by Small Cause Court Judge, Akola, in Suit No. 1531 of 1915, D/-4th November 1916.

Civil P. C. (1908) S. 11—Decision of the Subordinate Judge is *res judicata* in subsequent suit of small cause nature.

The decision of a Subordinate Judge in a previous suit is *res judicata* in a subsequent Small Cause suit between the same parties inasmuch as the inability of the Subordinate Judge to entertain a claim of a small cause nature arises not from incompetence but from the existence of another Court with a preferential jurisdiction. [P 164 C 2]

G. L. Subhedar—for Applicant.

Bipin Krishna Bose—for Non Applicant.

Order.—The defendant Amrit Rao had money dealings with the plaintiff Madhorao, and for the debts due on account of the money dealings he had executed three rajas in favour of the latter. These rajas were:

	Rs.	s.	p.	Dated
1 for	3,397	8	0	26-3-1912.
2 "	262	0	0	21-8-1912.
3 "	300	0	0	28-10-1912.

The plaintiff had filed Suit No. 32 of 1915 in the Court of the Junior Sub-Judge, Akola, for Rs. 3,821-14-6 on the ruju for Rs. 3,397-8-0, having admitted a payment of Rs. 1,000. The defendant in that suit had pleaded three more payments of Rs. 1,000, Rs. 1,262 and Rupees 1,000, and had said that these four repayments had been made on account of not only the ruju then sued upon but also of the two other rajas for Rs. 262 and Rs. 300. The first issue framed in that suit referred to the three additional payments pleaded by the defendant which had been denied by the plaintiff. The Sub-Judge found that all these three re-payments had been made in addition to the one admitted by the plaintiff. The plaintiff has now filed the present suit in the Small Cause Court, Akola, for Rs. 855-1-6 on the two rajas for Rs. 262 and Rs. 300. The defendant's plea in the present suit is substantially the same as in the suit before the Subordinate Judge. He claims that he has re-paid altogether Rs. 4,262 towards all the three rajas, and he admits that Rs. 107-12-0 are due to the plaintiff after receiving credit for the balance of Rupees 4,262 after deducting the amount due to the plaintiff on the ruju for Rs. 3,397-8-0. In both cases the point substantially raised is: what was the total amount paid to the plaintiff on account of the dealings in respect of which the three rajas were executed. This point was decided in defendant's favour by the Subordinate Judge, and the defendant pleads that it is now *res judicata*, and I think his contention is correct, provided the Sub-Judge was competent to decide the present claim. It is, however, urged for the plaintiff that the Sub-Judge was not competent to decide the present suit as he was not exercising the jurisdiction of a Small Cause Court. The reply to this is furnished by the judgment of Jenkins, C. J. in *Ghulappa v. Raghvendra* (1). It was there held, in a like case, that the inability of the Subordinate Judge to entertain a claim of a Small Cause Court nature arose not from incompetence but from the existence of another Court with preferential jurisdiction and the Subordinate Judge's decision was held to be *res judicata* with regard to the claim in the Small Cause Court. This application for revision is dismissed with costs.

P.N./R.K. *Application dismissed.*

A. I. R. 1918 Nagpur 164

BATTEN, A. J. C.

Sumera—Plaintiff—Appellant.

v.

Pemchand and another—Defendants—Respondents.

Second Appeal No. 561 of 1915, Decided on 2nd January 1918, from decree of Dist. Judge, Chhindwara, D/- 30th June 1915, in Appeal No. 57 of 1915.

C. P. Tenancy Act (11 of 1898), S. 2 (3)—Tenancy of undefined share of land is not permissible.

There can be no tenancy within the meaning of the Central Provinces Tenancy Act of a share of land, if that share is not defined by metes and bounds. [P 166C 1]

M. Gupta and S. Ramdas—for Appellant.

P. G. Misra—for Respondents.

Judgment.—The plaintiff Sumera, appellant, brought the suit out of which this appeal arises in the Court of a Subordinate Judge who was a Revenue Officer to recover possession of land from which he had been ejected, alleging that he was the ordinary tenant of the land in suit and that he had illegally been dispossessed by the defendants who were his landlords. The first Court held that the perpetual lease on which the plaintiff based his tenancy was not for the benefit of defendant 1, Pemchand, who was a minor at the time of the execution of the lease by his mother Sunderia, defendant 2, and dismissed the suit. The learned District Judge dismissed the plaintiff's appeal on the sole ground that the plaintiff's suit as framed does not lie since, whatever rights the plaintiff may have as against the defendants, he is not the ordinary tenant of the land in suit. The only question raised in appeal to this Court is whether the District Judge was right in holding that the plaintiff is not a tenant. The plaintiff based his claim to tenancy on a deed, dated 6th April 1908, executed by defendant 2 on behalf of herself and of her minor son, defendant 1, the consideration

mentioned in the deed being Rs. 1,500. The deed purports to be a perpetual lease.

It states that the lessors have 7 *sir* fields with an area of 23.29 acres and 3 *khudkasht* fields with an area of 13.99 acres. The area of each field is also given. But the whole of the fields are not leased out; of the total area of 37.28 acres, 24.42 are given on lease, i. e., 15.55 acres of the 23.29 acres of *sir* and 8.87 acres of the 13.99 acres of *khudkasht*. The area leased in each individual field is also given, amounting, as the District Judge observes, to about two-thirds of each field. The deed recites:

"We have for the above *nazrana* of Rs. 1,500 leased 24.42 acres of the undermentioned fields in perpetuity to Sumera on an annual rental of Rs. 9 and have put him in joint possession with us. The tenant has the right either to allow the 24.42 acres of *sir* and *khudkasht* to remain in joint possession with us, or to get the same partitioned."

It is not alleged that a partition was effected, and dispossession complained of is dispossession from joint possession.

The learned District Judge has dealt with the subject as follows:

"The question regarding tenancy is the real crux of the case. The plaintiff bases his claim to tenancy rights upon the lease of 24.42 acres. No definite piece of land was leased out, but only a certain undivided area out of a larger area. The terms of the lease gave the lessee two alternatives. Either he could apply for partition, in which case the area leased would be defined and by metes and bounds, and he would become an ordinary tenant of the land so delineated, or he could remain in joint possession of the whole with the lessors. As already stated there is no evidence that such a partition was effected. We must, therefore, assume that, if effect was given to the lease at all, Sumera remained in joint possession with the defendants of the entire home-farm. No single square yard of land did Sumera hold from the defendants, but in respect of each and every square yard of the home-farm he was in cultivating partnership with them. Sumera may have been in physical possession of the entire home-farm, but if so he was in possession partly as manager of Pemchand and Sunderia and partly on his own behalf as partner.

Be this as it may, it is clear that he was never in possession of the area mentioned in the plaint as a separate entity. It follows that there was a cultivating partnership of the sort contemplated in *Kishan Sukat v. Jaisant Rao Misar* (1) and *Khashal Chaudhary v. Nanha* (2) and that the plaintiff was not thereby constituted a tenant. There is a further question whether Pemchand as a 5 annas 4 pice co-sharer was competent to create a tenancy, into which it is not necessary to go. From what has been written above it is clear that no tenancy right was created in the plaintiff's favour. Whatever other rights he might have against the defendants, it follows that

he could not maintain a suit in the Court of the Additional Subordinate Judge in the capacity of tenant who had been ejected by the landlord? The question whether the appellant has any, and if so, what remedy against the defendants is one with which I have now no concern. It suffices for the determination of this appeal to decide that the appellant had not the remedy of suing as a tenant to recover possession of a holding from which he had been dispossessed by the landlord."

It is to be noted that no notification under S. 62 (2), G. P. Tenancy Act, has been made for the Chhindwara District and the appellant does not contend that he is a tenant because he cultivated in partnership with the defendants. Nor is it argued for the respondents that the Court of first instance had no jurisdiction to entertain a suit of any character since, under the proviso to S. 97, Tenancy Act, while only a Revenue Officer can entertain a suit between landlord and tenant as such, the jurisdiction of a civil Court excluded over by a Revenue Officer is not expressly restricted to suits between landlords and tenants. The suit has been dismissed on the ground that the plaintiff claims as a tenant, and is not a tenant, and the sole question before me is whether the District Judge is right in holding that the plaintiff is not a tenant. It is agreed for the appellant that he was given 24.42 acres of 24.42 acres by the deed of lease, and that therefore he is an ordinary tenant of that area. The problem may be simplified without any essential alteration by considering only one of the fields. *Khashal Chaudhary* held No. 51 measures 20 acres, of which only an area of 11 auras was leased, or roughly speaking three-quarters. Does a lease of an unspecified 3/4 acre of a field constitute the lessee an ordinary tenant of that share within the scope of the Tenancy Act? To answer this question we must look to the definitions in the Act. With reference to the definition of tenant we have to see whether the plaintiff is a person, who, under the deed, holds "land" from the defendants. To be a tenant a person must be the holder of land, that is to say, the land of which he claims to be the tenant must be a "holding." A "holding" means a parcel of land held by a tenant from a landlord under a lease. I do not see how a share, not defined by metes and bounds, can be described as a "parcel" of land. A "parcel" of land must be a definite piece of land. To parcel means to divide into portions and what is not divided off

1. (1890) 3 C P L R 180.

2. (1893) 6 C P L R 117.

cannot be a parcel. For these reasons I am of opinion that there can be no tenancy within the meaning of the Tenancy Act, of a share of land if that share is not divided off by metes and bounds, and that the learned District Judge has taken a correct view of the law. As the plaintiff claims to be a tenant within the meaning of the Tenancy Act, and as he is not such a tenant, his suit has rightly been dismissed. The appeal is dismissed with costs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1918 Nagpur 166

BATTEN, A. J. C.

Laxman—Plaintiff—Appellants.

v.

Tukia and others — Defendants—Respondents.

Second Appeal No. 26 of 1917, Decided on 29th January 1918, from decrees of Dist. Judge, Wardha, D/- 24th October 1916, in Appeal No. 171 of 1916.

(a) Easements—Public way—Public rights of way are not easements—They originate from dedication—Dedication is inferred from custom or user.

Public rights of way are not easements. Public, differing from private, rights of way originate from a dedication to the public by the owner of the soil over which they pass. Dedication means a gift not necessarily by a deed or any written document, and it is more often implied from custom and user than from any definite act of the owner of the land. Even when no such overt act can be shown if the public use a way for some time to the knowledge of a land owner and without resistance, dedication will be inferred and a right gained. [P 166 C 2]

(b) Easement — Rights to — Indeterminate body of persons cannot claim.

There can be no right of easement in favour of an indeterminate body of persons. [P 167 C 1]

(c) Easement — Public path closed—New path allowed—Fresh grant should be presumed.

If a person encloses a public path over his land and allows a new one to be opened in its place he must be presumed to have made a fresh grant to the public of the new path. [P 167 C 2]

(d) Easement Act (1882), S. 24, III. (d)—Path rendered impassable—Right of deviation should be reasonable.

When the owner of the land renders a way impassable the persons entitled to use the way may deviate from it and pass over the adjoining land of the owner provided that the deviation is reasonable: *Selby v. Nettlefold*, (1874) 9 Ch 111; *Fell*. [P 167 C 2]

(e) Easement — Cultivator is entitled to exclusive use of his field—Right of way over—Strong evidence is necessary.

A cultivator, prima facie has a right to the exclusive use of his own field and very strong evidence is necessary before it can be held that

other people have a right of way, public or private, over his land. [P 168 C 1]

M. R. Bobde—for Appellant.

D. T. Mangalmurti—for Respondents.

Judgment.—Appeal by the plaintiff.

The plaintiff brings this suit against three persons, as representing the village of Hingni under O. 1, R. 8, Sch. 1, Civil P. C. to get an injunction preventing the use of a footpath through his field. The plaintiff's field lies between two villages and the plaintiff objects to foot-passengers going through his field. The first Court wrongly treated the case as one of easement, that is, of a private right of way. The District Judge has looked at the case from a right point of view. He has held that the evidence shows that the public have been passing through the plaintiff's field for many years by immemorial village custom. The law as to public rights of way has been summed up in the Encyclopaedia of the Laws of England: see Vol. 14, pp. 633 and 634 Edn. as follows:

"Public rights of way are rights belonging to the public and exercisable by every member of the community of passing over land. They are not easements, though they are sometimes so called in error. . . . These ways sometimes take the form of highways and public roads. . . . At other times they are merely footways or bridle paths leading across fields. . . . Public, differing from private, rights of way originate from a dedication to the public by the owner of the soil over which they pass. Dedication as the word implies means a gift not necessarily by a deed or any written document and it is more often implied from custom and user than from any definite act of the owner of the land. . . . Even when no such overt act can be shown if the public use a way for some time to the knowledge of the landowner and without resistance by him dedication will be inferred and a right gained."

It is a well-known fact that there are public footpaths through fields in the villages of the Central Provinces. On this subject I may quote an extract from the instructions recently issued by the Chief Commissioner under S. 62, Land Revenue Act, 1917, regarding the preparation of the *wajibularz*:

"Village roads, paths and rights of way. There are usually to be found in every village certain general principles which form part of the almost universal communal rights and liabilities of village life. These are the rights of every cultivator to pass along the boundaries of any field or area in the village taking with him his plough cattle and agricultural implements on the way to his own field and the obligation on the *Malguzar* and villagers to keep all village roads in order and the right of passage to and from ploughing and threshing, grazing and water. In some districts the custom prevails that at certain seasons of the year the field embankments are cut so as to allow access with carts across the fields. In

some cases these communal rights are exercisable at all times and in some cases only during certain seasons of the year. Enquiry should be made into the customs which prevail regarding all these points and the result should be carefully recorded. A schedule showing the Khassra numbers of existing roads permanent or seasonal, or where such have no separate Khassra number, the Khassra numbers of the areas across which they pass should be included. All recognised public rights of way including foot-paths for assa culti where such paths are permanent and recognised should be entered and a note should be made where a special Goha or road for cattle exists showing which of the roads scheduled constitute the Goha. At the checking of the village map care should be taken that all roads are surveyed and shown not only where they cross areas occupied for cultivation, but also where they cross unoccupied areas and especially the village waste."

In this case there is no mention of the path in question in the village map. But no presumption against the defendants can arise from this as the instructions had not been issued at the time of settlement. The sole question in this case is whether the defendants have proved that there is a public path across the plaintiff's field by immemorial village custom. The District Judge has not expressly referred to the principles of law enunciated in the first of the above quotations but nevertheless his judgment proceeds upon correct lines. Given the plaintiff's averments that a public right of way can exist through a private field for his case is that the public right of way, the existence of which he does not deny lies not through his field No. 41, but through the neighbouring field No. 42 belonging to D. W. 1 Radhakisan. The learned District Judge has held on the evidence adduced by the defendants that there has been a public foot path through field No. 41 since time immemorial. This foot-path was obstructed by the plaintiff about 7 years ago and the direction of the path was, therefore, somewhat changed into the position which it occupied at the time the suit was brought.

The case having been decided on proper lines I will proceed to discuss the grounds of appeal. It is correctly contended in the first ground that there can be no right of easement in favour of an indeterminate body of persons but the case has not been decided on these lines by the learned District Judge who has dismissed the plaintiff's suit because the path is a public path.

The second ground that the question is one of license has not been argued. In the third ground of appeal it is urged that the defendants in their pleadings stated that the existing right of way had been in existence over 60 years while their evidence is that the direction of foot-path was changed 7 years ago and it is alleged that the findings are therefore not in accordance with the pleadings. On examining the record, I find there is no genuine cause of complaint on this score. The pleadings of the parties could not be understood until the Commissioner went to the spot to measure and the defendants made it clear in their representations to the Commissioner, which in these circumstances must be taken to be part of the pleadings, that the original path had been shifted 7 years ago into a new position because the then existing path was blocked by the plaintiff. The positions of the two paths are marked in the plans prepared by the Commissioner. In the fourth ground of appeal it is urged that even if the public had a right to use the old path, they have lost their right by abandonment and have no right to use the new path.

There is no doubt as answer to this contention. The first is that under the principles of law applying to public paths the plaintiff must be presumed by his action in enclosing the old path and allowing a new one to be opened in its place to have made a fresh grant to the public of the new path. Also under the principles recognized in *Illus. (3), S. 24, Easements Act*, when the owner of the land renders a way impassable, the persons entitled to use the way may deviate from it and pass over adjoining land of the owner provided that the deviation is reasonable. This principle has been clearly set out in *Selby v. Nettlefold* (1). The fifth ground says that the lower Court should have made a distinct finding as to exactly how many years the public had used the path. There is a finding that it has been in use for over 60 years. The sixth ground of appeal is not very clearly worded, but it has been argued on the assumption that it means that the defendants have not proved that the public used the path as of right. The nature of the evidence shows that the foot-path has always been recognized as a public foot-path.

A cultivator *prima facie* has a right to the exclusive use of his own field and very strong evidence is necessary before it can be held that other people have a right of way, public or private, over his land. This seems to have been recognized by the learned District Judge who has held that the evidence adduced by the defendants is insufficient. I may add that the suit appears to be the outcome of a quarrel between the plaintiff and Radhakisan. The appeal is dismissed with costs.

P.N./R.K.

Appeal dismissed.

* A. I. R. 1918 Nagpur 168

KOTWAL AND FINDLAY, A. J. CS.

Hazarilal and others — Plaintiffs — Appellants.

v.

Har Govind—Defendant—Respondent.

First Appeal No. 35 of 1917, Decided on 8th March 1918, from decision of Sub-Judge, Betul, D/- 29 March 1917.

(a) Hindu Law—Reversioner—Suit for possession by—Onus is on him to prove that no nearer heir exists.

In a suit by the reversioners of a deceased proprietor for possession of the property left by the deceased, the onus lies on the plaintiffs not only to prove that they are the reversioners entitled to succeed but that they are the only nearest reversioners; at any rate they must satisfy the Court that to the best of their knowledge there are no nearer heirs. [P 169 C 2]

* (b) Evidence Act (1872), Ss. 32, 64 and 65—Entries in Book of genealogy kept by Bhat—Copy of original which is in existence is not admissible under Ss. 64 and 65—(Obliter) Books would in other case have been admissible under Ss. 32 (2) and (5).

In order to prove their relationship with a deceased proprietor the plaintiffs relied on a Bhat's book of genealogy. It was admitted by the Bhat who produced it that the book was largely a copy made by his father from an older book which was then in existence. It was not alleged that the old book was in such a state that it could not be produced or that the entries made therein were indecipherable owing to age or owing to other cause :

Held : that having regard to Ss. 64 and 65 the entries in the book could not be looked upon as independent and original ones, nor could they be admitted as secondary evidence inasmuch as the original entries which were in existence could have, but had not, been produced. [P 171 C 1]

Obliter :—If the book had not been held to be inadmissible under Ss. 64 and 65 it would have been admissible under S. 32, sub-Ss. (2) and (5) of the Act, inasmuch as it was a recognised duty and pursuit of a Bhat to keep a genealogy of the families he was interested in and he had as a rule special means of knowledge in the matter. [P 171 C 1]

Judgment.—The plaintiffs-appellants Hazarilal, Beharilal, Misrilal and Dhan-

rajsued the defendant-respondent Har Govind in the lower Court for possession of a 10 annas 8 pies share in three villages Khandara, Kutarik and Bodi with proportionate *sir* and khudkasht and also for a similar share in two houses and compounds situated in Khandwa and Badnur respectively. Their case was that Hazarilal and Beharilal were, together with one Mehangelil, the nearest reversioners of one Balaram, deceased in 1879, to whom the whole of the above property belonged, but as Mehangelil declined to join in the suit only a two-thirds portion was sued for. It was further alleged that after Balaram's death, his widow Mt. Jadao remained in possession of the property until her death in 1914 and that thereafter the respondent Har Govind had entered into illegal possession thereof. The plaintiffs-appellants Misrilal and Dhanraj are the purchasers under a registered sale deed, dated 23rd August 1915, of half the property in suit from the first two plaintiffs-appellants and hence they also joined in the suit. A detailed genealogical table showing the relationship between Hazarilal, Beharilal and Mehangelil was also included in the plaint. The defendant-respondent Har Govind admitted in the lower Court that Balaram had been the owner of the property in suit; his death, however, was placed by him in 1889, not 1879 : it was further admitted that his widow Mt. Jadao held the property until her death in 1914, Balaram having left behind him no lineal heirs. The correctness of the genealogical tree included in the plaint was, however, denied in the defendant-respondent's written statement, dated 20th December 1915, except to the extent that Balaram's wife was Mt. Jadao and his father Ghasiram.

Apart from an alleged will by Mt. Jadao dated 1914 in his favour, Har Govind pleaded that he was, with her deceased husband's consent, adopted by Mt. Jadao about 1900. The plaintiffs, on their part, denied the adoption. On these and connected pleadings, the lower Court framed issues and, finally held that the plaintiffs-appellants had failed to prove that Hazarilal and Beharilal were, with Mehangelil, the nearest reversioners of the deceased Balaram. In particular, on the large amount of oral and documentary evidence on record the Subordinate Judge found that Hazarilal's relationship with

Balaram as shown in the plaint was established but that Beharilal's was not. The Subordinate Judge further held that the plaintiffs-appellants, apart from the failure to establish Beharilal's alleged relationship, had also failed to establish the fact that there were no other persons who, if alive, would have, as descendants of Balaram, excluded them from inheritance. He found it in these circumstances unnecessary to examine in detail into the defendant-respondent's title to hold the disputed property and accordingly dismissed the suit. In this appeal the plaintiffs have challenged the lower Court's finding that they had failed to establish Beharilal's relationship with Balaram. In the second place, they contested the lower Court's finding that it was incumbent on them to establish any further than they have attempted to do the fact that there were alive no other nearer or as near reversioners than Hazarilal, Beharilal and Mehangilal, and it was urged in this connection that the onus of proving the existence of any nearer heirs rested on the defendant respondent Har Govind. These are the two main positions of the appellants. The defendant-respondent, while supporting the lower Court's decree, challenged its finding that Hazarilal in particular had established his relationship with Balaram alleged in the plaint. The Subordinate Judge has written a careful and well considered judgment in the case and has examined the large mass of evidence on record in a clear, painstaking manner. We find it convenient to deal first with the second contention raised in appeal, viz., that the Subordinate Judge was wrong in holding that, even assuming that Hazarilal and Beharilal had established their alleged relationship with Balaram, it was incumbent on the plaintiff-appellant to definitely show further that there were no other possible nearer or as near heirs alive who were entitled to succeed to the inheritance.

An attempt has been made by the learned counsel for the appellants to urge that, in view of the allegation in para. 5 of the plaint that Hazarilal, Beharilal and Mehangilal were the nearest heirs of Balaram and of the defendant's reply in para. 4 (c) of his written statement, dated 20th December 1915, in which two steps in the descent of Hazarilal and Mehangilal from Radhakishan (vide the table in

plaint) were challenged, the plaintiffs-appellants had sufficiently discharged the onus of proof which rested on them in this connection and that on the findings of the lower Court on the evidence, a presumption arose that there were no nearer heirs. The Sub-Judge has dealt with this matter in para. 53 of his judgment. It has been established, and is indeed admitted by the appellants, that the genealogical tree in the plaint is not complete or exhaustive. They themselves have proved that Radhakishan had, besides the four sons shown in the plaint, two other sons Baijpath and Dinanath, both of whom left issue and had in due course grandsons. There is absolutely no evidence on which we can assume that none of the descendants of Baijpath and Dinanath were alive on the death of Mr. Jadoo and it is, in our opinion, clear that the onus of proof rested in this connection on the appellants. They came to Court claiming that they were the nearest reversioners, and it is clear that the defendant-respondent denied their genealogical table except to a specified extent: vide para. 5 of defendant-respondent's written statement dated 20th December 1915.

In these circumstances the appellants had to exhibit records that they were reversioners entitled to succeed on Mr. Jadoo's death but the fact that they were the only, and nearest reversioners. The case reported as *Kaveri Rao v. Kalliya Gaudan* (1) in reality gives appellants no help; the circumstances there were entirely different and indeed the principle on which we think the question we are considering must be dealt with was there enunciated. It is the remark of Trotter and Seshagiri Aiyar, JJ., at p. 515 of 30 *M. L. J.*, viz., that the appellants in this case were bound to satisfy the Court that to the best of their knowledge there were no nearer heirs. It must further go against the appellants that, in a case like the present where the utmost exactitude and precision in detail was necessary, they came to Court with a genealogical tree which in the course of the litigation their own evidence has shown to be incorrect and incomplete. We are asked to assume or presume that where the appellants have failed to show any branches of the family, such branches must be extinct. Such an argument however

begs the whole question at issue and it is impossible to consider it seriously. It does not seem to us possible or necessary to decide whether these omissions were made bona fide or otherwise by the plaintiffs when they filed this suit: however made, they seem to us fatal to their case. It is clear in any event that the information as to the existence of branches not shown in the plaint was available to them had they sought it with diligence, for they themselves have in this suit produced much of the evidence on the point and that evidence is largely unfavourable to their contentions in this connexion. It is impossible even on the plaintiffs-appellants' own evidence, to feel satisfied that there are not alive descendants of Chandrabhan, Baijnath or Dinanath who are not as much or more entitled to succeed than the appellants are and it seems unnecessary therefore to labour this point further. No grounds have been shown on which we could question the propriety of the finding of the Sub-Judge in para. 53 of his judgment and it is in our opinion correct.

The learned counsel for appellants has in this connexion raised an incidental point, viz., that if we were unable, as we are to hold that the onus of showing there were nearer heirs rested on the defendant-respondent the case was one for remand for a detailed finding on the point involved. We cannot however see our way to accept this contention. The plaintiffs came to Court alleging they were the nearest reversioners of Balaram; we have already remarked that their position was directly challenged by the defendant-respondent in almost every respect, and issue 1 framed by the lower Court was broad and explicit enough to cover specifically the matter involved. This particular matter was indeed the pivot of the plaintiffs' case and we can in these circumstances see no reason for granting the prayer for a remand.

Our finding on the point of the appellants' failure to prove the non-existence of nearer or as near heirs necessarily governs this appeal, but it may be of interest to consider shortly the first ground urged in appeal. The contention herein involved is to the effect that Beharilal's connexion with Balaram, the last male holder of the estate, as alleged in the plaint has been sufficiently established on the pleadings and evidence and that the

Sub-Judge was wrong in taking the contrary view. After a long and exhaustive analysis of the evidence produced, the lower Court has summed up its finding as regards Beharilal in para. 50 of its judgment. Everything turns in this connexion on the evidential value, if any, which may be attached to the Bhat's book of genealogy (P. W. 31) which has been produced by P. W. 1 Kesarilal. It is first of all necessary to consider whether this book was admissible in evidence at all, it having been pressed strongly in this Court on behalf of the respondent that this Exhibit was as a matter of fact totally inadmissible. The lower Court has dealt with the question of the admissibility or non-admissibility of this Exhibit in para. 8 of the judgment. The book contains the professed genealogical tree of many families including that of Radhakishan, the alleged common ancestor of the family. The first point urged on behalf of the defendant-respondent is that the book produced was not admissible as secondary evidence, in view of the admission by P. W. 1 Kesarilal that the present book is merely largely a copy made by his father from an older book of his which is still in existence. The critical portion of the evidence of the witnesses in this connexion is as follows:

"I have got another book, pothi also. It is old . . . I do not recollect exactly what that book contains, but it contains all the genealogies which are contained in this present book . . . This book is new book. My father told me that he made entries in this new book from the old book he had."

Now accepting these statements as correct, what is the exact concrete position? It is that there is in existence the original book containing not only the genealogical trees of this family but of many others also. It is not clear, nor does it seem to us material, whether the new book contains any entirely new matter or independent entries concerning other families. Concerning the family involved in this litigation, the position is that the entry we are concerned with is merely a copy—a copy, it is true, made by the original authority himself but still a copy—made long after the original entry made in the original book. This latter, although old, is still in existence and it has not been alleged that it is in such a state that it cannot be produced or that the entries made therein are in-

decipherable owing to age or other cause. We are of opinion, therefore, that, having regard to Ss. 64 and 65, Evidence Act, the entry in the present book cannot be looked on as an independent and original one, nor can it in the circumstances be admitted as secondary evidence of an original which is in existence and could have, but has not, been produced. So far as the genealogical entry we are considering is concerned, the statement of Kesarilal, if it means anything at all, means that this entry is a copy of the one in the old book. It has not been suggested that the father in compiling this new book added amending or independent matter regarding the old entries. On the contrary the new entries we are concerned with are mere copies of the original ones. The witness P. W. 1, is perfectly clear on that point and distinctly says that the new book contains all the genealogies which appeared in the old one and that his father told him he had made the new entries from those in the old one. For these reasons we are constrained to hold that the present Ex. P. 31 was not admissible in evidence; it is clearly not, so far as the genealogy of the present family is concerned, an independent creation by the author but a mere copy of the original, and the fact that this copy was made by the author himself does not materially affect the legal position. Cf. *Sarjan Shank v. Sardar Singh* (2). In view of this finding we need not discuss the question, whether the book was inadmissible under S. 32, sub S. (2), (5) or (6), Evidence Act, but we may say that, had we not been constrained to hold that it was inadmissible as being secondary evidence of an original which could have been and was not produced, the book would probably have been admissible in evidence under S. 32, sub-Ss. (2) and (5), because it is a recognized duty and pursuit of a Bhat to keep the genealogy of the families he is interested in and he has as a rule special means of knowledge in the matter. Whether, however, even if technically admissible, it would have had much evidential value in view of the many difficulties which arise on the evidence in connection with details of the family given therein and more particularly of the fact that the original fountain-head and source, viz., the old book, has not

been produced at all, is, of course, entirely another matter which we need not discuss.

Ruling out, therefore, as we feel we must do, Ex. 31, there is, of course, practically no evidence worthy of the name on which we can base Kesarilal's relationship with Balaram, established. The real evidence of the family with names which has been mentioned originally by the Sub-Judge is demonstrably insufficient to establish the plaintiff's case on this point. There is, as compared with the question of Kesarilal's relationship with Balaram, a striking and almost total lack of other independent evidence, such as statements or admissions of parties now dead which would support plaintiff's case, and it is clear that Kesarilal's relationship is the weak or entirely missing link in the chain. These findings necessarily govern the appeal and we find it unnecessary, therefore, to give a finding on the question which has been urged strongly on behalf of defendant respondent that the Sub-Judge's decision that Kesarilal's relationship with Balaram has been proved on the evidence is unjustifiable. The appellants' failure not only to establish Kesarilal's connection but also to show that there are no other existing nearer or as near heirs besides Kesarilal, Kesarilal and Mahalingal, necessarily implies the failure of their suit. The appeal is accordingly dismissed with costs on appellants.

P. N. R. G. Appeal dismissed.

A. I. R. 1918 Nagpur 171

DRAKE-BROCKMAN, J. C.

Pralhad Singh—Appellant.

v.

Abdul Aziz Khan—Respondent.

Second Appeal No. 112 of 1918, Decided on 7th September 1918, from decree of Addl. Dist. J., Balaghat, in Civil Appeal No. 456 of 1917, D/- 12th January 1918.

(a) C. P. Municipal Act (1903), Ss. 52 and 53—Municipality is not necessarily owner of all land within limits of Municipal town.

There is no authority for the proposition that all land within the limits of a Municipal town must in the absence of evidence to the contrary, be taken to belong to the Municipal Committee.

[P 172 C 2]

(b) Adverse Possession—Acquisition of Title—It is mixed question of law and fact and it should be raised in Court of first instance.

A claim of title by adverse possession raises a mixed question of law and facts and should there-

fore be raised in the Court of the first instance so that the opposite party may plead to the claim and evidence may be adduced thereon of title by adverse possession. [P 173 C 1]

(c) **Adverse Possession—Acquisition of title—Possession must be shown to be adequate to extinguish title of true owner.**

A person who seeks to establish a claim has to show that his possession was adequate in continuity, publicity and in extent to extinguish the title of the true owner 27 Cal 913 (P. C.), *Foil*.

[P 173 C 1]

K. K. Gandhe—for Appellant.

Judgment.—The suit out of which this second appeal arises was brought by the respondent Diwan as transferee of the malguzar Abdul Aziz Khan, defendant 2, to recover possession of a house site in the town of Balaghat from the present appellant Pralhad Singh, defendant 1. The malguzar supported the claim of the plaintiff as his transferee, alleging that the site was originally occupied by the house of one Sukhia, who left Balaghat over 12 years before the suit and had since been lying vacant and was therefore under the wajibularz the property of the malguzar. The present appellant pleaded that the land belonged to him and to his ancestors before him and that Sukhia, a relative, occupied it on his behalf. The conveyance (Ex. P 2) to the plaintiff is dated 1st November 1916. The trial Judge found that the land was first occupied by the house of Sukhia's mother Gajri who was succeeded in possession by Sukhia, that Sukhia abandoned the site more than 12 years before the suit, and that it became the property of the malguzar but lay vacant till occupied by the plaintiff. The claim for possession was therefore decreed. In appeal the Additional District Judge held that Sukhia left the house and its site 10 or 12 years before the suit; that in the absence of any evidence to establish the title of the plaintiff or any ancestor of his Sukhia must be deemed to have been the owner by reason of the presumption on which S. 110, Evidence Act, is based; that Sukhia abandoned the land which consequently reverted to the malguzar; and that the appellant made some show of occupying the site after Sukhia left it, but that being a mere trespasser his occupation, even if it exceeded 12 years in duration, could not afford a title as against the malguzar or his transferee. *Narain v. Behare* (1) was cited as negating any acquisition of title by the appellant. The appeal was accor-

dinally dismissed and Pralhad Singh has now come to this Court. An entirely new point is taken in the first ground of appeal, viz., that as Balaghat is a Municipal Town the Municipality, not the malguzar must be the owner if the title of the original owner has been extinguished by abandonment. There is however no basis in the pleadings or evidence for the assumption that the site in question does not form part of the area settled with the malguzar. The wajibularz was relied upon by the plaintiff and the defendant Abdul Aziz Khan and I know no authority for the proposition that the land within the limits of a Municipal town must in the absence of evidence to the contrary, be taken to belong to the Municipal Committee. The contrary is clearly indicated by Ss. 52 and 53, C. P. Municipal Act, 1903, where the property which vests in and belongs to the Committee is described and the acquisition of land within the limits of the Municipality, under the Land Acquisition Act, 1894, is contemplated. This ground is thus without substance. In the second ground it is said that having found the appellant to have exercised some sort of possession over the land, the presumption recognized by S. 110, Evidence Act, should have been made in his favour. To this the answer is that Sukhia having been the owner till she left Balaghat and the appellant not claiming through her there is in view of the terms of the wajibularz no room for any presumption in favour of the appellant, who set up an independent title and altogether failed to adduce evidence in support of it.

Thirdly, it is said that *Narain v. Behare* (1), the case cited by the lower appellate Court has no bearing, inasmuch as the point decided there was merely that a transferee from the occupant of a village site cannot claim a greater right than his transferor had. The appellant further relies on the fourth ground of appeal on adverse possession for more than 12 years as giving him a good title against the malguzar. There is however no finding that he enjoyed adverse possession for more than 12 years, nor was it part of his case that after Sukhia left Balaghat he had such possession as against the malguzar. The position he now seeks to take up was not even suggested in the grounds of appeal to the lower appellate Court, in fact one of the grounds of first appeal is that aban-

document of title by Sukhia had not been made out. It appears that on leaving Balaghat Sukhia went to live with the appellant at Kanki, and it is said in this Court that she died at Kanki while still living with him some three or four years later. There is nothing in the evidence to show that the appellant took possession of the land in Sukhia's lifetime and set up independent title in himself, and if he made any show of occupation before Sukhia died that may well have been regarded as made with Sukhia's consent. A claim of title by adverse possession raises a mixed question of law and fact and should therefore be raised in the Court of the first instance so that the opposite party may plead to the claim and evidence may be adduced thereon.

The appellant to establish such a claim had to show that his possession was adequate in continuity, in publicity and in extent to extinguish the title of the true owner: see the judgment of the Privy Council in *Badhamony Deb v. Collector of Khulna* (2). I have read the evidence adduced by the applicant and am clearly of opinion that it cannot suffice for this purpose and even if it were regarded as sufficient, there would remain the objection that the plaintiff and the magistrate had no notice on the pleadings of a claim by adverse possession. In *Sundari Dey v. Mulhoo Chunder Sircar* (3) it was held that a plaintiff may be allowed to succeed on a title by adverse possession pleaded for the first time in a Court of appeal, provided such a case arises on the facts stated in the plaint and the defendant is not taken by surprise. A similar rule should, in my opinion, be applied to a defendant and in the present case the element of surprise cannot fairly be said to be absent. The appeal fails and is dismissed without notice to the respondent.

P. N. / R. K. *Appeal dismissed.*

2. (1900) 27 Cal. 913=27 I. A. 135 (P. C.).
3. (1867) 14 Cal. 592.

A. I. R. 1918 Nagpur 173 (1)

KOTWAL, OFFG. A. J. C.

Martand Rao—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 85 of 1918, Decided on 18th June 1918, against order of Magistrate, First Class, Bhandara, in Misc. Criminal Case No. 51 of 1917, D/- 14th February 1918.

(a) Criminal P. C. (1898), Ss. 107, 125—Order under S. 107 can be cancelled by District Magistrate under S. 125 on ground that there is no likelihood of breach of peace.

An order righting a security for good behaviour under S. 107, Criminal P. C., can be cancelled by the District Magistrate under S. 125 of the Code on the ground that there is no proof of any likelihood of a breach of the peace, and the High Court will refuse to interfere with the order on this ground in revision, unless the District Magistrate has been shown under S. 125. (P. 173 C. 2)

(b) Criminal P. C. (1898), S. 423—High Court interferes under very exceptional circumstances.

The High Court will on its revisional side interfere only as a Court of last resort under very exceptional circumstances. (P. 173 C. 2)

M. Hanwant Shantkar Niyem—Applicant.

Order.—This is an application asking this Court to interfere in revision and set aside the order of the Subdivisional Magistrate, Bhandara, passed under S. 107, Criminal P. C., ordering the applicant to execute a bond for keeping the peace for one year on the grounds that there is no proof of any likelihood of a breach of the peace and that the materials on the record do not justify the order. Under S. 125, Criminal P. C., the District Magistrate has the power to cancel the bond on the grounds stated above. *Emperor v. Abdur Rahim* (1) and *Emperor v. Dolt* (2). The applicant has not applied to the District Magistrate under the above section, and following the Allahabad ruling cited above I decline to interfere in revision till this has been done. This Court will on its revisional side interfere only as a Court of last resort under very exceptional circumstances: *Emperor v. Hussain Shah* (3). No sufficient grounds are disclosed for not resorting to the District Magistrate in the first instance. The application is rejected.

P. N. / R. K. *Application rejected.*

1. (1905) A. W. N. 143.
2. (1915) 11 N. L. R. 98=29 I. C. 827.
3. (1904) 17 C. P. L. R. 107.

A. I. R. 1918 Nagpur 173 (2)

PRIDEAUX, A. J. C.

Krishna Mali—Plaintiff—Appellant.

v.

Deolia and another—Defendants—Respondents.

Second Appeal No. 303 of 1917, Decided on 25th February 1918, from decree of Addl. Dist. Judge, Betul, D/- 16th February 1917, in Appeal No. 4 of 1917.

Hindu Law—Adoption—Married Sudra.

The adoption of a married Sudra is invalid according to the Mitakshara as interpreted according to the Benares School of Hindu law; 11 C. P. L. R. 56 and 35 All. 263 *Foll.* [P 174 C 1]

Atmaram Bhagwant—for Appellant.

M. Gupta—for Respondents.

Judgment.—The facts of this case are given in sufficient detail in the judgments of the Courts below. I therefore do not repeat them here, but proceed at once to deal with the grounds of appeal. I deal with the second ground of the memorandum of appeal first. It is contended that as the parties are *malis*, that is Sudras, the finding that the plaintiff was a married man at the time he was adopted by Mt. Sakai cannot invalidate it. It seems to me settled law that in those parts of the country where Mitakshara is interpreted according to the Benares School a married Sudra cannot be adopted.

Teja Bai v. Mohanlal Marwadi (1) and *Jhunka Prasad v. Nathu* (2). The finding of the Courts below is therefore correct and the plaintiff's adoption is invalid because he was a married man. In this view of the case it is unnecessary to consider the point raised in the first ground of appeal as to *res judicata*. It is contended that the ancestors of the parties migrated from Berar in which the Bombay rule of Hindu law of adoption prevails and brought with them their customary law. Now custom of the caste was pleaded as to the adoption of a married man, but it was nowhere pleaded that because the parties came from Berar therefore they were governed by the Bombay law that the adoption of a married man is not opposed to the doctrines of Hindu law. This plea also was not raised in the lower appellate Court. It is far too late to raise in second appeal questions of pure fact. As to the custom alleged, both Courts have held that it has not been established and that finding is conclusive.

P.N./R.K. *Case remanded.*

1. (1898) 11 C.P.L.R. 56.
2. (1913) 45 All. 263=19 I C 960.

A. I. R. 1918 Nagpur 174

Drake-Brockman, J. C.

Bhaddu—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 183 of 1918, Decided on 19th January 1918.

Criminal Trial—Retracted—Confession—Use of retracted confession is matter of prudence.

There is no rule of law required a retracted confession to be supported by independent reliable evidence corroborating it in material particulars. The use to be made of such a confession is a matter of prudence rather than of law; 13 C. P. L. R. 107, *Foll.* [P 176 C 1, 2]

G. P. Dick—for the Crown.

Judgment.—The appellant, Bhaddu Gond of Mauza Mahura in the Niwas Tahsil of the Mandla District, has been sentenced to transportation for life along with three other persons for the murder of his fellow-villager Ranmat Gond. The co-accused are Bhaddu's brother Saddu, and Ram Sahai and Karuba, each of whom has married a sister of the other two. All have appealed and their appeals are disposed of by this judgment. Bhaddu, Saddu and Ram Sahai live in huts within single enclosure while Karuba's hut is a few paces distant. Saddu appears to be the youngest of the four, being only 20 years old, while the others are 25 or thereabouts, Ranmat being about the same age as Saddu. Ranmat lived with his mother and step-father Rowan (P. W. 4) about 200 yards from Bhaddu and for some little time before his disappearance had been sleeping at the house of Dola Gond (P. W. 9), who used to employ him as his ploughman. The case for the prosecution is that Ranmat was killed by the four appellants about midnight on Saturday 26th May last. As to what happened shortly before midnight there is no dispute, the facts being very clearly stated in para. 2 of the Sessions Judge's judgment. Lahwar Gond (P. W. 3) gave a feast to the whole village at which the appellant Bhaddu worked as cook.

The women and children were fed first and then left for home. Ranmat left before Bhaddu and took advantage of the opportunity to enter Bhaddu's hut and have sexual intercourse with Badhania (P. W. 10), Bhaddu's wife. He was still in the hut when Bhaddu returned and being unable to explain his presence was taken before the Mukaddam Nanho (P. W. 5). No stolen property being found on the intruder, Nanha made him over to Rowan and shortly afterwards Ranmat went to sleep at Dola's house. Dola was suffering from fever and unable to sleep: he deposed that two men whom he recognized by their voices to be Ram Sahai

and Saddu came that night and took Rammat away. Neither Dola nor Rowan ever saw Rammat alive again. Early on the morning of Sunday 3rd June, Tiwari Gond (P. W. 1), a resident of Jharni, close to the boundary between the Jabulpore and Mandla Districts, saw a dead body floating face downwards in a deep pool in the river Sankul. He took the news to the Kundam station-house, 20 miles distant, arriving at midnight, and Sub-Inspector Punaji reached the spot about noon the next day. Meanwhile the news reached Mahura and Rowan and others came to Jharni. When the Sub-Inspector removed the body from the pool, Rowan among others identified it as Rammat's by the clothes and articles on the neck. At 4 o'clock the same afternoon Guthu (P. W. 6), Kotwar of Mahura, reported this discovery at the Shabarpura station house, 16 miles from Jharni, with the result that Sub-Inspector Sheo Prasad (P. W. 14) repaired to the latter village, where he arrived at 2 p. m. on 5th June.

On Sunday 27th May at 4 p. m. the appellant Bhaddu accompanied by Guthu had reported the intrusion of Rammat and his release by the Mukaddam. Ex. P. 5 is a copy of the entry made in the *roznamcha* of the day, while Ex. P. 4 is a copy of Guthu's report of 4th June as recorded in the offence register. Sub-Inspector Punaji thought the body too decomposed to be worth sending for post mortem examination and buried it on 4th June immediately after holding the prescribed inquest, the report of which is Ex. P. 3. From Jharni the two Sub-Inspectors, with the Circle Inspector of Niwas who has not been examined as a witness, went to Mahura, the incident of 26th May having clearly pointed to a possible explanation of Rammat's death. In consequence of a statement made by the appellant Karuha to Sub-Inspector Punaji the other appellants were questioned, with the result that at 6 a. m. on 6th June all four men were arrested. They were then sent in to Mandla, where they arrived on 11th idem and were placed early in the afternoon before the Sub-Divisional Magistrate of the Niwas Tahsil. Bhaddu, Saddu and Karuha forthwith made in succession and in each other's presence detailed and precisely similar confessions. All were then remanded to jail and the following day at 4.30 p. m. the Sub-Divisional

Magistrate recorded the confession of Ram Sahai, the record corresponding closely with that of the earlier confessions. The commitment proceedings began on 20th June and were held by a different Magistrate. On 29th July the accused were examined and retracted their confessions, attributing them to fear caused by threats of personal violence from the police. Meanwhile on 2nd July the corpse had been exhumed under the Deputy Commissioner's order and the remains which consisted of nothing but bones had been examined by the Assistant to the Civil Surgeon, Jabulpore. At the trial the following explanations of the confessions were offered:

Bhaddu.—The Circle Inspector and both the Sub-Inspectors said that if the confessions were made the appellant would be released and otherwise would be hanged.

Saddu.—He was actuated by fear of the police.

Ram Sahai.—The police had beaten him and he was afraid that they would beat him again if he did not say what they had told him to say.

Karuha.—He had been ill-treated by the police and was led by fear to make the statement.

In this Court all the appellants alleged that they were tortured by the police, Bhaddu, Ram Sahai and Karuha alleging further that the police tortured their wives also. Bhaddu and Saddu further contend that Rammat was known to be alive for 15 or 16 days after the 26th May, while Ram Sahai avers that the medical evidence does not show Rammat to have met his death by violence and that he was for six days at Mijhauri in the Rewah State. The 1st question for determination is whether it has been proved beyond reasonable doubt that Rammat is dead. Apart from the confession it seems to me that there can be no doubt upon this point. There is no reason to suppose that on the 3rd June there was any difficulty in recognizing that the body in the pool was that of a male, and it is so described in Tewari's information, Ex. P. 6. Again the combination of 3 clothes and 3 neck pendants is one by which identification is certainly possible to persons like Rowan and Dola who had close relations with Rammat. Further there is the extreme improbability that so young a man would have remained absent from home for the

long period of six months which separated his disappearance from the trial in the Sessions Court. The real basis for the contention raised in this Court by the appellants Bhaddu, Saddu and Ram Sahai is evidently the story told by Guthu Kotwar in Ex. P. 4, the material portion of which may be translated thus:

"On seeing the cloth with which its (corpse's) hands were covered, Rowan Gond of Mahura said that it appeared to be the dead body of his son Ranmat Gond, aged 18 or 19 years, who left the house on Sunday the 27th May 1917 saying that he was going to Majhau in the Rewah State. On Tuesday the 20th May 1917 Lal Shah saw the deceased Ranmat in Mauza Paharna going to Mauza Saraswahi."

Guthu (P. W. 6) was pressed at the trial with this passage in his report and explained as follows:

"I told the police that Ranmat had gone off to Majhau on the Sunday, as I was afraid that I would get into trouble for not reporting sooner that Ranmat was missing, and as I and my father before me have been Kotwars of Mahura for a long time. Lal Shah had never told me that he had seen Ranmat going to Saraswahi on the Tuesday. I had never spoken to Lal Shah about Ranmat."

Lal Shah himself examined as D. W. 3 declared that he never saw Ranmat going towards Saraswahi or told any one that he had seen any person going in that direction. I find in the map a village named Saraswahi about two miles due south of Mahura, i. e. in quite the opposite direction to the Rewah State but close to Paharna where Lal Shah lives. The learned Sessions Judge is not satisfied with Guthu's explanation, but I am inclined to think that it may well be the truth or near the truth, as he would naturally fear punishment for having failed to report earlier that Ranmat had disappeared. With regard to the confessions they are corroborated by the evidence of Budhanis (P. W. 10). This woman has a small child (daughter, not son as recorded by the Sessions Judge) and I find it difficult to believe that a young Gondin would, in the circumstances, adhere in Court to a totally false story implicating her husband, the father of her child. Turning to the confessions which I have carefully read and considered, I can see no ground for refusing to accept them as truthful and voluntary. It was laid down by this Court in *Empress v. Chulia* (1) that there is no rule of law requiring a retracted confession to be supported by independent reliable evi-

dence corroborating it in material particulars. The use to be made of such a confession is a matter of prudence rather than of law.

The Sub-Divisional Magistrate would, in my opinion, have done well to remand all four appellants to jail on the 11th May before recording any confessions, so that they might have had the respite for reflection which is contemplated as desirable in para. 6 of this Court's Criminal Circular 1—7. I observe also that he did not use the revised form for his records and must ask the Sessions Judge and the District Magistrate to see that this mistake, which frequently occurs, is no more repeated. Some corroboration of the confessions is afforded by the fact that in the pool where the corpse was found there lay a pole (article in evidence G). In their confessions Saddu and Ram Sahai mentioned that the deceased's body was hung to a piece of wood at the bari which belongs to Bhaddu and is close to his hut. A gap which corresponds to such a pole was indicated by the appellant Bhaddu on 6th June in the mandwa in his bari and all the appellants being taken back to the pool successively and independently indicated the floating pole as the implement used for transporting the corpse. There is also the evidence of Ram Sahai's wife Katia (P. W. 8) that Ram Shai did not return to his hut after Labwar Gond's feast until after sunrise next morning and that his loin-cloth was then wet. When cross-examined by all the accused at once she retracted this statement and said that she had been threatened by the Police with torture and had spoken under the influence of that treat. She had however merely repeated what she had said to the Committing Magistrate on 21st June, and I have no doubt that her retraction was merely the outcome of the appellants' attitude towards her in Court.

The Sessions Judge accepted as evidence against the appellants the statement of Karuha's wife Bhuri (P. W. 7) made to the Committing Magistrate on 21st June that Karuha did not return home till the morning of Sunday 27th May; this statement was retracted at the trial and if it was to be treated as evidence, it should have been brought on the record under S. 288, Criminal P. C. There is however enough to satisfy me that the confessions are true without relying upon Bhuri. I think then that the corpse found in the

pool of Jharni was undoubtedly Ramnath's. The hands were tied behind the back and one of the articles of clothing in evidence was tied round the neck. These circumstances leave no room for doubt as to the nature of the death; it was homicidal, not suicidal. If the confessions are true, as I think they are, all the appellants have, in my opinion, been rightly found guilty of murder. Bhaddu took the leading part in that he throttled the deceased, but the parts taken by the other appellants included holding Ramnath down while the throttling went on, and this is not the line that would have been taken if the intention was merely to administer a beating. Bhaddu could certainly not have committed the crime single handed, for Nanka Mukyadon's house is only 30 yards distant, nor is it at all improbable that his brother and brothers-in-law gave him the aid required; on the other hand, it is unlikely that the brothers-in-law, the least concerned to administer punishment for the injury done to Bhaddu, would have been implicated if they were really innocent, for a theory that the killing and disposal of the body were carried out by two persons only would have been plausible enough. All the confessions agree in stating that Ramnath was dead when removed from Bhaddu's hut. The position therefore is that he was throttled to death by Bhaddu while the other appellants held him down. In view of the opinion of Stephen J. expressed in *Emperor v. Nirmal Kanta Roy* (2) there may be some room for doubt as to the application of S. 31, I. P. C., to circumstances like these, but in *Emperor v. Nirghi Gond* (3) S. 31 was actually applied in a similar case. The killing was really the result of a series of acts including not only the throttling but also rendering the victim incapable of resistance, and the common intention can only have been to kill. In this view the alteration of the charges by the Sessions Judge was uncalled for.

I, therefore, uphold the convictions for murder and dismiss all four appeals. The case however seems to be one in which some measure of clemency may be thought appropriate by the Crown and if the Sessions Judge thinks fit to make a recom-

mendation in favour of any of the appellants, I shall be prepared to support it.

P. N. D. K. Appeal dismissed.

A. I. R. 1918 Nagpur 177

CRIMINAL, A. J. C.

Krishnaji Raou—Defendant—Appellant

Raou and others—Plaintiffs and Defendants—Respondents.

Second Appeal Nos. 117-118 of 1916, decided on 27th February 1917, and remanded of 1916. *Appeal*, 1916—27th January 1917, in Appeal No. 38 of 1917.

Practice—Relief—Suit for ejectment—Redemption can be allowed.

A Court can in its discretion pass a decree for redemption in a case in which the plaintiff asks for ejectment. 20 Bom. 196; 5 C. L. J. 527 and 35 Bom. 507. (P. 177 C 2)

M. Mahomed Nankar—for Appellant.

Judgment.—This appeal has no force in it. The finding that the sale of 1897 by Nanka to the extent of a 2/3rd share in Survey No. 21 is not binding on the present plaintiffs is not challenged. It is admitted, therefore, that they are entitled to redeem the 1/3rd share of the field but is a separate suit and not in the present suit. The main point argued is that an amendment of the plaint of 1911 converting the suit as regards the present appellant from one of ejectment to one of redemption should not be allowed. Now there is authority showing that a Court can in its discretion pass a decree for redemption in a case in which the plaintiff sues for an ejectment: see *Parshotam Bhanshanikar v. Kamal Zunjari* (1), *Kotilasari Dasi v. Mohuni Kudranand Goswami* (2) and *Mahomed Ibrahim v. Hamja Mahomedally* (3). If ever a case existed in which this discretion should be exercised it is the present one. The fact that this would be done was foreseen in the remand order of the District Judge dated 1st December 1907 and was clearly dealt with in the remand order of the Additional District Judge dated 7th November 1913. No appeal was filed by the present appellant against those two remand orders. He lets the case proceed for another 5 years and then attacks the final decision on the ground that amendment should not have been allowed. The case had been pending

2. A. I. R. 1911 Cal 301=24 I. C. 310=41 Cal 1072.

3. (1893) 11 C. P. L. R. 2,

1918 N/23 & 24

1. (1896) 20 Bom. 196.

2. (1907) 5 C. L. J. 527.

3. (1911) 35 Bom. 507=12 I. C. 387.

since 1906. In this appeal no objection is taken to the amount fixed as annual profits of the 2/3rds share in the field.

In my opinion the amendment was rightly allowed. I, therefore, dismiss the appeal with costs. Appellant will pay respondent's costs.

P.N./R.K.

Appeal dismissed.

A.I.R. 1918 Nagpur 178

BATTEN, A. J. C.

Jairam and others—Defendants—Appellants.

v.

Gopikisan and others—Plaintiffs—Respondents.

Second Appeal No. 288 of 1917, Decided on 31st January 1918, from decree of Divl. Judge, Nagpur in Civil Appeal No. 59 of 1916, D/- 30th March 1917.

(a) C. P. Tenancy Act (1898), S. 36—Surrender by tenant for valuable consideration—S. 36 does not deal with remedy of landlord.

Section 36 is only exhaustive as to what the claimant is liable to pay and does not deal with any remedy the landlord may have against the tenant who surrenders his holding for valuable consideration, and certainly does not say that he has no remedy. [P 180 C 1]

(b) C. P. Tenancy Act (1898), Ss. 35 and 36 (1)—Surrender of holding by occupancy tenant under S. 35—Nearest heir put in possession of holding under S. 36 (1)—Landlord can recover from surrendering tenant consideration he has paid less amount he has recovered under S. 36 (1).

When an occupancy tenant surrenders his holding for consideration under S. 35, C. P. Tenancy Act, and his nearest heir is put in possession of the holding by a Revenue Officer acting under S. 36 (1) of the Act, the landlord can recover from the surrendering tenant the consideration he has paid less the amount he has received under sub-S. (1) S. 36. [P 179 C 2]

(c) C. P. Tenancy Act (1898), S. 46—Surrender for consideration does not contravene S. 46.

A surrender of an occupancy holding for a consideration is not a transfer in contravention of the provisions of S. 46. [P 179 C 2]

(d) Contract Act (1872), Ss. 23 and 65—Surrender—Agreement that in case any one set up claim to fields surrendered tenants would be responsible for costs of landlord in defending suit—Agreement held to be unlawful under S. 23 being one as would defeat provisions of C. P. Tenancy Act (1898).

A deed of surrender of an occupancy holding provided that if any one set up a claim to the fields surrendered, the tenants would be responsible for costs incurred by the landlord in defending the fields against such claims. The surrender was set aside at the instance of the heirs of the tenants:

Held: that the heirs were legally entitled to make the claim, and the agreement to prevent them making a claim was of such nature that, if

permitted, it would defeat the provision of the C. P. Tenancy Act and was, therefore, unlawful under S. 23, Contract Act, and that the landlord could not, therefore, recover the costs incurred by him in the revenue proceedings in defending the surrender against the heirs. [P 179 C 2]

D. N. Khare—for Appellants.

W. V. Gharpure—for Respondents.

Judgment.—The main question that arises in this case is one which does not appear to have come before this Court before. It is this: When an occupancy tenant surrenders his holding for consideration under S. 35, C. P. Tenancy Act and his nearest heir is placed in possession of the holding by a Revenue Officer under S. 36 (1) of the Act, can the landlord recover from the surrendering tenant the consideration he has paid less the amount paid to the landlord under sub-S. (1), S. 36? In this case the defendants were the occupancy tenants of an occupancy holding and the plaintiffs are the landlords. The defendants surrendered the holding to the landlords in 1911 by a deed of surrender Ex. P-1 for a consideration of Rs. 1,500. Of this amount Rs. 900 were stated to be received in cash and Rs. 600 were stated to be due on bonds and for grain debt. The deed of surrender recites that the land was in bad condition and that the tenants could not get sufficient profits from it to pay the rent without incurring expenditure for improvements beyond their means. It was also stated that the tenants had other lands for which the whole of their plough bullocks were required. Defendant 1 Jairam was the recorded tenant and the other two defendants are his sons. After the surrender the wives of Jairam applied under S. 36 (1), Tenancy Act, for possession of the holding. The Deputy Commissioner rejected the application, on the ground that it was really that of the surrendering tenant as the three applicants were his wives. On appeal the Commissioner ordered as follows:

"The Deputy Commissioner has summarily dismissed their claim on the ground that the application is that of the surrendering tenant. I have little doubt that they have been put up by the original tenant, their husband, but as S. 36 (1) now stands, they are undoubtedly persons who would be entitled to inherit his right in the holding in the event of his death without nearer heirs. The order of the lower Court must, therefore, be set aside and the appellants will be allowed to have the transfer set aside on payment of arrears of rent and expenses of cultivation. What that payment should be has not been decided. The case is, therefore, remanded to the lower Court for the disposal of this point."

The landlords made a second appeal to the Financial Commissioner, whose order runs as follows:

"The only point to be decided is whether a widow can succeed to the holding of an occupancy tenant on his death under S. 46, C. P. Tenancy Act, failing other heirs. It is admitted that she does, and if so, she can apply to set aside a surrender under S. 36 of the Act. If no nearer heirs apply, all such heirs are assumed to be dead, and the widow can take the holding back. This is always the interpretation placed on the section and I am not prepared to depart from it. The appeal will, therefore, be dismissed."

The meaning and effect of sub-S. (4) S. 36, Tenancy Act, has been fully discussed by the Financial Commissioner in his order, dated 22nd August 1916, in the case of *Shankar v. Ramfal*, published at p. 239, Vol. 1, C. P. Revenue Manual. With the views expressed by the learned Financial Commissioner I respectfully concur. It appears from his order that it had been previously considered that the fact that consideration had passed was conclusive evidence that the surrender was not bona fide and was made with the object of evading the provisions of S. 46. The learned Financial Commissioner ruled that this was not a correct view, and the instruction to Revenue Officers have been modified in accordance with the ruling of the Financial Commissioner. The order of the Financial Commissioner rejecting the present plaintiffs' appeal was passed in 1914 and the right of the tenants' heirs to be put in possession was evidently treated as one to which they were entitled as a matter of course because there had been consideration for the surrender. It appears to me extremely probable that if the case had been decided after the above cited ruling of the Financial Commissioner, the decision would have been different. The deed of surrender contained provisions that the defendants and their heirs would refrain from setting up claims to these fields and that if any one set up a claim, the defendants would be responsible for costs incurred in defending the fields against such claims. The plaintiffs, the landlords, sued for the return of the purchase-money, less the Rs. 154 paid to them under S. 36 (1), Tenancy Act, together with the costs incurred by them in resisting defendant 1's wives' claim. They have been given a decree for both purchase-money and interest, and the costs claimed.

In my opinion the appeal of the defendants must succeed so far as it relates to

costs incurred by the plaintiffs in the Revenue Courts. It has been found to be a fact that the defendants did instigate Jairam's wives to claim possession. But the wives as heirs were legally entitled to make the claim, and the agreement to prevent the wives making a legal claim was of such a nature that, if permitted, it would defeat the provisions of the Tenancy Act, and was unlawful under S. 23, Contract Act. The claim for repayment of the purchase money is on a different footing. The surrender for consideration was made in circumstances in which both parties knew there might be a failure of consideration by reason of the heirs making a successful claim under S. 36, Tenancy Act. Under the principles embodied in S. 65, Contract Act, where there is a failure of consideration, the party who has received advantage must make compensation, measured in this case by the amount of the purchase money, less the deduction mentioned above. It is argued for the appellants that the Revenue Authorities have decided that the surrender was transfer made with the object of evading the provisions of 46, Tenancy Act, within the meaning of 36 (4), that the contract of transfer was, therefore, against public policy, being made to defeat the provisions of the law, and the decision of the Revenue Authorities is final under S. 95. But all that is really meant by S. 36 (4) is that a surrender which is not illegal cannot be remedied if it would be against the provisions of S. 46, if it were not a surrender but a transfer. The Financial Commissioner in the ruling cited says:

The first point to be noticed is that the fact that there has been some consideration for a surrender does not alter the nature of the transaction, which remains still a surrender and does not thereby become a transfer. This has been decided both by the Judicial Commissioner in civil appeals and by the Chief Commissioner and the Financial Commissioner in revenue cases."

He goes on to say that a surrender should not be considered as bona fide for the purposes of S. 36 (5) if its intention was to deprive the heirs of their right and if its effects would thus be the same, as regards the heirs, as a transfer in contravention of S. 46 (3). In view of this ruling, with which I have already said I respectfully concur, it cannot be said that a surrender to the landlord can ever be in actual contravention of the law, though in certain circumstances it may be remedied just as

a transfer in contravention of S. 46 may be avoided. If the heirs make no application under S. 56 the surrender remains good. I am for these reasons of opinion that there has been no decision, that the surrender was such as would defeat the law, and the parties are in a position where the consideration offered by one of them has failed. The plaintiffs are thus entitled to get back their purchase-money less the aforesaid deduction. The above remarks dispose of the first four grounds of appeal. The 5th ground is to the effect that the civil Court has no jurisdiction to try the suit, and that S. 56, Tenancy Act, must be looked to for any remedy that the plaintiffs may have. As to this S. 56 is only exhaustive as to what the claimant is liable to pay and does not deal with any remedy the landlord may have against a tenant who surrenders for valuable consideration, and certainly does not say he has no such remedy. The 6th ground relates to interest. There was no agreement for interest, no demand for the refund of the purchase-money is proved and at the time of the surrender both parties were aware that the surrender might be defeated by the heirs. In these circumstances I disallow the claim for interest. The result is that the amount decreed is reduced to Rs. 1,346. Costs in proportion in all Courts.

P.N./R.K.

*Decree modified.***A. I. R. 1918 Nagpur 180**

MITRA, A. J. C.

Madhusudan Das—Defendant—Appellant.

v.

Bissuji—Plaintiff—Respondent.

Second Appeal No. 500 of 1917, Decided on 23rd September 1918, from decree of Dist. Judge, Raipur, D/- 27th July 1917 in Appeal No. 27 of 1917.

Easements Act (5 of 1882), S. 60—Licensee cannot be revoked if work of permanent character is allowed to be executed by licensee.

Under S. 60 (b) a license may be revoked by the grantor, unless the licensee acting upon the license has executed a work of permanent character and incurred expenses in the execution.

Plaintiff, out of gratitude, allowed the defendant who was his medical adviser to occupy a certain house. The defendant erected a compound wall, fixed up a water pump, flagged the floor with stones and erected two huts:

Held: that the improvements executed by the defendant were of a permanent character and that therefore the license was not revocable during the lifetime of the defendant. [P 180 O 2]

*M. R. Bobde—for Appellant.**J. C. Ghose—for Respondent.*

Judgment.—The Courts below have found that the defendant-appellant was given a license to live in a house belonging to the plaintiff. It would appear that the plaintiff was under the medical treatment of the defendant and the house was given to live in out of gratitude. There was no written agreement as to the terms on which the defendant was to occupy it. It has been held by the Courts below that the defendant was a mere licensee. The point raised in this second appeal is that the case is covered by S. 60, Cl. (b), Easements Act. Under that section a license may be revoked by the grantor unless the licensee acting upon the license has executed a work of permanent character and incurred expenses in execution. The first Court found that the defendant had spent Rs. 600 in what may be described as improvements. The finding of the lower appellate Court is that only Rs. 200 was spent by the defendant. The lower appellate Court finds that the improvements consist of a compound wall, the fixing up of a water pump, the flagging of the floor with stones and the erection of two huts. Having recorded these findings, the learned District Judge thinks these are nothing more than what an ordinary licensee paying no rent would make for adding to his comforts. I am unable to agree with him in his view that a licensee would spend so much as Rs. 200 for his own comforts when the license can be determined at any moment. These findings substantially comply with the terms of the Statute and I think that the license should have been held not revocable. The first Court properly dismissed the suit, holding that the license was not revocable during the lifetime of the licensee. The appeal is decreed. The decree of the lower appellate Court is set aside and the decrees of the first Court restored. Each party will bear his own costs of the two appellate Courts.

P.N./R.K.

Appeal allowed.

A. I. R. 1918 Nagpur 181

DRAKE-BROCKMAN, J. C.

Warisali and another — Defendants — Appellants.

v.

Mohamed Azimulla Khan — Plaintiff — Respondent.

Misc. Appeal No. 40 of 1917, Decided on 4th February 1918, from decree of Divl. Judge, Saugor, in Civil Appeal No. 1 of 1917, D/- 25th April 1917.

(a) Contract Act (1872), S. 23 — Object of agreement to cause withdrawal of application to sanction prosecution — Agreement is not valid.

A trial for an offence need not actually be in progress to make an agreement for stifling a prosecution in respect of that offence improper for the purposes of S. 23, Contract Act. The section applies if the object of the agreement is to cause the withdrawal of an application to sanction the prosecution under S. 195, Criminal P. C. [P 183 C 1]

(b) Criminal P. C. (1868), S. 345 (7) — Prohibition in S. 345 (7) is general.

The prohibition contained in S. 345 (7), is a perfectly general one, which governs the composition of offences whether any steps are prosecuted the alleged offender have been taken or not. *Jones v. Meromithitree Permanent Benefit Building Society*, (1892), 1 L.N. 172, *Rel. on*. [P 183 C 2]

(c) Penal Code (1860) Sec. 213 and 214 — Commission of offences screened must be proved.

To establish the commission of offences punishable under S. 213 and 214, it is essential to prove commission of the offences screened: 23 Cal. 120 and 37 Bom. 638, *Full*. [P 184 C 1]

(d) Contract Act (1872), S. 16 — Mere fear of punishment in criminal case does not constitute undue influence.

A mere fear of punishment in a criminal case does not constitute undue influence, and the law as to obtaining a refund of money or a release of security given under an agreement not to prosecute is that the transaction cannot be set aside unless the circumstances disclose pressure or undue influence: 42 Cal. 236, *Full*. [P 184 C 2]

(e) Contract Act (1872), S. 23 — Application by defendant for sanction to prosecute plaintiff — Application withdrawn on plaintiff paying large sum to defendant — Suit by plaintiff to recover amount — Plaintiff held not entitled to money — Agreement was void as against public policy — *Maxims* — *In pari delicto, potior est conditio defendantis*.

Defendants applied for sanction to prosecute plaintiff for giving false evidence in a judicial proceeding. While the application was pending plaintiff paid Rs. 2,000 to the defendants and the latter thereupon represented to the Court in which the application for prosecution was pending that they did not desire to proceed with the application as they had no evidence in support of it. The application was dismissed. The plaintiff then sued to recover the Rs. 2,000 paid by him:

Held: that the money having been paid for an illegal object and the object having been executed, the maxim *in pari delicto, potior est conditio defendantis* applied and the plaintiff was therefore not entitled to recover the money, that the object of the agreement being to stifle a criminal prosecution and to compound a non-compoundable offence, the agreement was void as being against public policy and on that ground too the plaintiff was not entitled to recover the money. [P 181 C 2]

G. Z. Sakhedar — for Appellants

H. S. Gaur — for Respondent.

Judgment.—The plaintiff in the case out of which this appeal arises was convicted by the District Magistrate of Saugor on 4th September 1912 of being a gangster in a forged document and sentenced under S. 475, I. P. C., to rigorous imprisonment for a year. His appeal to the Sessions Judge was dismissed, and on 12th February 1914 he moved this Court in revision with the result that on 31st March following the unexpired portion of his term of imprisonment was set aside and in lieu thereof a fine of Rs. 3,000 was imposed. Previously to all this the plaintiff had sued the defendants in the Court of a revenue officer to evict them from certain six fields, 11.10 acres in area and situated in his town near village of Mahakhers. On 11th December 1912 he obtained a decree for possession but in appeal on 24th June 1914 the District Judge set aside the decree holding, that the suit, being brought against trespassers, was not triable by a revenue officer and returned the plaint for presentation to an ordinary civil Court. Eventually the suit was dismissed on 7th January 1914, the plaintiff having failed to pay the court-fee for service of a summons on one of the defendants.

On 10th February 1914 the defendant Muntaz Ali moved the revenue officer, who had first dealt with the plaintiff's suit, to sanction his prosecution for perjury on the ground that he had falsely denied the genuineness of his signature on a certain document filed by them in that case. Notice of this application was given to the plaintiff and three legal practitioners, including one of the leaders of Saugor Bar, appeared to oppose it on his behalf. The application was dismissed on 12th May 1914, the defendants having represented to the Court in writing (Ex. P 7) that they had no evidence and did not wish the inquiry to proceed. Meanwhile on 9th May 1914 the

plaintiff had executed a lease (Ex. P-5) in favour of the defendants giving them for 25 years at a rent of Rs. 20 per annum 50.67 acres of *sir* land in Mauza Mahuakhara.

Before proceeding to set out the pleadings in the present case, it seems desirable to mention that on 6th July 1914 the defendant Mumtaz Ali applied to the Court, which had dismissed the plaintiff's suit for ejectment, for sanction to prosecute him for an offence punishable under S. 209, I. P. C., the allegation being that the claim was false and made with intent to injure the defendants. This application was dismissed on 30th August 1915 by the Munsif of Saugor, who held that the claim for ejectment had not been proved to be false and that the object of the application was to harass the plaintiff and extract money from him. The District Judge dismissed on 13th January 1916 an appeal preferred from the Munsif's order, holding that there had been great and unexplained delay in applying for sanction and generally agreeing in the view taken by the Munsif. The plaint in the present litigation was filed on 21st September 1915. After briefly stating most of the acts prior to the defendants' application for sanction to prosecute the plaintiff for giving false evidence, it goes on to allege that owing to illness and worry the plaintiff was unable to attend the Court and oppose the application and that the defendants taking advantage of his circumstances used undue influence to obtain from him the aforesaid lease. It further alleges that the defendants in the same manner and at the same time obtained from him Rs. 2,000 in cash and that the rent fixed for the land was inadequate (*khafif*). Cancellation of the lease and recovery of Rs. 2,000 were prayed for.

The defendant Mumtaz Ali put in a written statement in which he demanded further particulars of the undue influence alleged in the plaint and denied that the plaintiff was otherwise than in good physical and mental condition on 9th May 1914. He also denied receipt of Rs. 2,000 and alleged that there was no connection whatever between the lease of 9th May 1914 and his application for sanction to the prosecution of the plaintiff. He further pleaded that even if Rs. 2,000 were paid and the lease granted by way of consideration for dropping the proceed-

ings under S. 195, Criminal P. C., the plaintiff could not recover the money or have the lease cancelled, the object of the transaction being to stifle a prosecution in respect of a non-compoundable offence. The other defendant adopted this defence. In an oral reply the plaintiff explained that undue influence was used, inasmuch as the defendants dealt with him when he was physically and mentally incapacitated by illness and mental distress and threatened to harass him if he did not cause them to withdraw the application for sanction by paying the money and granting the lease. The following are the issues material for the purpose of this appeal:

"(1) (a) Did the defendants recover Rs. 2,000 and get the patta by undue influence under the circumstances stated by the plaintiff? (b) Were the defendants in a position to dominate the plaintiff's will? (2) Were these transactions made for stifling a prosecution? If so, how is the claim affected? (3) Is the plaintiff entitled to any of the reliefs claimed?"

The trial Judge found that the Rs. 2,000 were paid to the defendants on 9th May 1914, but that the defendants were not then in a position to dominate the plaintiff's will, also that the consideration for the agreement leading to the payment of Rs. 2,000 and the lease was the compounding of a non-compoundable offence and, therefore, void being illegal and opposed to public policy. Finally the plaintiff was treated as in *pari delicto* with the defendants and his claim was dismissed *in toto*. In appeal both sides admitted that the lease was given with the object of having the application for sanction to prosecute the plaintiff dropped. Two contentions were pressed on behalf of the plaintiff, namely, that the compromise between the parties was not void for unlawfulness and that defendants brought about both the payment of Rs. 2,000 and the execution of the lease by the exercise of undue influence. The decree of the trial Judge was set aside and the case was remanded for fresh findings and decision with regard to the question embodied in an issue to which no reference need be made in this judgment.

The findings of the District Judge are in effect: (1) that the contract under which Rs. 2,000 were paid and the lease executed is voidable at the plaintiff's option, having been induced by undue influence on the part of both defendants; (2) that

both defendants joined in taking the money and the lease; and (3) that the transaction is not opposed to public policy and, therefore, not void. This appeal has been preferred by defendants. The first question to be decided is whether the agreement between the parties is opposed to public policy as found by the trial Judge. For the opposite view the lower appellate Court gave no reason except that to arrange for dropping an application for sanction to prosecute for a non-compoundable offence does not amount to compounding such an offence. The learned District Judge appears to have thought that a trial for an offence of the kind mentioned must be actually in progress to make an agreement for stilling a prosecution improper for the purposes of S. 23, Contract Act. I do not think this view is correct. In *Jones v. Merionethshire Permanent Benefit Building Society* (1) no prosecution was ever undertaken and the whole object of the agreement which the Court had to consider was that there should be no prosecution. On the subject of such agreements Bowen, L. J., remarked as follows (at p. 183):

"The duty to prosecute or not to prosecute is a social and not a legal duty, which depends on the circumstances of each case. It cannot be said that it is a moral duty to prosecute in all cases. The matter depends on considerations which vary according to each case. But the person who has to act is bound morally to be influenced by no indirect motive. He is morally bound to bring a fair and honest mind to the consideration and to exercise his decision from a sense of duty to himself and others. What is it that the law requires about the exercise of this moral duty? It is that it shall not be made a matter of private bargain."

In the case just cited the offence which has been committed was embezzlement and Bowen, L. J., (at p. 181), considered it impossible to deny that this crime was one committed against the public as well as against the individual, and in deciding what steps should be taken to punish it, the person who has to deal with the case must, if he is to discharge his moral duty, conscientiously consider the public as well as himself. To my mind this view is even more applicable to the offence of intentionally giving false evidence in a judicial proceeding. In the present case the parties arranged to drop a proceeding which by reason of S. 195 (1) (b), Criminal P. C., is an essential precedent to

a prosecution for giving false evidence and I do not think that any distinction can reasonably be drawn between this position and what would have obtained if after grant of sanction a complaint had actually been filed. Moreover the prohibition in S. 345 (7), Criminal P. C., seems to be a perfectly general one, which governs the composition of offences whether any steps to prosecute the alleged offender have been taken or not. What is required is, as stated in *Kishanlal v. Aman Singh* (2), a collusion between the parties affecting the due course of the criminal law. If the accused person is innocent the law is abused for the purpose of extortion; if guilty, the law is eluded by a corrupt compromise screening the criminal for a bribe: see *Keir v. Leeman* (3).

It is urged for the respondent that it is not open to a Judge to invent a new head of public policy or to condemn an agreement simply because in his opinion it is not consistent with public interest, and in this connection *Janson v. Driefontein Consolidated Mines Ltd.* (4) and *Hyams v. Stuart King* (5) are cited. But in the latter case it was laid down that the Courts will not shrink from acting on public policy if the contract sought to be enforced leads to immorality or crime. For cases in which the rule of public policy has been extended to new circumstances I may refer to *Wilson v. Carnley* (6), in which a promise of marriage made by a man who to the knowledge of the promisee was at the time of the making of the promise married, was held void, and to *Beard, In re, Reversionary and General Securities Co., v. Hall* (7), where a similar view was taken regarding a condition divesting the interest of a devisee or legatee if he enters into the naval or military services of the Crown. It is not however, necessary to rely upon invention in the present case, as the authorities already mentioned suffice to show. It is desirable before passing on to refer briefly to an argument on behalf of the appellants that the agreement is unlawful because the defendants and the plaintiff committed offences punishable respectively under Ss. 213 and 214, I. P. C. In this connec-

2. (1912) 8 N L R 97=16 I G 555.

3. (1844) 66 R R 392=6 Q B 308.

4. (1902) A C 424=71 L J K B 857.

5. (1908) 2 K B 296=77 L J K B 794.

6. (1908) 1 K B 729=77 L J K B 591.

7. (1908) 1 Ch 883=77 L J Ch 265.

1. (1892) 1 Ch 173=61 L J Ch 133.

tion I hold on the strength of *Queen Empress v. Saminatha* (8), *Girish Myle v. Queen Empress* (9) and *Emperor v. Sanatal* (10) that to establish the commission of these offences it is essential to prove the commission of the offence screened. The next question for determination is whether the bargain between the parties has been rightly held to have been induced by undue influence. In this connection the lower appellate Court has failed to notice that the plaintiff has not attempted to establish the threat which he alleged in his pleadings. R. 4, O. 6, Sch. 1, Civil P. C., requires particulars to be given where undue influence is relied upon and it is for a plaintiff to make out his case as laid. That the plaintiff was really influenced by any threat used to him by the defendants is negatived by his own evidence as P. W. 4, in the course of which he deposed as follows:

"The big criminal case in the Court of the Judicial Commissioner was decided in April 1914. The fact that the case before the Judicial Commissioner was pending was causing me great anxiety, and the application for sanction quite frightened me on that account. Each criminal case would frighten me. I do not mean that if case before the Judicial Commissioner had been decided in my favour, I would not have been in fear of the case before Mr. Mia Bhai. My Pleaders had told me that in no case could defendants get sanction to prosecute me in Mr. Mia Bhai's Court. My Pleaders always gave me this assurance. Nothing was done on the application beyond reading of pleadings. The defendants came to my house in May 1914 but I cannot say in which part of the month. They came to me at about 12 noon. I was seated alone when the defendants came. Defendants said: 'It will be well for you to return our village otherwise we shall file other cases against you.' I told them plainly that they might file any number of cases but that I would not return the village to them. I cannot say how long after this the settlement took place. Mr. S. C. Mukerji is my Pleader and I often go to him. I went to him some time after the defendants had talked to me. Mr. S. C. Mukerji himself started the talk and gave me the friendly advice that I should pay Rs. 2,000 and give a patta of 50 acres as demanded finally by the defendants. He said that it was possible sanction might be given. I did not quite agree with this advice and I said, *Yo mahaz jabran hai magar abru ka mamla hai ap ya tai karaden.*"

This passage too refutes the allegation in the plaint that the plaintiff was unable to attend the Magistrate's Court and oppose the application for sanction to prosecute him. The plaintiff appears to have made the settlement partly because, to use his own words, he was apprehensive for his

honour and partly at the suggestion of the Pleader Mr. S. C. Mukerji (P. W. 5), who conducted the negotiations and himself paid on the plaintiff's behalf to the defendants. The lower appellate Court has not found that the bargain was unconscionable, nor can I agree with its view that the false denial of Rs. 2,000, leads almost irresistibly to the conclusion that they exerted undue influence. Such evidence, as there is shows merely that the plaintiff was neither afraid of the defendants nor guided by his legal advisers, but acted on the suggestion of Mr. Mukerji and I hold accordingly. In *Amjadnessa Bibi v. Rahim Bakas Sikdar* (11) it was held that mere fear of punishment in a criminal case does not constitute undue influence, and the law as to obtaining refund of money or return of security given under agreement not to prosecute was laid down to be that the transactions could not be set aside unless the circumstances disclose pressure or undue influence. In the present case the illegal purpose of the parties had been executed and they being equally in fault the defendants must succeed in accordance with the maxim in *pari delicto*, potior est conditio possidentis. This appeal succeeds, the order of the lower appellate Court is set aside and the decree of the trial Judge restored. The appellants will have their costs in this Court and in the lower appellate Court but inasmuch as they falsely denied the payment of rupees 2,000 I direct that they bear their own costs in the Court of first instance so far as they arise out of that part of the claim.

P.N./R.K.

Order set aside.

11 (1915) 42 Cal 286=28 I C 718.

A. I. R. 1918 Nagpur 184

MITTRA, A. J. C.

Ramsa Haransa—Defendant—Appellant.

v.

Ratansa and another—Plaintiffs—Defendants—Respondents.

Second Appeal No. 328-B of 1917, Decided on 22nd July 1918, against Decree of Special Addl. Dist. Judge, Akola, in Civil Appeal No. 268 of 1916, D/- 30th April 1917.

Transfer of Property Act (4 of 1882), S. 53—Transaction amounting to preference to some creditors, is not voidable.

Preference shown to some creditors is not a ground for holding that a transaction comes within the scope of S. 53: A I R 1915 P C 115, *Foll.* [F 185 C 1]

8. (1891) 14 Mad 400.

9. (1896) 23 Cal 420.

10. (1913) 37 Bom 658=20 I C 613.

G. P. Dick—for Appellant.

M. V. Joshi—for Respondents.

Judgment.—The appellant obtained a decree against the husband of defendant 2 and attached the house in suit. The plaintiff, who is the father of defendant 1 filed an objection to the attachment on the basis of a sale-deed dated 27th August 1914, executed by the daughter in favour of the father. The objection was unsuccessful, and the present suit has been brought for a declaration that the sale was valid and that the house in suit is not liable to attachment. The defence of the appellant was that the sale was a nominal transaction intended to defeat and defraud the decree-holder. Both the Courts below have found that there was consideration for the sale-deed and that the transfer was a real transfer not intended to defeat the decree of the decree-holder. It is first contended that as the consideration money Rs. 700, was not paid to the vendor but to the creditors of the deceased husband of the vendor, the transaction was not a sale but one creating a security. I cannot agree with this. There was a sale for Rs. 700 and the purchaser, instead of paying the money to the vendor paid to her husband's creditors. The suggestion is a novel one, and it is consistent with the main defence put forward in the Court below.

It is contended that the vendor is in possession and hence the sale is nominal. This argument is based upon a misapprehension. The house itself has been leased, but the plaintiff and his daughter are, however, living in another house. This is a fact which has been noticed by the Courts below as one giving rise to no suspicion. It certainly does not justify my holding that the house in suit is not in the possession of the vendee. The appellant's decree has not been paid off, but the vendee made himself responsible only to the extent of Rs. 700 and he has proved to the satisfaction of the lower Court that he has paid the amount. No question was raised as to the adequacy of the consideration. Preference shown to other creditors is not a ground for holding that the transaction comes within the scope of S. 53, T. P. Act. The case cited in the lower Courts [*Musahar Sahu v. Hakim Lal* (1)] fully supports this view.

1. A I R 1915 P C 115=34 I C 313=43 Cal. 521=43 I A 104 (P C).

The appeal fails and is dismissed with costs.

P. N. S. R.

Appeal dismissed.

A. I. R. 1918 Nagpur 185

PRIDEAUX, A. J. C.

Shriram—Deceased—Appellant.

v.

Raguram and another—Plaintiffs—Respondents.

First Appeal No. 87 of 1917, decided on 17th April 1918, from decree of Addl. Dist. Judge, Raipur, D. No. 546 August 1917, in Civil Suit No. 150 of 1917.

Mortgage—Suit for foreclosure.—Court can pass personal decree for costs when there is condition to that effect in mortgage deed—Appeal lies.

In a suit for foreclosure a court may pass a decree directing that the costs of the suit should be recovered personally from the mortgagor, if there is a condition to that effect in the mortgage-deed: 3 A I R 27 Pat., [1915 C 2]

An appeal lies from a preliminary decree for foreclosure directing the recovery of the costs of the suit from the person of the mortgagor.

[1915 C 2]

J. C. Ghosh—for Appellant.

Almarani Bhagwant—for Respondent.

Judgment.—The suit from which this appeal arises was filed on two mortgage loans, dated respectively 7th May 1912 and 18th March 1914. The foreclosure decree asked for has been obtained. In this appeal I am concerned with the question of costs. The lower Court, following the stipulations in the two documents sued upon, has given the plaintiff a personal decree for costs of the suit against the present appellant. It is contended for him that this should not have been done. A preliminary objection is raised that no appeal lies. *Sidha Gopal Brahmin v. Purni* (1) is quoted in support of the objection. This authority does not seem to me applicable, for the decree in the present case cannot be said to be final. It seems to me that an appeal does lie. On the merits, however, I am of opinion that the appellant has no case. There is no valid reason why the mortgagee in the present case should not get his costs and as both mortgage-deeds contain personal convenants to pay, the lower Court was in its discretion justified in directing that such costs should be recovered from the appellant personally. That a Court may award costs personally is clear from

1. (1906) 2 N L R 49.

Dhondu v. Daulatpuri (2). The appeal fails and is dismissed with costs.

P. N. / R. K. *Appeal dismissed.*

2. (1907) 3 N L R 97.

A. I. R. 1918 Nagpur 186(1)

MITTRA, A. J. C.

Sitabai—Applicant.

v.

Babu Anna and others—Non-Appllicants.

Civil Revn. No. 104 of 1917, Decided on 5th October 1918, to revise order of Dist. Judge, Amraoti, in Misc. Probate Case No. 1 of 1901, D/ 9th May 1917.

Will — Administrator — Public Officer should not be appointed administrator.

In the absence of a statute authorising such an appointment, a public officer and his successors-in-office should not be asked to undertake the duties of an administrator, which are outside their official duties. [P 186 C 1]

One of the executors appointed under a will retired with leave of Court and the other became an insolvent whereupon the Court appointed the Deputy Commissioner of the District to act as administrator of the estate:

Held: that the order appointing the Deputy Commissioner to act as administrator was ultra vires and must be set aside. [P 186 C 1]

G. V. Deshmukh—for Non-Appllicants.

M. V. Joshi and V. D. Sathey—for Opposite Party.

Order.—Of the surviving executors appointed under the will of Mr. Jog one has become insolvent and the other retired with the permission of the Court. The District Judge has now appointed the Deputy Commissioner, Amraoti, to act as administrator. This order is ultra vires. In the absence of a statute authorising such an appointment, a public officer and his successors-in-office cannot be asked to undertake duties outside their official duties. Before inviting the Deputy Commissioner to become administrator, the District Judge should have fully realised the situation in which he was placing him. The administrator has to collect debts, pay legacies and carry out the terms of the will, and these duties may be prolonged indefinitely during the lifetime of the legatees and the testator's widow *Sitabai*.

Suits will have to be filed by the administrator and it is difficult to see how funds are to be supplied to him. He may be held responsible for the costs of litigations if eventually the appeal now pending before the Privy Council is successful, I hold that the order was ultra vires and it is accordingly set aside. My

attention has also been called to a previous order to be found in the order sheet dated 30th April 1917, in which it is recited that the appointment of Mr. Jog as guardian is cancelled. This is not correct. So far as I can find, there is no such order either in these proceedings or in the proceedings under the guardianship case. Each party will bear the costs of this petition of revision in both Courts.

P. N. / R. K.

Order set aside.

A. I. R. 1918 Nagpur 186 (2)

KOTWAL, A. J. C.

Jwalaprasad—Defendant—Appellant.

v.

Pundlik Pandurang—Plaintiff—Respondent.

Second Appeal No. 607 of 1917, Decided on 25th April 1918, from decree of Dist. Judge, Bhandara.

Contract Act (1872), S. 176 — Pledge — Notice before suit is not necessary.

Section 176 requires a notice only when the pawnee wishes to exercise his option of selling the pledged goods. If he chooses to bring a suit upon the debt, no notice is required by that section. [P 186 C 2]

G. R. Pradhan—for Appellant.

Judgment.—In view of the finding of the lower appellate Court that the plaintiff had verbally asked the defendant to re-pay the loan several times, I cannot see my way to interfere with that Court's decision. S. 176, Contract Act, requires a notice only when the pawnee wishes to exercise his option of selling the pledged goods. If he chooses to bring a suit upon the debt no notice is apparently required by that section. As to ground 1 it seems me that the whole case was here opened up on record, and it was open to the lower appellate Court to reconsider its finding arrived at the ex parte hearing. The finding may have been adverse to the appellant on that hearing, because he may have thought it unnecessary to prove his case fully on the point involved in the finding, hoping to succeed on the other points. At any rate the finding referred to in the ground 1 makes no difference to the result of the appeal before the lower appellate Court.

This appeal fails and is dismissed under O. 41, R. 11, Civil P. C.

P. N. / R. K.

Appeal dismissed.

A. I. R. 1918 Nagpur 187 (1)

MITTRA, A. J. C.

Dindayal Sheodutta—Plaintiff—Appellant.

v.

Mt. Sukha and others—Defendants—Respondents.

Second Appeal No. 484 of 1917, Decided on 26th August 1918, from decree of Addl. Dist. Judge, Bilaspur, in Civil Appeal No. 780 of 1917, D/- 4th July 1917.

(a) C. P. Tenancy Act (1898), S. 81 (b)—Adjudication between persons impleaded as parties is necessary.

To bring a case under Cl. (b), S. 81 it is necessary that there should have been an adjudication as between persons impleaded as parties to the suit and having conflicting interests: 14 C. P. L. R. 31, *Foll.* [P 187 C 2]

(b) C. P. Tenancy Act (1898), S. 81 (b)—Suit for arrears of rent—Amount less than Rs. 100—Defendants denying liability on ground of relinquishment of share—Held second appeal did not lie—Case did not fall under Cl. (b), S. 81.

Plaintiff malguzar sued the defendants for arrears of rent, the amount of which was less than Rs. 100. The defendants pleaded that they were not liable for rent as they had relinquished their share in the holding in favour of their nephew J.

Held: that no second appeal lay, inasmuch as the amount claimed was less than Rs. 100, and the case did not fall under Cl. (b), S. 81, C. P. Tenancy Act, J. not being a party to the suit and the defendants and J. not having conflicting claims with regard to the tenancy. [P 187 C 1]

P. S. Kotwal—for Appellant.

Gangadhar Sitaram—for Respondents.

Judgment.—The plaintiff-appellant, who is the malguzar of the village, sues the defendants for arrears of rent. The defence was that by a compromise they have relinquished their share in the holding in favour of their nephew one Jodha and have therefore ceased to be liable for rent. The defence has prevailed in the Court below, and this second appeal has been filed by the landlord. The preliminary point for decision is whether having regard to the provisions of S. 98, Tenancy Act, there is a second appeal. The amount claimed was less than Rs. 100. Admittedly there will be no second appeal unless the case comes under Cl. (b), S. 81, that is,

"unless a question relating to a title to land or some interest in land has been determined as between parties having conflicting claims thereto."

The plaintiff's title to the land has never been disputed. But it is urged that a decision has been arrived at regarding the rights to the tenancy as between the defendants and Jodha. Jodha was not a

party to the suit, nor can the defendants and Jodha be said to have had conflicting claims with regard to the tenancy. The defendants admit Jodha's right and do not dispute it. To bring the case under Cl. (b) it is necessary that there should be an adjudication as between persons impleaded as parties to the suit and having conflicting interests. *Hempaj As-karan v. Kankhalal* (1). Neither of these conditions is fulfilled in this case. The appeal is dismissed with costs, on the ground that no appeal lies in the case.

P. N. R. K. *Appeal dismissed.*

L. (1901) 14 C. P. L. R. 31.

A. I. R. 1918 Nagpur 187 (2)

BATTEN, OFFG. J. C.

Vithoba and others—Defendants—Appellants.

v.

Sego and another—Plaintiffs—Respondents.

First Appeal No. 45 of 1917, Decided on 23rd February 1918, against judgment of Dist. Judge, Bhandara, in Civil Suit No. 33 of 1915, D/- 31st January 1917.

(a) Minor—Decree against—Setting aside—Though gross negligence of guardian in conducting suit is ground for minor suing for setting aside decree still mere bad management of suit or omission to raise money by further encumbering estate to prevent final decree being passed is not ground for setting aside decree unless guardian's conduct amounts to fraud.

Gross negligence on the part of a guardian or next friend in conducting a suit on behalf of a minor is a good ground for the minor to bring a suit for setting aside the decree. [P 189 C 2]

But mere bad management of a suit by the guardian or an omission to raise money on behalf of the minor by further encumbering the estate, in order to prevent a final decree in a mortgage suit from being passed, is not a sufficient ground for setting aside a mortgage decree unless the conduct of the guardian amounts to fraud or gross negligence: (1894) A. W. N. 141. *Foll.* [P 189 C 2]

(b) Interpretation of Statutes—*Audi alteram partem*—Applicability of.

There is no exception to the rule *audi alteram partem* unless such an exception is made by legislation. [P 190 C 2]

(c) Civil P. C. (1908), O. 17, R. 2—Non-service of summons on minor's guardian—*Ex parte* decree passed—Minor's remedy is under R. 13, O. 9 and not by separate suit unless absence of guardian amounts to gross negligence on his part—Civil P. C. (1908), O. 9, R. 13.

The mere non-service of summons on a party to a suit is not a sufficient ground for setting aside the decree in a fresh suit unless it is part of a scheme of fraud. [P 191 C 1]

If an *ex parte* decree is passed against a minor under O. 17, R. 2, Civil P. C., the remedy of the

minor acting through his guardian lies in the provisions of O. 9, R. 13 of the Code, and he cannot obtain relief in a separate suit unless the absence of the guardian has resulted in such an injustice to the minor as would amount to gross negligence on the part of the guardian.

[P 191 C 1]

(d) Minor—Minor represented by guardian—Ex parte decree—Minor does not cease to be represented owing to absence of guardian.

A minor once represented by a guardian does not cease to be so represented merely because an ex parte decree is passed against him owing to the absence of his guardian.

[P 191 C 1]

M. Gupta, S. Ramdas and R. B. Waghare—for Appellants.

B. K. Bose, V. Bose, V. M. Jakatdar and M. Bhawani Shankar—for Respondents.

Judgment.—This appeal arises out of a suit filed as a sequel to the case disposed of in Miscellaneous Appeal No. 30 of 1913 disposed of on 6th February 1915. The minor defendants in Suit No. 50 of 1908, Sego and Jagan, have now brought a suit for a declaration that the decree final in that suit is null and void and for possession of the mortgaged property, alleging that the mortgage debt has been fully satisfied by the usufruct of the property since it has been in the decree-holder's possession. In the alternative they ask to be allowed to redeem in case any balance of the mortgage debt remains unsatisfied. The District Judge has granted a decree that the final decree passed against the plaintiffs in Suit No. 50 of 1908 does not bind them and is null and void as against them. He has not, however, granted a decree for possession or redemption but has relegated the parties to the position they were in before the decree final was passed. It is admitted by both sides that if the District Judge is right in holding that the decree final does not bind the plaintiffs, the form of the decree in this suit is a correct one. The plaintiffs claim that relief should be granted on three grounds. The first is fraud on the part of the decree-holders; the second is negligence on the part of Budhu, the guardian ad litem of the plaintiffs in the former suit; thirdly, it is said that the decree final is void against the plaintiffs as they were not properly represented by a guardian ad litem when the decree was passed. The learned District Judge has held that none of the allegations of fraud made against the decree-holders have been proved, and this finding has not been challenged in argument

by the learned counsel for the respondents. The nature of the fraud alleged is, however, closely bound up with the charge of negligence directed at Budhu.

The facts of the case as regards the circumstances in which the decree was made final have been fully set out in the former judgment of this Court and the judgment appealed against and need not be repeated fully here. It is sufficient to say that Budhu is the full brother of one appellant and stepbrother of the other appellant and was their guardian ad litem. When the decree-holders applied for a final decree for foreclosure, a notice was issued to the minors in which they were described as minors by guardian Sakham, Sakham being their father. Sakham was not their guardian ad litem, but it has been found that the notice was drawn up incorrectly not through anybody's fraud but by a pure mistake Sakham having been nominated as guardian ad litem by the plaintiffs in that suit at the commencement of the proceedings. He declined to act as guardian of his sons and then Budhu was appointed guardian ad litem. Even Sakham was not served as guardian of the minors but the notice was served on the minors personally. Subsequently on 25th September 1910 service was made on Sakham and Budhu, defendants 1 and 2 in the case, in their own names and not as guardians of the minor defendants. The notice was to appear on 8th October 1910, but they did not appear, and the notices were held to have been duly served on them. What happened was, and this is the version adopted by the plaintiffs in this suit, that Sakham and Budhu, when they saw the process server appear, concealed themselves inside the house and the notices were affixed to the house.

In the lower Court the charges of fraud made against the decree-holders have been broken down and no attempt is made to sustain them in this Court. The specific acts of negligence alleged against Budhu are: (1) that he made no attempt to raise the mortgage money before 15th April 1910, the date named for payment in the preliminary decree; (2) that he did not apply on the minors' behalf to set aside the ex parte final decree against the minors; and (3) that he did not appeal against the final decree on behalf of the minors on the ground that it had been passed behind their backs. In estimat-

ing the negligence, if any, on the part of Budhu we must see what the allegations made by the plaintiffs are, and these are contained in the main charge of fraud against the decree holders. The plaintiffs allege that on 25th September 1910, when Budhu and Sakharan concealed themselves within the house from the process-server, a compromise was effected inside the house between the parties, and the defendants stated to the mothers of the plaintiffs that they would not get the decree made final for the full 5 annas 4 pies mortgage, but would give up the minors' share of the property and accept the other half of the property in full satisfaction of the decree. According to the plaintiffs' case therefore what they would have argued if they had appeared through their guardian as from on 8th October 1910, is that the decree-holders had released their share of the property. The story about the alleged compromise on 25th September 1910 has on very good grounds been found to be a tissue of falsehoods and this finding is accepted in this Court. I do not understand how the plaintiffs can complain that their guardian did not appear for them and tell a story which has now been found to be absolutely false. There can be no negligence in omitting to come forward and tell a false story. It is nowhere alleged in the plaintiffs' pleadings that if they had appeared through a diligent guardian they would have asked for an extension of time. According to their case what they would have pleaded would have been something perfectly different. Presumably any appeal made on behalf of the plaintiffs would have put forward the story that has now been put forward and is found to be false. I do not see how we can ignore the plaintiffs' pleas in the present case and suppose that a different case might have been put forward for them than the one they have advanced now. But even if we ignore the specific allegations made by the plaintiffs, it remains to be seen whether Budhu can be said to have been negligent in not raising the money, in not applying to have the ex parte decree set aside on the ground that the minors have not been served and in not appealing against the decree on the same ground.

As to the alleged negligence in not raising the money, the plaintiffs' plea is that the other cosharer of Mouza Pal-

longuri was willing to advance the money on easy terms, that is to say, that the money might have been raised by further unumbering the property. Budhu and Sakharan did not raise the money in their own interest and an omission to raise the money on behalf of the minors by further unumbering the estate is not such an act of gross negligence as would entitle the plaintiffs to set the decree aside as a nullity. It is not a fact that the money was available on 8th October, the date on which the decree was made final, and in these circumstances it cannot be imputed as an act of gross negligence that Budhu failed to appear or failed to take steps to set aside the ex parte decree. No money was deposited on account of the plaintiffs until 25th August 1912. No doubt gross negligence on the part of a guardian or next friend in conducting a suit on behalf of a minor is a good ground for the minor setting aside the decree: vide *Lalla Sheo Churn Lal v. Ramnandan Dohy* (1), *Ram Sarup Lal v. Shah Lalajit Hosain* (2), *Golepati Sabhara v. Golepati Narasamma* (3). But mere bad management of a suit by the guardian is not a sufficient ground for setting aside a decree unless it amounts to fraud or gross negligence: vide *Daulat Singh v. Raghubir Singh* (4). The time for payment expired on 15th April 1910, and the decree was made final on 8th October 1910. The minors through their guardian could have asked for an extension of time quite independently of any application by the decree holders for making the decree final. No such application was ever made on their behalf. In the circumstances of the case it was not gross negligence on the part of the guardian to abstain from seeking to set aside or appealing against a final decree merely on the ground that the minors had not been noticed. It was an omission on his part which may well have been the wisest course in the circumstances of the case. It would have been gross negligence not to appeal or apply for restoration if the money had been paid or if the alleged compromise had really taken place, but it was not necessarily negligence to abstain from doing so when

1. (1895) 22 Cal 8.

2. (1902) 29 Cal 735.

3. A I R 1915 Mad 381=26 I C 16.

4. (1891) A W N 141.

all that could be hoped was that the Court might possibly grant an extension of time, which had not been asked for up to the date of the hearing of the application to make the decree absolute.

We next come to the most important question in the case namely, whether the final decree is a nullity against the minors because they were not noticed when the decree-holders applied to have the decree made final. The District Judge seems to think that this point has been settled by my remarks in the former case. This is not so. I held and I still hold that the minors' guardian was not noticed, and, therefore, the minors were not represented at the hearing when the decree was made final. I did not intend to say nor could I say, that the minors were entirely unrepresented so that the proceedings against them were void. Nothing I said in the former appeal can possibly make this question *res judicata*. I will first dispose of three arguments raised on behalf of the appellants. It is first of all urged that on an application being made for an order under O. 34, R. 3 (2), for a final decree the non-applicant party concerned is not entitled to notice thereof or to appear and be heard in answer thereto. It is urged that the ruling in *Seth Bagandas v. Shridhar* (5) is no longer to the point, since under the present Civil Procedure Code all proceedings up to the granting of a final decree are proceedings in the suit. I am of opinion, however, that the principles of that ruling are still in force. The proceedings started by an application to make a foreclosure decree final are no doubt proceedings in the suit, but they are a fresh stage in the proceedings which are opened by the application. The mere mentioning of a date for payment in the preliminary decree cannot possibly be a notice of the re-opening of the fresh stage of the proceedings beginning with an application to make the decree final.

Where there is no possibility of giving the parties a date for further hearing, then the other side must be given a notice when the proceedings are re-opened by one party or the other. To ignore this rule would be to neglect the maxim *audi alteram partem*. Under O. 21, R. 22, it is provided that in execution cases notice to the judgment-debtor need be given only if the application is made more than a

year after the date of the decree. This seems at first sight to be an exception to the rule laid down by the maxim, but it is not really so. If nothing at all were said about noticing the other side then a notice would have to issue. What R. 22, really means is that the rule is that the other side should be noticed, but that rule need not be observed if the application is made less than a year after the date of the decree. This is not an execution case but I have mentioned the point in order to show that there is no exception to the rule *audi alteram partem*, unless such an exception is made by legislation. It is next urged for the appellants that the service on the minors personally was a valid service. No serious argument has been addressed in support of this contention, which I consider to be unsustainable. This plea certainly does not obtain adequate support in some remarks of Wilson, J., in *Suresh Chander Wum Chowdhry v. Jagat Chander Deb* (6). It is also suggested that the fact that Budhu was personally served was a sufficient service on the minors of whom he was the guardian, though he was not served as their guardian. I am not prepared to say that the service on a guardian personally as a party to the suit can never be a good service on the minors of whom he is the guardian, but I adhere to my opinion that in this case the service on Budhu cannot be regarded as a proper service of the notice to the minors through their guardian inasmuch as Budhu never subsequently acted in the capacity of the minors' guardian. When he applied in Ex. P 10 to set aside the *ex parte* decree, he did so on his own behalf and not on behalf of the minors.

The main contention on behalf of the appellants is that the final decree is merely an *ex parte* decree in the ordinary sense of that term, liable to be set aside in the prescribed manner, and not a mere nullity not requiring to be set aside or liable to be set aside only by a separate suit. On the one hand we have a class of cases dealt with in *Rashid un-nisa v. Muhammad Ismail Khan* (7), *Sham Lal v. Ghasita* (8), *Hanuman Prasad v. Muhammad Ishaq* (9), *Khairaj Mal v. Daim* (10) and

6. (18-7) 14 Cal 204 (F B).

7. (1909) 31 All 572=36 I A 163 (P C) 3 I C 864.

8. (1901) 23 All 459.

9. (1905) 28 All 137.

10. (1905) 32 Cal 296=32 I A 23 (P C).

Purna Chandra Kumar v. Bejoy Chand (11). These were all cases in which either no guardian at all was appointed at any stage of the suit or in which the guardian appointed was not legally competent to be a guardian or next friend. On the other hand we have a class of cases instanced by *Raghubar Dyal Sahu v. Bhikya Lal Misser* (12), where throughout the suit the infant has been duly represented by his guardian. In such a case where the infant after attaining majority seeks to set aside that decree by a separate suit, he can succeed only on proof of fraud or collusion on the part of his guardian. In the present case the plaintiffs were duly represented by their guardian and that representation undoubtedly extended until the termination of the suit by the passing of the final decree. After studying the cases, *Narsing Das v. Bibi Rafi-kan* (13), *Pran Nath Roy v. Mohesh Chandra Moitra* (14), *Radha Raman Shaha v. Pran Nath Roy* (15), *Khages-dra Nath Mahata v. Pran Nath Roy* (16) and *Puran Chand v. Sheo Dal Rai* (17), it seems to me clear that the mere non-service of summons on a party to the suit is not a sufficient ground to set aside the decree in a fresh suit, though where the non-service is a part of a scheme of fraud the decree might be set aside.

There are no rulings exactly on all fours with the present case. The first question that arises is whether a minor who is duly represented by a guardian is in a better position than an adult. He would certainly be in a better position if he was not served because no guardian was appointed for him. If an ex parte decree is passed against a minor under O. 17, R. 2, it appears to me that the remedy of the minor acting through his guardian lies in the provisions of O. 9, R. 13, and he cannot obtain relief in a separate suit unless the absence of the guardian has resulted in such injustice to the minor as would amount to gross negligence on the part of the guardian. In other words, a minor once represented by a guardian does not cease to be so represented merely because an ex parte decree is passed against him owing to the absence

of his guardian. The further question remains whether the minors in the present case can be said not to have been represented because no notice was served on their guardian at the opening of the fresh stage of the suit. After some consideration I am of opinion that the minor cannot be said not to have been represented by a guardian. They were represented, but an ex parte order was passed against them in circumstances which would have entitled their guardian to apply to have the ex parte decree set aside under O. 9, R. 13. The Court took steps to have the minors served but owing to a mistake of procedure they were not served. It appears to me that they are exactly in the same position as if their guardian had been served but had been unavoidably prevented from attending in circumstances which entitled him to have the ex parte decree set aside. In such circumstances I do not think it can be said that the minors were not represented at all.

The lower Court has held that there was no fraud, and I have held that there was no gross negligence on the part of the guardian, and I am of opinion in the special circumstances of the case that while the minors could have applied to set aside the ex parte decree under O. 9, R. 13, they cannot set aside the decree under a fresh suit since the decree was not a nullity but an ex parte decree within the ordinary meaning of that term. To hold otherwise would, in my opinion, be to hold that when a defendant is entitled to get a decree set aside under O. 9, R. 13, he is always, as a matter of course, entitled to set aside the decree by a separate suit if he is a minor. I do not find anything in the circumstances of this case to entitle the plaintiffs to any special consideration. For the above reasons, I set aside the decree of the District Judge and dismiss the suit with costs in both Courts.

P.N./R.K.

Decree set aside.

A. I. R. 1918 Nagpur 191

DRAKE-BROCKMAN, J. C.

Shiva Prasad Singhai — Applicant — Appellant.

Lachman Prasad — Non-applicant — Respondent.

Misc. Appeal No. 68 of 1917, Decided on 18th June 1918,

11. (1913) 18 I C 859.

12. (1886) 12 Cal 69.

13. (1910) 37 Cal 197=5 I C 192.

14. (1897) 24 Cal 546.

15. (1901) 28 Cal 475.

16. (1902) 29 Cal 395=29 I A 39. (P.C.).

17. (1907) 29 All 212.

(a) Civil P. C. (1908), Sch. 2, Paras. 15 and 16—Decision not in excess of award—Appeal does not lie.

Where a case has been referred to arbitration, no appeal lies from the decision of the Court if it is not in excess of or otherwise than in accordance with the award. [P 192 C 2; P 193 C 1]

(b) Civil P. C. (1908), Sch. 2, Paras. 15 and 16—Decree in term of award—Appeal does not lie.

A decree made in accordance with an award cannot be challenged by way of appeal on the ground that there is no valid and legal award.

[P 193 C 1]

G. L. Subhedar—for Appellant.

N. Gupta—for Respondent

Judgment.—The parties to this case occupy contiguous premises in the town of Saugor. Between their houses runs a lane which forms part of the plaintiff's property, and he sued to obtain an injunction restraining the defendant from passing dirty water from a latrine over his lane. In appeal the District Judge on 9th December 1914 gave the plaintiff a decree in the following terms:

"It is hereby ordered and decreed in favour of plaintiff that the defendant do build a cesspool for the reception of the dirty water flowing from his house and latrine on his own ground in order to prevent its outflow on to the plaintiff's kulla and be further restrained from causing the water to pass and flow over the kulla. The decree shall be subject to the reservation in favour of the defendant that should it be found that the cesspool cannot be made at any place in defendant's ground other than at a point between X and Y in order to prevent the outflow of filthy water of the defendant's house it may be built at this point."

From the wording it would naturally be inferred that the spot between X and Y, which letters are to be found in a plan annexed to the plaint, is itself within the defendant's premises, but the parties are agreed that this is not the case, the spot being in fact on the plaintiff's side of the boundary. On 7th September 1915 in the course of proceedings taken upon the plaintiff's application for execution of the decree, it was agreed that the decree-holder should construct the cesspool at the judgment-debtor's cost and a receptacle was accordingly made on the judgment-debtor's premises. On 10th January 1916 the judgment-debtor complained that in executing the work the decree-holder had improperly interfered with an existing latrine and that the directions in the decree had not been complied with. This complaint was dismissed by the executing Court, but in appeal a further inquiry was ordered by the District Judge. Further pleadings

were then recorded and the following issues were framed on 2nd February 1917:

"1. Whether there were latrine seats in the lane in which the cesspool is made and whether the judgment-debtor was using them? 2. Whether the decree-holder in constructing the cesspool removed those seats and they cannot now be conveniently placed there and used as before? 3. Whether the cesspool in question produces bad smell and causes nuisance to the members of judgment-debtor's house?"

"4. What is the length of this cesspool? 5. Was there an old cesspool as shown in judgment-debtor's map between X and Y and whether it will be convenient to make a cesspool there instead of at its present site?"

On 12th March the parties moved the Court for an order of reference to arbitration, naming two arbitrators and praying the Court to nominate a third. The Court appointed a third arbitrator and selected him as umpire. In its order of reference the Court directed a copy of the issue to be supplied to the arbitrators and stated the question for decision as follows:

"Whether the cesspool as at present made is convenient to the parties, or whether it would be convenient to make a cesspool between X Y as shown in the applicant's map."

The arbitrators named by the parties having differed in opinion, the umpire decided on 19th April 1917 that the new cesspool caused serious inconvenience to the judgment-debtor and that X Y is the most convenient site for the required structure. The decree-holder objected to the umpire's decision on several grounds, with which we are not now concerned as they are admitted to be without substance. On 29th June the Munsif overruled all the objections and directed the decree-holder to construct a new cesspool at X Y. The decree-holder then appealed to the District Court, which held the award to be invalid and directed the executing Court to continue its proceedings according to law. The learned Additional District Judge overruled an objection that no appeal lay from the lower Court's order based upon the award, and citing *Kewal Lodhi v. Baijnath* (1) decided that the order of reference was invalid by reason of the omission to raise the question whether the cesspool could not be built at some place on the judgment-debtor's land and that the award based on such a reference is invalid. The judgment-debtor has now moved this Court contending that no appeal lay, inasmuch as the decision of the executing Court is not in excess of or otherwise than in accordance

with the award and I am clearly of opinion that this contention must succeed. In the decision of this Court relied upon below no reference is made to the decision of the Privy Council in *Ghulam Khan v. Muhammad Hassan* (2), where it was laid down (at p. 183) that to hold that an appeal lies from a decree pronounced under S. 522, Civil P. C., 1882, except in so far as the decree may be in excess of or not in accordance with the award, would be doing violence to the plain language and the obvious intention of the Code. In *Chairman of the Purnea Municipality v. Siva Sankar Ram* (3) decided in the same month as *Kewal Lodhi v. Baij Nath* (1), the effect of the decision of the Privy Council was considered by Maclean, C. J., and Mookerjee, J., and the view was accepted that a decree made in accordance with an award cannot be challenged by way of appeal on the ground that there is no valid or legal award. That view was approved by a Divisional Bench of the Madras High Court in *Kanaka Nagalinga v. Nagalinga* (4), where also the effect of S. 522, in the 1882, Civil P. C., fell to be considered. That this view has been accepted by the legislature seems to me placed beyond the reach of doubt by the insertion of the words "or being otherwise invalid" in sub-para. (1)(c), para. 15 Sch. 2, Civil P. C., 1908. Authority in support of this opinion will be found in the Full Bench decision of the Allahabad High Court in *Lutawan v. Lathiya* (5), in *Batcha Sahib v. Abdul Ganng* (6) and in *Khundiram Mahto v. Chandi Charan Mahto* (7).

I would also observe that on the ground upon which the Additional District Judge held the order of reference, and therefore the award to be invalid was not put before the executing Court at all and that it might not unfairly be inferred from this omission that the parties assumed, as the executing Court evidently did, that if the present site is really unsuitable X Y would necessarily be selected. In this connection it is important to notice that on 12th March 1917 when the order

of reference was passed, each of the parties was represented by a pleader who signed the order sheet. The respondent has endeavoured to support the Additional District Judge's order by citing *Bindesuri Pershad Singh v. Jankoo Pershad Singh* (8) and pointing out that the application for an order of reference does not state the matter in difference between the parties, though particulars in this respect are made essential by para. 1 (2), Sch. 2, Civil P. C., and the connected form in the appendix thereto. In the case relied upon, the agreement of submission to arbitration was indeed held to be vague and indefinite, but it further failed to clearly lay down the power of the arbitrator in dealing with the subject matter in dispute—a defect which cannot be said to exist here. Moreover the learned Judges of the Calcutta High Court interpreted under S. 522 of the 1882 Code while in the Privy Council case above cited a revision was deprecated as even more objectionable than an appeal. Interference by way of revision was refused in *Batcha Sahib v. Abdul Ganng* (6) above cited on the strength of the plain general policy of the legislature that in a matter of arbitration the judgment in accordance with an award should be final. I am quite unable to think that in the present case a discretion in favour of the decree-holder should be exercised if indeed the law permits of any discretion being exercised in the matter.

Holding that the order of the executing Court, pronounced under para. 16 (1), is final under para. 16 (2), Sch. 2, Civil P. C., I allow this appeal and setting aside the order of the Additional District Judge restore that passed by the executing Court on 29th June 1917. All costs hitherto incurred will be paid by the decree holder.

P.N./R.K.

Appeal allowed.

S. (1889) 16 Cal 482=S Ind Dec (n s) 318.

* A. I. R. 1918 Nagpur 193

PRIDEAUX AND KOTWAL, A. J. Cs.

Sultan Beg and others—Defendants—Appellants.

v.

Chunilal Maluram Shop—Plaintiffs—Respondents.

First Appeal No. 13-3 of 1917, Decided on 17th April 1918.

2. (1902) 23 Cal 167=23 I A 51 (P C).

3. (1906) 31 Cal 899.

4. (1909) 32 Mad 510=4 I O 871.

5. A I R 1914 All 416=21 I O 993=36 All 69 (F B).

6. A I R 1914 Mad 675=21 I C 303=38 Mad 256.

7. (1916) 1 P L J. 306=35 I C 358.

* (a) Civil P. C. (1908), S. 109, (a) and O. 41, R. 23—Order of remand is not final order within S. 109 (a).

An appeal does not lie to His Majesty in Council against an order of remand under O. 41, R. 23, Civil P. C., as it is not a final order within the meaning of S. 109 (a). [P 194 C 2]

* (b) Civil P. C. (1908), O. 41, Rr. 23 and 25—Remand under S. 23, cannot be reconsidered in subsequent appeal from decision of first Court after remand—But order under R. 25 can be reconsidered.

In a remand under O. 41, R. 23, the case remains pending or undisposed of on the appellate Court's file, and the Judge may yield to conviction and change his mind at any time before he has pronounced a final judgment. A remand order under O. 41, R. 23, however, cannot be reconsidered in a subsequent appeal from the decision of the first Court after remand. [P 195 C 1]

H. S. Gour and V. V. Chitale—for Appellants.

N. K. Phadke and M. R. Bobde—for Respondents.

Judgment.—The suit out of which this appeal arises was one to enforce a mortgage executed by the three defendants, who are now appellants, on 25th February 1898. The properties mortgaged were at the date of the mortgage under the management of the Collector in execution proceedings taken by one Magniram Tansukrai to realise a decree obtained by him against the appellants. The Additional District Judge, without going into the merits of the case, dismissed the suit on the preliminary ground that the mortgage was taken without the written permission of the Collector and was void under S. 325-A, Civil P. C. 1882. On appeal by the plaintiff it was held by a Bench of this Court that the transfer was not void, and although for want of the Collector's concurrence it was at its inception inoperative, just as in the case of a conveyance by a person with a defective title, it did not necessarily follow that it was open to the transferors to repudiate it when the management of the Collector was over and they were in a position to make good their contract. The question for determination was, in the opinion of the Bench, not so much whether the transfer was void or voidable, but whether, though inoperative, it might not give rise to an equity. The case was on 23rd January 1914 remanded to the 1st Court for a trial on the merits. That Court after trying the case on the merits has on 31st October 1916, decreed the plaintiffs' claim and the present appeal is from that decree. Although a number

of grounds were taken in the memorandum of appeal attacking the findings of the first Court on the merits, they have not been pressed before us, and the learned counsel for the appellants has frankly admitted that he has no case on the merits. He, however, relies on a decision of a Full Bench of this Court published as *Salu Bai v. Bajat Khan* (1), wherein the view taken in the remand order of the Bench in the present case has been overruled, and asks us to reconsider that order and to uphold the original decree of the first Court dismissing the suit.

The respondent has urged that S. 105, (2), Civil P. C. 1908, debars the appellants from disputing the order, as it could have been appealed from to His Majesty in Council as a final order under S. 109, (a), and no appeal was preferred. In Miscellaneous Petition No. 16 of 1914, for leave to appeal to His Majesty in Council from First Appeal No. 19 of 1912, a Bench of this Court, following *Ahmad Husain v. Gobind Krishna Narain* (2), and *Venkataranga Row v. Narasimha Rao* (3), has held that, under S. 109, Civil P. C., an appeal does not lie to His Majesty in Council against an order of remand under O. 41, R. 23, as it is not a final order within the meaning of S. 109 (a), and also that S. 109 (c), is not applicable. We are not prepared to differ from that decision and hold that S. 105, (2), does not debar the appellants from disputing the order of remand. In asking us to reconsider the order of remand two arguments are advanced; first, that the case having come up again in appeal the whole of it is opened up for our consideration; second, that we are bound to exercise our inherent power under S. 151, Civil P. C. and for the ends of justice reverse the order of remand. With reference to the first argument reliance is placed by the appellant's learned counsel upon the following rulings; *Ganendra Nath Roy v. Surja Kanta Roy* (4), *Thakur Sheo Narain Singh v. Thakur Bishunath Singh* (5), *Hira Lal Pal v. Etbar Mandal* (6), and *Debi*

1. (1917) 13 N L R 130=42 I C 200 (F B).

2. (1911) 33 All 391=9 I C 932.

3. A I R 1915 Mad 423=21 I C 342=38 Mad 509.

4. (1912) 15 I C 39.

5. A I R 1914 P C 153=22 I C 315=17 O O 33 (P C).

6. (1916) 32 I C 866.

Baksh Singh v. Habib Shah (7). The Allahabad case cited last is a case where their Lordships of the Privy Council held that the course adopted in the Court of the Judicial Commissioner in applying rules or orders dealing with the case of the non-appearance of a suitor to the situation which arises when the suitor is dead amounted to abuse of the process of the Court, and it is such abuse that the Court had inherent power to prevent under S. 151, Civil P. C. and that apart from the Code any Court has an inherent power to rectify a mistake inadvertently made. This decision deals only with the question of a mistake inadvertently made in applying rules of procedure which result in abuse of the process of the Court. That is not the case here. The Calcutta Weekly Notes cases are all cases where the Appellate Court had remanded under O. 41, R. 25, and it was held that it was open to the appellate Court, after the receipt of findings after remand, to reconsider any point which it had already considered and expressed an opinion on in its order of remand. The ratio decidendi of these rulings is that in a remand under O. 41, R. 25, the case remains pending or undisposed of on the appellate Court's file, and the Judge may yield to conviction and change his mind at any time before he has pronounced a final judgment. In *Ganendra Nath Roy v. Surja Kanta Roy* (1), however, at p. 466, (of 17 C. W. N.) the Judges appear to be of the opinion that even in such a case they would be slow to go back upon any final opinion expressed by another Judge in an earlier stage of the case. No case has been cited before us where a remand order under O. 41, R. 23, has been reconsidered in a subsequent appeal from the decision of the first Court after remand. In the present instance the remand order was under O. 41, R. 23, and the appeal cannot be said to have been pending or undisposed of on this Court's file. In our opinion, the whole case is not opened up on the present appeal from the decree after remand, and it is not open to us, therefore, to reconsider the remand order. We, moreover, consider that the opinion expressed by the former Bench was final and we refuse to go back upon it.

The second argument is to this effect. As the view of the law taken by the

former Bench is now found to have been erroneous by the Full Bench, whose decision is binding on us, the remand order must be deemed to have resulted in a grave miscarriage of justice. In such circumstances, it is argued, it is our duty to exercise our inherent power under S. 151, Civil P. C., and reverse the remand order for the ends of justice. We are bound by and accept the view of the law laid down by the Full Bench, but we do not think that our interference in this case is necessary for the ends of justice. The appellants had filed an application for review on a 2 rupee court-fee stamp. This has been dismissed on the grounds of delay and non-payment of the proper court-fee, namely, Rs. 500. Where the Code has specifically provided for a review, and the appellants have failed to avail themselves of it by a proper application, we do not think they have a right to appeal to, or the Court would be justified in exercising its inherent power to help him to get over the consequences of his default. On the merits the appellants have no case. They have received the benefit of a large sum of money advanced by the plaintiff at a time of stress, and we do not think that justice or equity requires that we should come to their aid under such circumstances. The appeal fails and is dismissed with costs.

P.S. R.K.

Appeal dismissed.

A. I. R. 1913 Nagpur 195

BATTEN, A. J. C.

Govinda and another—Defendants—Appellants.

v.

Chindhoo—Plaintiff—Respondent.

Second Appeal No. 201 of 1917, Decided on 21st June 1918, from decree of Dist. Judge, Bhandara, D/- 6th January 1918, in Appeal No. 118 of 1916.

C. P. Tenancy Act (1899), S. 60—Sub-lease by occupancy tenant—Notice to eject given to sub-tenant—Sub-tenant, after notice, is trespasser and can be ejected through civil Court.

Under S. 60 a sub-lease of occupancy land cannot be made from year to year, it can only be made for a term of one year. If before the end of the year no notice is given, there may be a presumption that the parties intend to make a fresh lease for the ensuing year, but where a notice is given by the occupancy tenant to his sub-tenant that he does not intend to renew the sub-lease, the sub-lease comes to an end with the end of the agricultural year, and the sub-tenant is thereafter in the position of a

trespasser and can be ejected through a civil Court. [P 196 C 1]

S. C. Dutta Chowdhury and K. K. Gandhi—for Appellants.

G. L. Subhedar—for Respondent.

Judgment.—This appeal arises out of a suit brought by an occupancy tenant to eject a sub-tenant who refused to vacate the field after the end of the agricultural year, although a notice was given to him before the end of the agricultural year that the sub-lease would not be renewed. In appeal it is urged for the defendants that the Munsif had no jurisdiction to try this suit because the suit was one between landlord and tenant, and that the notice of ejectment was not valid because it was not given sufficiently early. Under S. 60, Tenancy Act a sub-lease of occupancy land cannot be made from year to year, it could be only made for a term of one year. No doubt if before the end of the year no notice is given, there may be a presumption that the parties intend to make a fresh lease for the ensuing year, but in this case notice was given by the occupancy tenant to his sub-tenant that he did not intend to renew the lease. The lease, therefore, came to an end under S. 60 with the end of the agricultural year and after that date the defendants in the circumstances were trespassers. The Munsif had jurisdiction to try this suit and the notice was given in sufficient time. I may add that it would have been a sufficient notice even if the land had been an absolute occupancy tenancy, since it was given over 5 months before the end of the agricultural year. For these reasons the appeal is dismissed.

P.N./R.K.

Appeal dismissed.

A. I. R. 1918 Nagpur 196

BATTEN, A. J. C.

Hazarilal Motilal—Appellant.

v.

Shyanibabu and another — Respondents.

Second Appeal No. 508 of 1917, Decided on 6th April 1918, from decree of Addl. Dist. Judge, Saugor, in Civil Appeal No. 45 of 1917, D/- 24th August 1917.

(a) C. P. Land Revenue Act, (1881), S. 69 — S. 69 does not apply to disputes as to proprietorship of land.

Section 69 relates to disputes as to whether or not land admittedly belonging to one particular proprietor is *sir* land or not. It has no application whatever to disputes as to whether A or B is the proprietor of a plot of land. [P 196 C 2]

(b) C. P. Land Revenue Act (1881), S. 69 (4) — Limitation—Rule of, in S. 69 (4) does not apply to correction of entries in settlement records.

The special rule of limitation laid down in S. 69 (4) has no application whatever to a suit brought for the correction of a settlement entry in which the defendant has been recorded as a proprietor instead of as an occupancy tenant of *sir* land. [P 196 C 2]

G. L. Subhedar—for Appellant.

Judgment.—The lower Courts in this case have dismissed the suit solely on the ground of limitation, holding that the special period of one year laid down in sub-S. (4), S. 69, Central Provinces Land Revenue Act is applicable to the case.

Section 69 relates to disputes as to whether or not land admittedly belonging to one particular proprietor is *sir* land or not *sir* land. Section 69 has no application whatever to disputes as to whether A or B is the proprietor of land. In this case the plaintiff's claim is that they are the proprietors of the land and that the defendant is only their occupancy tenant. They complain that at the settlement defendant 1 was recorded as proprietor instead of as occupancy tenant. The mistake alleged to have occurred is that whereas defendant 1 was formerly the proprietor of the land as his *sir* and he has now ceased to be proprietor and has now become occupancy tenant, he is still wrongly recorded as proprietor of *sir* land instead of as occupancy tenant of the land which was formerly *sir*. If the plaintiffs fail in their case, they can have no possible objection to defendant 1 being recorded as *sir* proprietor instead of ordinary proprietor. The question whether the land should be recorded as *sir* or not, does not arise in this case. The sole question is whether or not plaintiff is the proprietor and defendant 1 the tenant. The special rule of limitation laid down in S. 69 (4), Central Provinces Land Revenue Act, has therefore no application whatever to the case. The case has been decided on wrong grounds and is remanded to the lower appellate Court for further trial with reference to the above remarks. It is to be observed that the plaintiffs complain that the settlement entry is incorrect but they have filed no copy of the settlement entry to which they object. Before the suit can be properly decided, the plaintiffs must be called upon to file a copy of the entry to which they object and which they say is wrong.

A refund certificate will issue. Other costs will be costs in the suit.

P.N./R.K.

Case remanded.

A. I. R. 1918 Nagpur 197 (1)

KOTWAL, OFFG. A. J. C.

Sheshrao Nagorao Patil—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 7-B of 1918, Decided on 26th January 1918, against an order of Sub-Divl. Magistrate, Darwah, in Misc. Criminal Case No. 20 of 1917, D./ 31st October 1917.

(a) Criminal P. C. (1898), S. 145 (1)—Condition precedent is likelihood of breach of peace.

The condition precedent authorising a Magistrate to issue an order under S. 145 (1) is that he should be satisfied that a dispute likely to cause a breach of the peace exists. [P 197 C 1]

(b) Criminal P. C. (1898), S. 145 (1)—Complainant out of possession for over two months—Proceedings under S. 145 are not vitiated.

The fact that the complaint shows that complainant was not out of possession of the property in dispute for over two months does not vitiate the proceedings under S. 145. [P 197 C 1]

C. B. Parakh—for Applicant.

Order.—It is urged that the Magistrate had no jurisdiction to start the proceedings, when the complaint made to him on the face of it showed that the complainant was out of possession for over two months and in consequence he could not get an order in his favour. This contention is based upon a misapprehension of the conditions, the existence of which authorises a Magistrate to issue an order under S. 145 (1), Criminal P. C.

The Magistrate can issue the order if he is satisfied that a dispute likely to cause a breach of the peace exists. He was so satisfied in this case from the police report, dated 6th April 1917. He could therefore make the order and therefore decide the question of possession in favour of either party to the proceeding. It is next urged that there is no finding that there is a danger of a breach of the peace, but such finding is involved in the order under S. 145 (1) and the applicant's plea admits that no plea was raised under S. 145 (5). The proceedings do not appear to be open to objection on the score of want of jurisdiction. This application is dismissed.

P.N./R.K.

Application dismissed.

A. I. R. 1918 Nagpur 197 (2)

FINDLAY, OFFG. A. J. C.

Ganga Prasad—Plaintiff—Appellant.

v.

Fida Ali Chandathai—Defendant—Respondent.

Second Appeal No. 315 of 1917, Decided on 21st April 1918, from decree of Dist. Judge, Nagpur, D/- 10 March 1917 in Appeal No. 35 of 1917.

Provincial Insolvency Act (3 of 1907), S. 28—"Debt provable under Act" does not cover obligation incurred after adjudication—Suit is maintainable to recover same.

An obligation incurred by an insolvent after the date of his adjudication is not debt provable in the insolvency proceedings within the meaning of S. 28, Provincial Insolvency Act and a suit in respect of such obligation is not governed by S. 16 (2) of the Act. [P 197 C 2]

G. B. Salghedar and N. R. Alekar—for Appellant.

Atmaram Bhagwan and S. C. Dutt Chowdhury—for Respondent.

Judgment.—There can, in my opinion, be no question but that the lower appellate Court has erred in excluding Rs. 60 relief on account of rent given by the first Court. The learned District Judge failed to notice that this item of rent was not an item which fell under the category of debts provable under this Act alluded to in S. 16 (2), Provincial Insolvency Act. What are debts provable under the Act is laid down in S. 28 *idem*. Now the order of the District Judge declaring the defendant an insolvent, was passed on 27th September 1913, Ex. A-1, while the rent note shows that the obligation of debt was incurred on 15th November 1913. This obligation, therefore was not an obligation incurred before the date of the adjudication, vide S. 28 of the Act, and it follows, therefore that the claim in question is not a debt provable under this Act. S. 16 (2), therefore did not exclude the lower appellate Court from allowing the decree for rent to stand. The result is that the appeal succeeds and the lower appellate Court's decree will be modified to the extent of restoring the decree of the original Court as regards the payment of Rs. 60 on account of rent. The respondent must bear the appellant's costs in this appeal as well as his own.

P.N./R.K.

Appeal accepted.

A. I. R. 1918 Nagpur 198 (1)

BATTEN, A. J. C.

Puranlal and another—Defendants—Appellants.

v.

Venkatrao Gujar—Plaintiff—Respondent.

Second Appeal No. 16 of 1917, Decided on 22nd January 1918, from decree of Addl. Dist. Judge, Nagpur, D/- 19th September 1916, in Appeal No. 163 of 1916.

C. P. Courts of Wards Act (1899). S. 16(2)(b)
—Contract by guardian, not for benefit of minor, cannot be specifically enforced.

The words "for the preservation and benefit of such property" in S. 16(2)(b) should be interpreted in the light of the usual powers of guardians to bind the estates of minors. No decree for specific performance of an agreement for transfer made by his guardian should be passed against a minor unless the Court is quite certain that the agreement was for the benefit of the minor and that it would be for his benefit that it should be enforced.

[P 198 C 2]

*Atmaram Bhagwant—for Appellant.**W. H. Dhabe—for Respondents.*

Judgment.—In this case while the plaintiff was a minor, the Court of Wards let out the land in suit for a term of ten years in renewal of a previous lease for 20 years. The lease has now expired and the defendants claim to remain in possession on the ground that they had the right specifically to enforce a contract for an unspecified term of years. The main ground of appeal on which the District Judge has dismissed the defendant's appeal is that even if the contract for a renewal of the lease were sufficiently precise to be capable of specific enforcement if the contract had been made between adults, yet the contract is one which cannot be specifically enforced against the minor as it is not for the preservation or benefit of such property that a fresh lease be entered into. The words "for the preservation or benefit of such property" are taken from S. 16(2)(b), Courts of Wards Act, applicable to these Provinces. In interpreting these words regard should be had to the usual powers of guardians to bind the estates of minors. There are a large number of decisions collected together by Trevelyan at p. 167 of his "Law Relating to Minors," Edn. 5. The effect of these rulings is that the Court will not decree against a minor for specific performance of an agreement for transfer made by his guardian unless it be quite certain that the agreement was for the benefit of the minor and that it

would be for his benefit that it should be enforced. It is impossible to hold that it would be for the benefit of the minor that this contract for specific performance should be decreed against him, and it is equally difficult to imagine that there was any necessity for inserting such conditions in the renewal of the lease for ten years.

It is perfectly feasible to get a tenant for 30 years without making any promise to give a fresh lease at the termination of that period. To enforce the contract, if it be a contract for specific performance against the minor would be to act directly contrary to his interests. It is not necessary to refer to the grounds of appeal which deal with other points. The appeal is dismissed with costs.

P N./R.K.

*Appeal dismissed.***A. I. R. 1918 Nagpur 198 (2)**

DRAKE-BROCKMAN, J. C.

Kamoda—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 4 of 1918, Decided on 25th January 1918, against the decision of Sess. Judge, Jubbulpore, D/- 23rd November 1917, in S. T. No. 26 of 1917.

Criminal Trial—Confession—Court can disregard any statement in confession which it disbelieves.

Although a confession must be taken as a whole and considered along with the admitted facts of the case, the accused being judged by his whole conduct, the Court is at liberty to disregard any statement contained in the confession which it disbelieves; *Case-law discussed* [P 200 C1]

G. P. Dick—for the Crown.

Judgment.—The appellant Kamoda Gond aged 25 years and his fellow-villager and co-accused Samni Gond aged 19 or 20 have been convicted and sentenced to transportation for life for the murder of Jonhu Baiga. The assessors considered that the conviction should have been for causing hurt only. Samni as well as Kamoda has appealed and both appeals are disposed of by this Judgment.

Jonhu Baiga was 25 years old and according to the Sub-Assistant Surgeon, who conducted the post mortem examination on 24th July last, was stronger than either of the appellants. His dead body was found tied to a bamboo with his own dhoti early on the morning of Monday the 23rd July. He had been missed on the previous evening and the fact was

reported at the Mahadwani station house, three miles away, at mid night. Early next morning before the Police arrived, both the appellants confessed to the mukadam Bhuru (P. W. No. 3) and showed not only the dead body but also the spot in the field of one Nihali where Jonhu was killed: the distance between the two places is about 435 yards. Bhuru was not cross-examined by either appellant and when examined by the Sessions Judge they both admitted that Bhuru had told the truth. Even at this early stage Kamoda asserted that Samni's father Ganga had taken part in the murder while Samni denied this. On the arrival of the Police Ganga as well as the appellants was arrested, and on the afternoon of the 28th July each of the appellants made a detailed confession to the 1st Class Magistrate who subsequently committed them for trial. The confessions were repeated on 22nd August when the Committing Magistrate examined the accused; these later statements include a new detail, namely, that Jonhu was dragged from Nihali's field to the Norbudda. In neither statement did Kamoda implicate Ganga and that person was discharged by the Committing Magistrate. At the commencement of the trial both the appellants pleaded not guilty, but after the Public Prosecutor had opened the case they withdrew these pleas and substituted the following:

Kamoda.—"Ganga and Samni came for me in my field and got me to join them and we three killed Jonhu with our fists, and we three carried his body to the Norbudda and threw it away there."

Samni.—"Only I and Kamoda were concerned in the murder of Jonhu. We killed him with our fists, and the two of us carried the body to the Norbudda. My father was not concerned in it."

When examined by the Sessions Judge Kamoda repeated his allegation that Ganga took part in the murder. Both he and Samni denied that they tied Jonhu's corpse to the bamboo which was found with it. Kamoda repeated his explanation of the murder, but Samni made no further statement on the point. When required to enter upon their defence, each said that he killed Jonhu but did not mean to kill him. The medical evidence shows that death was due to dislocation of several cervical vertebrae and indicates that the neck had been violently twisted. The assessors accepted the confessions in full and considered that the appellants

must have beaten Jonhu with their fists on being attacked by him with his parana (ox goad); the injuries to the neck they attributed to dragging from the scene of murder to the river. The learned Sessions Judge declined to believe that Jonhu assaulted the appellants with his goad, as alleged in their confessions and considered that the injuries to the neck indicated conspiracy and deliberation.

In appeal Kamoda declares that he has been falsely accused and has no reason to kill Jonhu, but attempts no explanation of his confessions. Samni's ground of appeal are not clear, but he apparently intends to admit that there was a quarrel between Kamoda and Jonhu in which he (Samni) was present without taking any part. That the appellants took Jonhu's life cannot, in my opinion, be doubted. They have confessed on 5 distinct occasions, namely, on 23rd July, the 28th July, the 22nd August and twice on 22nd November. The only question for determination seems to be whether the Sessions Judge was justified in refusing to believe the confessions in their entirety. The ordinary rule is that a prisoner's confession must be so taken: *Queen v. Sheikh Doodhoo* (1) and *Queen v. Nityo Gopal Dass Byrango* (2). It was, however, held in *Rex v. Higgins* (3) that one part of a confession may be credited and not another. In *Rex v. Clow* (4) Littledale, J., charged the Jury in a case of murder that if the prosecution wished to make out that the prisoner did more than was stated in his confession there should be some evidence of that, and also held in the course of the trial that though a confession made by the prisoner must be taken altogether, and it is evidence for the prisoner as well as against him, still the Jury were at liberty to believe one part of it and disbelieve another. In *Rex v. Jones* (5) the law was thus laid down:

"There is no doubt that if a prosecutor uses the declaration of a prisoner, he must take the whole of it together, and cannot select one part and leave another, addit there be either no other evidence in the case, or no other evidence incompatible with it, the declaration so adduced in evidence must be taken as true. But if, after the whole of the statement of the prisoner is given in evi-

1. (1867) 8 W R Cr 38.

2. (1873) 21 W R Cr 80.

3. (1828) 3 Car & P 603.

4. (1829) 4 Car & P 221.

5. (1826) 2 Car & P 629.

dence, the prosecutor is in a situation to contradict any part of it, he is at liberty to do so; and then the statement of the prisoner, and the whole of the other evidence, must be left to the Jury, for their consideration, precisely as in any other case, where one part of the evidence is contradictory to another."

Similarly it was laid down by Chady, J., in *Queen-Empress v. Dada Ana* (6) that though a confession must be taken as a whole and considered along with the admitted facts of the case, the accused being judged by his whole conduct, the Court is at liberty to disregard any self-exculpatory statements contained in the confession which it disbelieves. The learned Judge cited *Reg v. Amrita Govinda* (7) where, however, there was evidence besides the statement of the accused. The story told in the confession is that while the appellants were smoking with Jonhu in Nihali's field, he threatened to make their wives his mistresses and enraged by their remonstrances attacked them with his parana, whereupon they seized and beat him with their fists. The Sessions Judge considered this story inherently improvable. His view is thus expressed:

"I cannot believe that a single man would deliberately taunt two Gonds in a lonely field about their wives, and wantonly attack them. The conduct is overheating beyond belief, and is also extremely rash. Further, no goad stick was found on the spot, but an axe was. I hardly think that the police would suppress a goad-stick and produce an axe, if there was any chance whatsoever of a plea of self-defence being put up. Lastly, the accused have implicated themselves clearly enough, but their confessions are not entirely disincenuous. There are still at loggerheads about Ganga's share in it, and I am inclined to think that Ganga was one of the murderers. Yet in their confessions both accused omit the name of Ganga. They have told a great deal of truth, but not the whole truth by any means."

It is true that an axe was found 24 yards away from where Jonhu was killed and that the mukaddam Bhuru has identified it as Jonhu's. But it does not appear that either of the appellants had any weapon whatever and if Jonhu was armed with an axe, he may have considered himself safe. It is not open to us at this stage to treat Ganga as having been with the appellants. The fact that no goad is proved to have been found on the spot may be explained by an omission to look for one. According to the appellants Jonhu had been ploughing and it is quite likely that he had a parana with

him as well as an axe. It seems to me not improbable that Jonhu calculated on impunity and was overwhelmed by a sudden assault, which deprived him of an opportunity to use his weapon or weapons. The axe may have been seized and flung to a distance, while the parana owing to its length would be too clumsy to use at close quarters. In the circumstances I think the Sessions Judge was wrong in refusing to accept the appellants' story. He has relied to some extent upon the statement of the appellant Kamoda's wife Bhagi (P. W. 1), who is Bhuru's daughter, that Kamoda told her on the night of the 22nd July that he had killed Jonhu on suspicion of having improper relations with her. This communication should not have been admitted in evidence without obtaining the previous consent of Kamoda: see S. 123, Evidence Act. The point is not of much importance, inasmuch as at the close of Bhagi's deposition both the appellants declared that she had spoken the truth, but the express provision of law should not have been contravened. Nor is the communication inconsistent with the appellants' story. The Judge regarded the appellants as having "boasted" to Bhagi and Aklo (P. W. 2) respectively that they had killed Jonhu, but their depositions are not indicative of any boasting. He also drew an adverse inference from the fact that the appellants made no attempt to conceal the murder when the villagers turned up to search for Jonhu early on the 23rd July, but surely they would be more likely to confess to the killing if they had some excuse than if they had committed a coldblooded and premeditated murder.

In my opinion the appellants are entitled to the benefit of sub-S. (1). S. 300, I. P. C. They used no weapon upon the deceased and unless there is some truth in their statements about his behaviour to Bhagi and Aklo we are without any motive for the killing. That they intended to cause death must be inferred from the fatal injuries actually caused and I agree with the Sessions Judge that if mere castigation was intended, the course of twisting the neck would not have been adopted. I set aside the finding that the appellants are guilty of murder and convict them instead under the part, S. 304, I. P. C. The sentences of transportation for life are set aside and in lieu thereof I direct that

6. (1891) 15 Bam 452.

7. (1873) 10 B H C R 497.

Kamoda he rigorously imprisoned for five years and Samni for three years.

P.N./R.K.

Order accordingly.

A. I. R. 1918 Nagpur 201

FINDLAY, A. J. C.

Bhikamchand Gekulchand — Defendant—Appellant.

v.

Harprasad—Plaintiff—Respondent.

Second Appeal No. 510 of 1916, Decided on 13th March 1918, from decree of Dist. Judge, Raipur, D/- 12th July 1916, in appeal No. 155 of 1913.

C. P. Tenancy Act (1898), S. 94—Disposition by non-lambardar mortgagee—S. 94 does not apply.

One K who was the owner of a 13-annas 4-pies share in a village mortgaged the share on 18th February 1895 with the defendant who obtained a sale decree and put the mortgaged property to sale and having himself purchased it obtained possession thereof in 1909. The plaintiff who was the owner of the remaining share, had already sold it to B on 7th May 1907. The plaintiff filed the present suit on 4th May 1912 to recover possession of the land on the ground that by the transfer of his 2-annas 8-pies share he became an occupancy tenant of the village *sir* and ordinary tenant of the *khudkasht*. It was contended for the defendant that the right of the plaintiff as an occupancy tenant, if any, had become extinguished under Ss. 35 (1) and 94.

Held: that as the defendant took possession in 1909 *qua* mortgagee and not *qua* lambardar, S. 94 which has reference only to relations between landlords and tenants did not apply to the case. [P 202 U 1]

H. S. Gour—for Appellant.

K. K. Gandhi—for Respondent.

FACTS. will appear from the following extract from the judgment of the lower appellate Court. The dispute related to 127 odd acres of *sir* land of Mouza Khamaria. The village was owned by Nagbadia and he transferred a 13-annas 4-pies proprietary share in favour of his brothers Sobhit and others, who sold the share acquired by them to Kesholal, father of the plaintiff on 8th May 1894. Nagbadia on 16th July 1894 mortgaged the entire 16-annas share to Balmukund who assigned the mortgage to Kesholal and who obtained a foreclosure decree on 28th February 1899 and in pursuance of the decree Kesholal obtained possession of the village and home farm. Kesholal mortgaged the 13-annas 4 pies share with the appellants on 18th February 1895, who obtained a sale decree and put the mortgaged property to sale and having purchased the share obtained possession

on 24th May 1909. The plaintiff who was the owner of the remaining 2-annas 8-pies share of the village, sold the share to Bansilal. Plaintiff says that by the transfer of the 2-annas 8-pies share of the village, he became an occupancy tenant of the village *sir* and as the defendants took possession of the entire home farm in 1910 he has sued to recover possession of 127.95 acres of *sir* land of which he became an occupancy tenant and of 4.90 acres of *khudkasht* of which he became an ordinary tenant. In fact the plaintiff claimed possession of the entire *sir* and *khudkasht* lands of the entire village alleging that the home farm belonged to the 2 annas 8 pies share which was foreclosed by the father of the plaintiff and that the said lands did not appertain to the 13-annas 4-pies share of the village mortgaged to the defendant and purchased by them and that the said lands were not mortgaged to the defendants. The first Court decreed the claim of the plaintiff in respect of the entire *sir* lands and so the defendants appealed to this Court. My predecessor reversed the decree of the Court and dismissed the suit of the plaintiff. The plaintiff appealed to the Court of the Judicial Commissioner. The appellant practically gave up his right to claim anything more than 2-annas 8-pies share in the *sir* lands, so his appeal was limited to the share mentioned above. The decree of this Court was reversed and the appeal was remanded for re-trial to this Court.

Judgment.—The facts leading to this second appeal by the defendants Bhikamchand and Gekulchand are sufficiently clear from the judgment of the District Judge, Raipur, appealed against as well as from the earlier judgments in the case and it is unnecessary to recapitulate them here. I proceed at once therefore to a consideration of the matter raised in the second appeal. The first contention urged on behalf of the appellants is that the plaintiff-respondent had no right of suit inasmuch as he had already sold his 2-annas 8-pies share of Mouza Khamaria to Bansilal on 7th May 1907 and that the suit having been filed on 4th May 1912, his right as an occupancy tenant, if any, had become extinguished under Ss. 35 (4) and 94, C.P. Tenancy Act. This matter of limitation is dealt with in para. 12 of the lower appellate Court's judgment and in para. 6 of that of the Sub-Judge. It is in particular urged in second appeal that

the lower appellate Court has failed to notice that the defendant appellant 1 was a lambardar and could therefore eject a tenant and thus the shorter period of limitation set up by S. 94, would come into operation. This latter provision has obviously reference only to relations between landlord and tenant and it is sufficiently established that when the appellants took possession in 1909 they took possession qua mortgagees and not qua lambardar. Indeed until the appellants got possession, neither of them could in the nature of things be lambardar. Still further, their action in taking possession as mortgagees was in a sense an action adverse to that of the other cosharers and it took place not for the benefit of the proprietary body as a whole but as the result of a mortgage in which the other cosharers had no interest. There seems to be, therefore, no good ground on which the limitation prescribed by S. 94, Tenancy Act applies to this case.

An attempt has, however, been made to urge on behalf of the appellants that even if the ordinary rule of 12 years' adverse possession were applicable to this case, the present suit was time barred. I cannot find, however, that this pleading was ever specifically put forward in the lower Courts and if it had been I do not think there was any chance of its success. The sale to Bansilal by plaintiff-respondent in 1907 excluded cultivating rights in *sir* and he remained in possession of at least a 2 annas 8 pies share of the *sir* land until he was dispossessed in 1909. The statement of Mr. Barat, Pleader, recorded on behalf of the plaintiff-respondent at an early stage of the case on 26th September 1912 must, I think, be read in the light of the judgment of Batten, A. J. C. dated 15th April 1915 who pointed out the confusion that had been introduced into the case by the extravagant claim originally put forward by parties to this litigation to the effect that the whole *sir* land of the village fell into their respective share. In the peculiar circumstances of this case it is impossible to hold that plaintiff was not in juridical possession until 1909 and the presumption necessarily is that he was. I can see no reason, therefore, for holding that the present suit was barred by the ordinary rule of 12 years' adverse possession. The point of limitation was the only one that has been seriously pressed

in this Court. As regards ground 5 of the petition of appeal I need only say that the District Judge's finding that a 13-annas 4-pies share of the *sir* in the village was mortgaged is one for the disturbance of which no good grounds have been shown in this Court. These findings govern the appeal which is dismissed with costs on the appellants.

P.N./R.K.

*Appeal dismissed.***A. I. R. 1918 Nagpur 202**

MITTRA, A. J. C.

Raja Udrum—Plaintiff—Appellant.

v.

Khanbeg Amirbeg—Defendant—Respondent.

Second Appeal No. 308-B of 1917, Decided on 24th June 1918, against decree of 2nd Addl. Dist. Judge, Akola, in Civil Appeal No. 10 of 1917, D/- 14th May 1917.

Evidence Act (1872), S. 114—Notice, registered, sent through post—Refusal must be proved by examining post-peon as witness.

Where a defendant denies the receipt of notice alleged to have been sent to him through registered post, it is incumbent upon the plaintiff to call the post-peon to prove that the registered post-card was tendered to and was refused by the defendant. [P 202 C 2]

M. V. Joshi—for Appellant.

G. V. Kukde—for Respondent.

Judgment.—This second appeal and Second Appeal No. 310-B of 1917 have been disposed by the lower appellate Court in one judgment, and this judgment will therefore govern the disposal of both the second appeals. The plaintiff sues for ejectment of the defendants on the allegation that their tenancy has been determined by a notice to quit under S. 79, Berar Land Revenue Code. The suit has been dismissed on the ground that service of the notice has not been sufficiently proved. The defendants denied having refused the notice sent by the plaintiff by registered post. There is an endorsement of refusal on the back of the registered post-card. The dak-peon has not been called as a witness. The address of the addressee given on the post-card is vague. The lower Court has held that as the defendants deny the notice it was incumbent upon the plaintiffs to call the post-peon to prove that the registered post-card was tendered and refused by the defendants. This view is supported by the judgment in *Gobinda Chandra Saha v.*

Dwarka Nath Patita (1). On this finding the suit has been rightly dismissed and I can see no error of law in this finding. The lower appellate Court has also held that the plaintiff has failed to prove his title by proper evidence. It is however unnecessary to examine the correctness of this finding. The decree of the lower appellate Court is confirmed and the appeal is dismissed with costs.

P.N./H.K. *Appeal dismissed.*

1. (1915) 20 I C 502.

A. I. R. 1918 Nagpur 203

Drake-Brockman, J. C.

Mohan Lal—Plaintiff—Appellant.

v.

Ganesh Ram and another—Defendants—Respondents.

Second Appeal No. 118 of 1918, Decided on 30th September 1918 against decree of A.H. Dist. Judge, Seoni, in Civil Appeal No. 60 of 1917, D/- 18th December 1917.

Limitation Act (9 of 1908), S. 19 (1)—Endorsement of payment implying liability for balance amounts to acknowledgment.

An endorsement of payment on the back of an instalment bond in the handwriting of the debtor, impliedly acknowledging his liability for the balance of the debt due under the bond, amounts to an acknowledgment of liability for the purposes of S. 19 (1); 33 Cal 1917 (P.C.), P.H. 1914 C 11.

Erakshah—for Appellant.

G. L. Subhedar—for Respondents.

Judgment.—This second appeal arises out of a suit brought on 9th May on foot of a bond (Ex. P 1), dated 18th February 1908. By this document the defendants who are respondents in this Court, promised to pay Rs. 1,000 due to the plaintiff-appellant by 5 instalments of Rs. 200 each. The payments were to be made in the month of Baisakh of each of five consecutive vimbhat years beginning with 1907 so that they were due as follows:

1. Between 25th April and 24th May 1910. 2. Between 14th April and 13th May 1911. 3. Between 2nd April and 1st May 1912. 4. Between 21st April and 20th May 1913. 5. Between 11th April and 9th May 1914. The first instalment was paid in full on 16th May 1910. Two other payments were made, namely, Rs. 186-4-0 on 10th November 1912 and Rs. 57-5-0 on 30th October 1913. All these payments were evidenced by an endorsement written on the back of the bond by the defendant Ganesh

Ram and signed both by him and by his co-defendant Ranchand. The endorsement has been translated thus:

"Repayments made.

Rs. a. p.

200 0 0 Baisakh Sudi 8, 1907.

First instalment paid.

243 0 0 Second instalment, Baisakh Sudi 15, 1908.

Paid on account of the third instalment, P.C. 229-0.

Rs. 186-4-0 Katak Sudi 1, 1909.

Third instalment paid to the extent of Rs. 186-4-0.

Rs. 57-5-0 Gadh Sudi 1, 1910.

Fourth instalment paid to the extent of Rs. 57-5-0.

343 0 0

The bond contains a stipulation that if any instalment remained unpaid wholly or in part on due date, the balance should be paid along with the next instalment falling which the entire balance should become exigible in lump. Interest at 8 annas per cent. per mensem was made payable on each defaulted instalment from the date of default. It is common ground that the cause of action arose on 1st May 1912 and in the plaint reliance is placed upon the defendant's endorsement on the bond, which bears date 10th May 1914. The defendants pleaded limitation, and the trial Judge dismissed the suit after finding on a single preliminary issue that the endorsement did not give the plaintiff a fresh period of limitation from the time of its being signed. His view was that the writing did not of itself import any acknowledgment of existing liability and that S. 19 (1), Lim. Act, had therefore no application to the case. In appeal S. 19 was not relied upon for the plaintiff, but the lower appellate Court took the same view as the trial Judge of the terms of the endorsement. In this Court S. 19 (1), Lim. Act, is again relied upon for the plaintiff appellant and the following authorities are cited: *Bheemangowda v. Eeranah* (1), *Janki Prasad v. Ghulam Ali* (2) and *Pamulapati Venkatakrishnaiah v. Kondamudi Subbrayudu* (3). None of these cases was referred to by either of the lower Courts. In the first the terms of the endorsement are not given in the report. In the second the debt was a judgment-debt and the judgment-debtor, after making payments out

1. (1871-74) 7 M H C R 258.

2. (1923) 5 All 201.

3. (1917) 40 Mad G.S.=36 I C 240.

of Court, endorsed the decree in his own handwriting in words which were translated as follows:

"I Chulam Ali judgment-debtor of this decree have myself paid Rs. —and have endorsed this payment on the decree in my own handwriting."

It was held that the description of himself as judgment-debtor necessarily implied the admission of liability under the decree. In the third case the endorsement ran thus:

"Rs. 378 13th July 1905. Rs. 378 only have been paid towards this document by Subbarayudu. Rs. 22. Again on the same day, Rs. 22 only has been paid."

Both the learned Judges who decided the case had no doubt that these endorsements embodied an acknowledgment of liability. Srinivasa Aiyangar, J., remarked as follows:

"The debtor states in terms that he pays Rs. 378 towards the amount due on the bond and on the same day, made another payment of Rs. 22 and made another endorsement. I construe the endorsement as meaning that the debtor made a part payment of the amount due on the bond (on that day over Rs. 1,500 was due as shown on the face of the bond), which is certainly an acknowledgment that more money was due."

The circumstances of the present case are very similar to those in the recent Madras case and I am clearly of opinion that the endorsement amounts to an acknowledgment of liability. In *Vithal v. Gopal Rao* (4) I pointed out that S. 19, Lim. Act, does not require the exact amount of liability to be stated in the acknowledgment. The defendants expressly admitted by writing that they paid Rs. 43-9-0 on account of the third instalment, thus indicating that the balance of that instalment was still unpaid. Moreover, when the third payment (Rs. 57-5-0) was made, the fourth instalment had already fallen due and the reference to the 1st, 2nd and 3rd instalments only raises the implication that nothing had been paid against the fourth instalment. Similarly by the time the endorsement was written the fifth instalment also had fallen due and the necessary implication from the omission to show any payment as made against it is that it remained wholly unpaid. This view seems to be supported by the decision of their Lordships of the Privy Council in *Maniram v. Seth Rupchand* (5), where a mere admission that the defen-

dant had open and current accounts with the plaintiff was held to amount to an acknowledgment of liability to pay any sum which on taking of an account might be found due.

On behalf of the defendants respondents I am referred to *Khwaja Mahomad Janula v. Venkatarayar* (6). In that case the defendant who pleaded limitation had entered the payment in the plaintiff's account book; the body of the entry included the defendant's signature but no signature was appended. It was held that writing the name in any part of the document would suffice for a signature, provided the writer intended by entering his name to indicate that the acknowledgment was his own. The judgment of Scotland, C. J., shows that to obtain the benefit of a new period of limitation the plaintiff must prove that the party sued has in writing authenticated by his signature, either in express terms or by reasonable construction acknowledged and admitted that the debt or part thereof is due from him. The payment made in that case satisfied the debt in part only and it was held that the entry aforesaid might serve as a sufficient acknowledgment in writing. Being of opinion that the endorsement on the bond amount to an acknowledgment of liability for the purposes of S. 19, Lim. Act, I set aside the decrees of the lower Courts and remand the case for disposal on the merits to the Court of first instance. The court-fee paid on the memorandum of second appeal will be refunded and other costs in this Court will be costs in the cause.

P.N./R.K.

Case remanded.

6. (1904-05) 2 M H C R 79.

A. I. R. 1918 Nagpur 204

BATTEN, A. J. C.

Lobhaji—Defendant—Applicant.

v.

Narayan—Plaintiff—Non-Applicant.

Civil Revn. No. 182 of 1918, Decided on 6th November 1918 from Judgment of Sm. C. C. Judge, Nagpur, in Civil suit No. 1242 of 1917, D/- 25th March 1918.

Provincial Small Cause Courts Act (9 of 1887), S. 25—Different view of evidence might be taken in revision is no ground for interference.

The fact that the Revisional Court might take a different view of the evidence from that taken by the Court of Small Causes is not a justifiable ground for interference in revision under S. 25.

4. (1909) 5 N L R 8=1 I C 240.

5. (1906) 33 Cal 1947=2 N L R 130=33 I A 165 (P C).

C. L. Subhedar—for Applicant.

A. C. Roy—for Non-Applicant.

Judgment.—It is merely a question of weight of evidence. It is impossible to consider that it has not all been considered. It is quite possible, I might have taken a different view of the evidence, if I had been the Small Cause Court Judge, but this does not justify interference in revision. The application is dismissed with costs.

P.N./R.K. *Application dismissed.*

A. I. R. 1918 Nagpur 205

MITTRA, A. J. C.

Surya Bhan—Plaintiff—Appellant.

v.

Renai—Defendant—Respondent.

Misc. Appeal No. 1-B of 1917, Decided on 30th April 1917, against the Decree of Addl. Dist. Judge, Amravati, D. 13th October 1916, in A. No. 106 of 1916.

(a) Berar Land Revenue Code, (1896), S. 205.—Occupant of recognized division of survey number cannot pre-empt another division of same number.

An occupant of a recognized division of a survey number, within the meaning of S. 4 (5), Berar Land Revenue Code, has not right of pre-emption with reference to another recognized division of the same survey number. 9 N. L. R. 16, P. 11.

(P 205 C 2)

(b) Berar Land Revenue Code, (1896), S. 4 (5)—Recognized division of Survey number—Meaning of, stated.

A sub-division of a survey number made by agreement of parties but which has not been recognized within the meaning of S. 4 (5), Berar Land Revenue Code, is not a "recognized division of a survey number." (P 206 C 2)

(c) Berar Land Revenue Code, (1896), S. 87—Survey number—Meaning of.

The words "survey number" in S. 87, Berar Land Revenue Code, include recognized divisions of a survey number. (P 206 C 1)

(d) Berar Land Revenue Code, (1896), Ss. 4 (5) and 86, 87—Record of Rights—Officer in charge of, cannot recognize division and his recognition is no bar to pre-emption.

The Officer-in-charge of the Record of Rights is not an officer authorised, under S. 4 (5), Berar Land Revenue Code, to recognize the division of a survey number. Therefore a recognition of a sub-division by him is no bar to pre-emption. (P 205 C 2)

N. M. Badakar—for Appellant.

G. L. Subhedar—for Respondent.

Judgment.—The plaintiff is the owner of a demarcated plot in Survey Number 200, which at the recent Record of Rights has been numbered as 200/2. He seeks to pre-empt what has been similarly recorded as 200/1. This right of pre-emption is based on S. 205, Berar Land Revenue Code. The parties are agreed, as held by this Court in *Mt. Gangav*

Chandu (1), that the occupant of a recognized division of a survey number has no right of pre-emption with reference to another recognized division of the same survey number. The point for determination is whether the plots, as they have been called, constitute "recognized divisions of a survey number" within the meaning of the Code. If they are, then on the authority of the case cited, there is no right of pre-emption and the plaintiff's suit must fail. If they are not, then the lower Court has rightly remanded the case for trial on the merits. Now S. 4 (5) lays down that

"Recognized division of a survey number recognised at the last preceding survey, or subsequently recognised as such by the Deputy Commissioner or any other officer recognised on his behalf."

Admittedly there was no such recognition at the last survey nor has it been subsequently recognised by the Deputy Commissioner. The question is whether the officer-in-charge of the Record of Rights, Berar, is an officer "authorised in this behalf." Under S. 86 (1), when two or more holdings are included in a single survey number, the Deputy Commissioner or the officer deputed to conduct any revenue survey may recognize such holdings without forming separate numbers. Holdings so recognized shall be "recognized divisions of survey numbers." Sub-S. (2) declares the provisions of the Code relating to survey numbers applicable, so far as may be, to recognized divisions of survey numbers. The effect of sub-S. (2) S. 86 seems to be that the recognized division of a survey number stands, for all practical purposes, on the same footing as a distinct survey number. The revenue recognized or fixed on the recognized division of the survey number now becomes revenue separately assessed. The separately assessed portion under S. 4 (10) is to be regarded as held under a separate title and is, therefore, a separate holding. For non-payment of revenue, this separately assessed portion, that is, the recognized division of the survey number, being a separate holding, alone becomes liable to forfeiture without any liability to forfeiture of the rest survey number. S. 36 occurs in a chapter relating to survey Settlement, and its object seems to be to enable the Deputy Commissioner or the Settlement Officer to revise the assessment, if necessary, at the

revision of a Survey Settlement. Although the definition of a recognized division of a survey number contemplates the Deputy Commissioner recognizing such a division subsequently to the survey, there is no procedure provided for by the Code, unless S. 53 is held to apply to such a case. Probably the Deputy Commissioner will not recognize a division unless the revenue fixed by the agreement of parties represents a fair proportion of the total revenue. The recognition of the division is, in my opinion, for purpose of separate liability to revenue. There are, however, restrictions introduced by S. 17 on the power of recognition. A minimum area fixed by rules under the Code is essential for such recognition. I read "survey number" in that section to include a "recognized division of a survey number", and this appears to me to follow from Sub-S. (2) of the previous section. A Record of Rights can be prepared if a notification is issued under S. 83, for a survey

"with a view to the Settlement of the land revenue and to the ascertainment and Record of Rights and liabilities of every description connected with the land."

But a new Ch. 8-A has been added to the Code in 1913, which enables the Government to direct the preparation of a Record of Rights apart from any Survey Settlements. The Officer-in-charge, however, has no power to revise. He merely ascertains and records existing fact such as the amount of revenue ordinarily paid or payable by each person as the result of an agreement with his co-sharers. S. 96-J clearly lays down that no entry or entries in the Record of Rights or register of mutations shall affect the liability of any person to pay the land revenue of alienated or unalienated land under the provisions of this Code or other law for the time being in force relating to the recovery of land revenue. The Officer-in-charge of the Record of Rights gives a separate serial number to each portion of a survey number, however small (down to a limit of 1 ganth), which is separately owned or cultivated by a single person or by a group of co-sharers or co-partners. Although paiki numbers (recognized divisions) have been shown as ordinary sub-divisions, the relation of the present sub-divisions to the former paiki numbers is indicated in the Record of Rights in the remarks column.

The appellant asks me to hold that pre-emption is recognized only among co-occupants of the present sub-divisions made on the basis of existing facts, a sub-division in some cases not extending to more than 1 gantha of land. This is practically to repeal the law of pre-emption in Berar. No such intention could be deduced from the language of the Code and the recent amendment. The sub-division has been made only by agreement of parties and duly recorded but has not been recognized within the meaning of the Code. The ruling in *Mt. Gangu v. Chandu* (1) has, therefore, no application. I agree with the lower appellate Court that the plaintiff has a right of pre-emption subject to the decision of various questions left undetermined by the first Court. The appeal fails and is dismissed with costs. I fix Rs. 15 as pleader's fee.

P.N./R.K.

Appeal dismissed.

A. I. R. 1918 Nagpur 206

MITTRA, A. J. C.

Balobrao Apparao — Defendant—Appellant.

v.

Anad Rao and others—Plaintiffs and Defendants—Respondents.

Second Appeal No. 331-B of 1917, Decided on 26th July 1918, from doores of First Additional District Judge, Akola, D/- 10th May 1917, in Appeal No. 254 of 1916.

Pre-emption—Suit for—Trees standing on land and rights of easement go with land.

In a suit for possession of a piece of land by pre-emption, the trees standing on the land and all rights of easement appertaining to the land pass with the land. [P 206 C 2]

M. Chakerbutty—for Appellant.

G. L. Subhedar—for Respondent.

Judgment.—This appeal was filed before the judgment in *Surya Bhan v. Renai* (1) was published. The learned counsel for the appellant admits that the ruling in question governs this case. This disposes of the first ground of appeal. As to the second ground of appeal the trees would undoubtedly go with the land on pre-emption. So would a right of easement. It is urged that these rights were separately valued. But this is not so, as far as the sale-deed is concerned. Some statement was made to this effect in the first Court. The price of pre-emption decreed

includes the value of the rights. There is no error of law pointed out by the appellant's counsel. The appeal is therefore dismissed with costs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1918 Nagpur 207

Drake-Brockman, J. C.

Apa Pandurang and another — Plaintiffs—Appellants.

v.

Damdia and another—Defendants—Respondents.

Second Appeal No. 589 of 1917, Decided on 1st July 1918, from decrees of Addl. Dist. Judge, Betul, D/- 20th August 1917, in Appeal No. 61 of 1917.

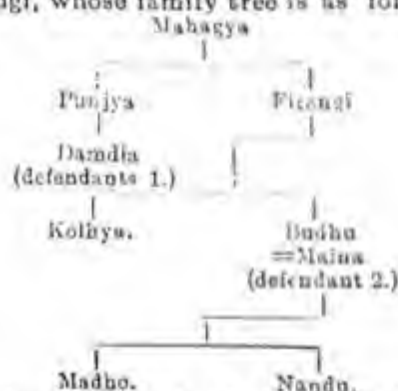
Hindu Law—Succession — Mother — Remarriage—She can succeed to property of deceased son of first marriage.

A remarried Hindu widow is entitled to succeed to the property left by a son of her first husband if the son dies after the re-marriage. (P 207 C 2)

N. Bhawani Shankar—for Appellants.

D. T. Mangalmooty — for Respondents.

Judgment.—This litigation relates to a house which belonged originally to one Firangi, whose family tree is as follows:



After the death of Firangi his son Kolhya died without issue so that Budhu became sole owner. 15 years before the suit was filed, i. e., in 1902, Budhu was succeeded by his sons both of whom died in 1908. In the meantime Budhu's widow Maina had remarried in 1906. Madho and Nandu each left a widow, but both those women remarried almost immediately after their husbands' deaths and Maina, having succeeded as mother of Budhu's sons, was in possession when the suit was brought. The plaintiffs are vendees from the defendant Damdha and having failed to obtain possession from Maina sued for possession, on the ground that she having remarried could not inherit her sons' property. The

trial Judge, following *Sammar v. Mt. Bhago* (1) and referring to *Sadhu v. Mt. Patwaga* (2) and *Jarman v. Gunolaji* (3), dismissed the claim on the ground that a remarried widow is entitled to succeed to the property left by the son of her first husband if the son died after the re-marriage. The plaintiffs appealed on the strength of the decision of Sanyal, A.J.C., in *Basorey v. Ballabhdass* (4), where it was held that a Hindu widow who remarries becomes thereafter incapable of inheriting any property which, but for her remarriage, she would have inherited from a lineal successor of her former husband. The lower appellate Court considered the learned Additional Judicial Commissioner to have taken a different view in *Kashirao v. Utarda* (5) and concurring with the trial Judge dismissed the appeal. In second appeal it is pointed out for the plaintiffs that in the case reported as *Kashirao v. Utarda* (5) the propositus Pandharinath died in 1896 and his mother Manjai remarried in 1897 after inheriting the field in dispute.

It is contended therefore that the remarks at p. 118 (of 11 N. L. R.) of the report, regarding the position which would have obtained had Manjai obtained after remarriage, constitute a mere obiter dictum and should not be taken into account. It is further urged that just as a widow by remarriage ceases to be the patni of her husband so she must cease to be a Gotraja Sapinda of her son, to whom therefore she cannot inherit. The decision in *Basorey v. Ballabhdass* (4) above cited is said to be precisely in point and it is urged that if I am not prepared to follow it I should make a reference to a Bench. On a careful perusal of the judgment in *Basorey v. Ballabhdass* (4), I have come to the conclusion that with all respect to the learned Additional Judicial Commissioner who decided it I should not regard it as binding upon me. It seems clear from the facts stated at p. 174 (of 6 N. L. R.) that the plaintiffs failed to prove the date on which Mt. Chaturia remarried and that their claim was really barred by limitation, inasmuch as she had held the land in dispute as occupancy tenant in her own right, not as heir of

1. (1894) 5 C P L R 85.

2. (1903) 16 C P L R 99.

3. (1910) 6 N L R 103=7 I C 543.

4. (1910) 6 N L R 171=8 I C 1146.

5. (1915) 11 N L R 116=31 I C 290.

her son Dhira by her first husband Latorey.

The ante-penultimate paragraph of the judgment does indeed support the appellants, but for the reason already stated this portion appears to have been unnecessary. That it was recorded without any basis in the arguments of the counsel seems to be indicated by the fact that it contains no reference to the important decision in *Sammar v. Mt. Bhago* (1). Moreover, the reference to *Vrijbhukandas v. Bai Parvati* (6) is not intelligible, for in that case none of the women concerned had been remarried. The Bombay case really in point is *Basappa v. Ragava* (7), where a Full Bench of four Judges held, following the Calcutta decision relied on in *Sammar v. Mt. Bhago* (1), that a remarried Hindu widow is entitled to succeed to the property left by her son by her first husband, the son having died after the remarriage. An earlier Bombay case to the same effect is *Chamar Haru v. Kashi* (8). And in a recent Calcutta case of *Ganga Prasad v. Ramasrey Shahu* (9), Mookerjee and Casperz, JJ., referred to *Akora Suth v. Boreani* (10), *Chamar Haru v. Kashi* (8) and *Basappa v. Ragava* (7) as showing the legislature to have recognized that remarriage not only does not operate as physical death of the widow, but that it does not operate even as a civil death for all purposes. Again in *Laxman v. Gundaji* (3), Bose, A. J. C., pointed out that a mother stands on an altogether different footing from a widow succeeding to her son, because he is part of her body, a connexion which cannot be put an end to by the mother remarrying. Bose, A. J. C., further remarked that the Hindu Widows Remarriage Act, 1856, could not apply to the case of a mother remarrying during her son's life, inasmuch as she had then no interest in her deceased husband's property by inheritance to him or his lineal successors. He considered that the Act could not apply prospectively and a remark to the same effect is to be found in *Kashirao v. Ukarda* (5).

In this state of the authorities I do not feel at all pressed by the decision in *Basorey v. Ballabhdass* (4) and following the earlier decision of this Court confirm

the decrees of the Courts below. This appeal is dismissed with costs. In the lower Courts costs will be paid as already ordered.

P.N./R.K.

Appeal dismissed.

A. I. R. 1918 Nagpur 208

BATTEN, OFFG. A. J. C.

Beharilal—Defendant—Appellant.

v.

Hukumchand and others — Plaintiffs and Defendant—Respondents.

First Appeal No. 9 of 1918, Decided on 25th April 1918, from decree of Addl. Dist. Judge, Saugor, D/- 28th September 1917, in C. S. No. 76-10 of 1916.

Hindu Law—Alienation—Coparcener can mortgage his own share without such necessity as is binding on all coparceners.

Under the Mitakshara as strictly interpreted any mortgage granted by a coparcener on his own account over the joint family property is invalid but the view that has prevailed in the Central Provinces, following that of the Bombay and Madras High Courts, has been that a coparcener can mortgage his own share without any such necessity as is binding on all the coparceners. This view has been one of gradual growth founded upon the equity which a purchaser for value has to be allowed to stand in his vendor's shoes and to work out his rights by means of a partition: *Case law discussed.*

[P 209 C 1]

G. L. Sudhedar—for Appellant.

M. Gupta—for Respondents.

Judgment.—Appeal by defendant 3. The suit out of which this appeal arises was based on a mortgage deed executed by defendant 1 in favour of the plaintiff on 21st December 1909. Defendant 2 who is a minor, is the nephew of defendant 1. Admittedly they constitute a joint Hindu family. The property mortgaged consisted of two houses and one house site. The family own a lot of other immovable property. The appellant defendant 3 is the purchaser of item 2 of property at an auction sale in execution of a decree in a money suit in which the decree was against both defendants 1 and 2. Defendant 2 was impleaded on the ground that the debt was for legal necessity and binding on the joint family. It has been found that the money was not borrowed for legal necessity and that it was a personal debt unconnected with the family business. The learned Additional District Judge has given a decree for sale as against defendant 1's share in the property mortgaged but has exonerated from all liability the share of defendant 2. Defendant 3 appeals and asks

6. (1908) 32 Bom 26.

7. (1905) 29 Bom 91 (F.B.).

8. (1902) 26 Bom 388.

9. (1911) 38 Cal 862=10 I C 69.

10. (1869) 11 W R C R 82.

that item 2 of the property should be excluded from the operation of the decree. His case is that there could be no sale decree of any of that defendant 1's share but he is not concerned with the other items though if he succeeds defendant 1 will get the benefit of his appeal under R. 33, O. 41, Sch. 1, Civil P. C. The appellant's case is that on the facts found which are not disputed plaintiff is not entitled to proceed against the mortgaged property as the deed is entirely void as a mortgage of family property. The contention of the learned counsel for the appellant is that a coparcener cannot mortgage even his own share without some such necessity as is binding on all the coparceners. This is the view taken by the Allahabad and Calcutta High Courts.

The contrary view has prevailed in Bombay and Madras, and the Bombay and Madras view has been followed in these provinces; it will be sufficient to refer to *Divaker v. Jamerdhan* (1) *Mukund Ram Sukal v. Ram Ratan* (2). No doubt under the Mitakshara law as strictly interpreted any mortgage granted by one coparcener on his own account over the joint family property is invalid and the Mitakshara law has been strictly followed by the Allahabad and Calcutta High Courts. As stated in *Suraj Bansi Koer v. Sheo Persad Singh* (3). The law as established in Madras and Bombay has been one of gradual growth founded upon the equity which a purchaser for value has to be allowed to stand in his vendor's shoes and to work out his rights by means of a partition. In *Lakshman Dada Naik v. Ramchandra Dada Naik* (4) their Lordships of the Privy Council clearly recognised the view taken in Madras and Bombay. They refer to it as an exceptional doctrine established by modern jurisprudence. In *Balgobind Das v. Narain Lal* (5) their Lordships again recognized the rule obtaining in Madras and Bombay. It is contended by the learned counsel for the appellant that by two recent decisions their Lordships of the Privy Council have ruled that the stricter view, which they have recognised as being properly applicable to the United Provinces and to Bengal, is of universal

application and should be applied to Madras and Bombay also. The 1st case relied on is *Sahu Ram Chandra v. Bhup Singh* (6). I have studied this case very carefully and I do not find any decision whatever of their Lordships upon the point now in dispute.

The case was one from Allahabad and the appellants did not attempt to say that one coparcener could alienate his own share if the alienation as a whole was not binding on his coparceners. The points for decision of their Lordships were entirely different, and what their Lordships decided was what was the exact nature of an antecedent debt and that a mortgage otherwise not binding on the sons would not be binding on them because of any prior obligation. The appellants accepted the Allahabad view that the father could not alienate even his own share unless the alienation of their share was binding on the sons. I am, however, referred to another case not referred to in the grounds of appeal, viz., *Lachman Prasad v. Sarnam Singh* (7), in which the point now in question was directly in issue. It was contended for the appellants that the mortgage could be enforced against the share of the mortgagor himself, and this plea was rejected by their Lordships of the Privy Council, who quoted with approval the general law as laid down by Lord Watson in *Madho Parshad v. Mehran Singh* (8). The learned counsel for the appellants relies on the following words used by their Lordships:

"Now these are the principles which govern this and all other cases of the kind, and according to these principles, there can be no doubt that the present mortgage is void."

It appears to me, however, that their Lordships did not intend that their observations should be applied to the whole of India including Madras and Bombay. The case was one from Allahabad and the appellants contended that the general rule applied in Allahabad and Bengal should be departed from and the precedent of a particular Calcutta case followed. Their Lordships held that that particular case must be distinguished. No Madras and Bombay case was referred to in argument or by their Lordships, nor was any refer-

1. (1890) 8 C P L R 64.

2. (1906) 2 N L R 52.

3. (1880) 5 Cal 143=6 I A 88 (P C).

4. (1870-8) 5 B M 48=7 I A 191 (P C).

5. (1893) 15 All 329=20 I A 116 (P C).

6. A I R 1917 P C 61=39 All 437=39 I C 180=44 I A 126 (P C).

7. A I R 1917 P C 41=29 All 500=40 I C 284=44 I A 163 (P C).

8. (1891) 18 Cal 157=17 I A 194 (P O).

ence made by counsel or by their Lordships to any of the cases in which their Lordships had referred to the view taken in Madras and Bombay. It appears to me impossible to suppose that their Lordships intended their observations to overrule the view taken by the Bombay and Madras High Courts, without making any reference whatever to any ruling of the Madras or Bombay High Courts or to any of the previous references made by the Judicial Committee to the views obtaining in Madras and Bombay. I do not consider that there is anything in this ruling which makes it imperative upon this Court to depart from the practice which has previously obtained in these Provinces, based upon the practice prevalent in Madras and Bombay. For these reasons the appeal is dismissed with costs.

P.N./R.K.

*Appeal dismissed.***A. I. R. 1918 Nagpur 210**

BATTEN, OFFG. J. C.

Banmali—Defendant—Appellant.

v.

Nihal Singh—Plaintiff—Respondent.

Second Appeal No. 62 of 1915, Decided on 23rd April 1918, against decree of Divl. Judge, Raipur, in Civil Appeal No. 29 of 1914, D. - 18th November 1914.

(a) *Transfer of Property Act, (1882), S. 117*—Provisions of Chap. 5 do not apply to agricultural lease.

A lease of a village or of a share in a village for the purpose of bringing it under cultivation is a lease for agricultural purposes and the provisions of Chap. 5, T. P. Act, do not apply to it as laid down in S. 117 of the Act. [P 211 C 2]

(b) *Landlord and Tenant—Agricultural lease*—Tenant is entitled to reasonable notice.

In the case of an agricultural lease the tenant is entitled to a reasonable notice before ejectment. What is a reasonable notice is a question of fact: 9 Cal 48; 12 Cal 82 and 26 Cal 761, *Foll.* [P 211 C 2]

A notice giving the tenant more than six months for vacation is a reasonable notice. [P 212 C 1]

(c) *Landlord and Tenant—Onus is on tenant to show that tenancy had become permanent.*

The length of the period for which a tenant has been holding land does not, in the absence of any contention that the rent has never been enhanced, raise any presumption that the tenancy is a permanent one. [P 212 C 1]

To raise an equitable estoppel against a lessor precluding him from suing for possession on the determination of the tenancy, the tenant must show facts sufficient to justify a legal inference that the lessor has by plain implication con-

tracted that the right of tenancy should be changed into a right of permanent occupancy. 21 All 496 (P C), *Foll.* [P 212 C 2]

(d) *Transfer of Property Act, (1882), S. 51*—S. 51 does not apply to tenants.

Section 51, T. P. Act, does not apply to tenants. [P 213 C 1]

A tenant is not entitled, either under the T. P. Act, or apart from it, to any compensation for any improvements made by him on the land during the continuance of his tenancy. 27 Cal 570 and A I R 1914 Mad 564, *Foll.*; 2 N L R 34; *Disappr.* [P 213 C 1]

Judgment.—This appeal arises out of a suit for ejectment brought by the zamindar of the Gundardehi zamindari, in the Drug Tehsil, of the Drug District against the appellant, the thekedar of the village of Limora. It appears from the District Gazetteer that there are 55 villages in the zamindari, of which 41 are leased to thekedars, of whom 28 have received the status of a protected thekedar under S. 65-A, C. P. Land Revenue Act, 1881. The village was held by Mukti, the father of the appellant, on an annual theka jama of Rs. 300, which was subsequently enhanced to Rs. 351. The jama was again enhanced to Rupees 396 at the time of the execution of Ex. P. 1 dated 8th December 1904, which the plaintiff describes as a kabuliyat, that is to say, counter part of a lease for six years. The deed recites as follows:

"Up to this date I used to pay a jama of Rs. 351 including cesses, but now the cesses have been enhanced by Rs. 45 so I will now pay a total jama of Rs. 396, including cesses, annually in two equal instalments up to the time of the new Settlement, that is to say, for six years."

This document was not registered. The zamindari estate was under the management of the Court of Wards from 1st January 1906 to 10th September 1913. On 23rd June 1911 the Deputy Commissioner, as agent of the Court of Wards, issued a notice to Mukti stating that the theka expires, according to the kabuliyat, on 30th June 1911, and calling upon him, to vacate possession on 32nd June 1911. Mukti was dead and the notice was received by his son the appellant Banmali. On 30th August 1911 a 2nd notice was issued to Mukti, saying that the theka jama for 1911-12 would not be received and warning him that he would be liable to a suit for possession and damages. On 28th November 1911 a 3rd notice was issued to Banmali himself, giving time till the end of May 1912 to vacate the village. Banmali refused to accept service of this notice.

Banmali then applied to the revenue authorities for protected status. Sometime in the beginning of 1913 the Financial Commissioner passed a final order, allowing Banmali to select 100 acres out of the home farm to be his occupancy holding, but refusing him protected status. Banmali applied to the Financial Commissioner for review of this order, and the Financial Commissioner on 19th May 1913 passed an order (Ex. P.7) refusing the application and informing Banmali that he would lose the benefit of the former order unless he selects his 100 acres in three months. Banmali refused to comply with the order and on 21st November 1913 the Financial Commissioner cancelled the grant of occupancy rights (Ex. P.6). Meanwhile on 8th April 1913 the plaintiff himself sent a notice, which Banmali refused to accept, to the effect that Banmali would be liable to legal proceedings if he retained possession of anything more than the 100 acres.

The learned Divisional Judge has found that Mukti first became thekedar about 1870, and that defendant has failed to prove the terms of the lease. Some document appears to have been executed but it is not forthcoming, and clearly it was not registered. He has also decided that the document of 8th December 1904 is not a lease but a mere agreement to pay enhanced jama till the next Settlement, which it was assumed would take place in 1910. He has found that the appellant has failed to prove by evidence that the original lease to Mukti was a lease in perpetuity, and that the collateral facts do not establish that the lease is a perpetual one. On the question of notice the learned Divisional Judge has held that the third notice, dated 28th November 1911, giving Banmali notice to quit before 1st June 1911 was sufficient notice. Defendant pleaded that the lease year coincided with the agricultural year, which in Drug expires on 31st March. The Judge expresses the opinion that the lease year expires at the beginning of June, but I doubt if this can be characterized as a definite finding. The Divisional Judge has also held that by reason of Cl. (b), S. 108, T. P. Act, the appellant is not entitled to compensation for improvements, and on the evidence adduced by the appellant has held that he has failed to prove the exact nature or value of the improvement, or that he has made any

improvements other than such as he would naturally make for the beneficial enjoyment of even a temporary lease, or that the Zemindar allowed Mukti and Banmali to spend more money than he otherwise would, under the impression that the Zemindar acquiesced in the expenditure and tacitly guaranteed its benefit to the lessee.

The first ground of appeal is to the effect that as the plaintiff set up a lease for a term and not a lease from year to year, it lay on him to prove that the lease had come to an end. On this point I agree with the Divisional Judge's observations in para. 9 of his judgment. The pleadings are not scientific, as is usual in the mofussil. The appellant has in no way been prejudiced, and if the evidence shows that the lease was merely a lease from year to year, the plaintiff is entitled to any remedy he is entitled to on that finding.

The second ground of appeal is that the notices were not legally sufficient to terminate even a year to year lease. It is contended that it is not proved that the lease year ended at the beginning of June. The 3rd notice gave more than 6 month's notice ending with the end of May. The learned counsel for the respondent argues that even if S. 108, T. P. Act, applies, the notice is sufficient. He contends that it is evident that neither party knows when the tenancy began, and defendant's witnesses who say that the original lease was in writing do not say in what quarter the lease began. The main contention for the respondent, however, is that the lease being a lease for agricultural purposes, the provisions of Ch. 5, T. P. Act do not apply to it, as laid down in S. 117 of the Act. This contention must in my opinion prevail. It was observed by Ismay, J. C., in *Anup Singh v. Khuman Singh* (1) that a lease of a village or of a share in a village is clearly a lease for agricultural purposes and the provisions of Ch. 5, T. P. Act do not, therefore, apply. The observation is particularly apposite to this case, where the lease was for the purpose of bringing the land under cultivation. In such cases the tenant is entitled to reasonable notice, and what is reasonable notice is a question of fact: vide *Jagat Chunder Roy v. Rup Chand Chango* (2), *Radha Gobind Koer v.*

1. S. A No 442 of 1902.

2. (1883) 9 Cal 48.

Rakhal Das Mukherji (3) and *Digamber Mhato v. Jhari Mahto* (4). I have no doubt whatever that the 3rd notice was a reasonable notice as it gave more than six months for vacation, and there would be no crops left on the land on the date mentioned in the notice. It is not alleged that there is any local custom or local law bearing on the question. This ground of appeal therefore fails, if the lease was one from year to year.

Grounds 3 and 4 of appeal are to the effect that the conduct of the plaintiff in standing by and allowing the defendant to erect costly structures of a permanent character, to raise embankments and to build tanks raises a presumption that the lease was a perpetual one, and estops the defendant from pleading that the lease was a temporary one. In this connexion the appellant's counsel complains that no attention was paid to an application made to the first Court by the appellant asking that an Engineer be appointed as Commissioner to make an estimate of the costs incurred in making improvements. This application was presented on 25th September 1914 at a very early stage of the case, before the defendant was represented by a pleader, and it does not appear to have been brought to the notice of the Court at the time. Subsequently the defendant's pleader made no allusion to the application and did not renew it, and he closed his case without asking for the appointment of a Commissioner. In these circumstances the application must be held to have been dropped, and the appellant has no legitimate grievance.

I have no doubt whatever that the learned Divisional Judge is right in holding that the length of the period for which the appellant and his father have been holding the village as tenants does not raise a presumption that the tenancy is a permanent one. The tenure commenced in about 1870, and the suit was filed in April 1914, so that the lessees have been in possession for about 44 years. The learned Divisional Judge has cited *Nabu Mondul v. Cholim Mullik* (5), where long possession for upwards of 60 years was held not to justify the presumption of a permanent grant; a similar view was taken in *Narayanbhat*

v. Davlata (6); it is not contended that the rent has not from time to time been enhanced.

The pleading on which these grounds of appeal are based are that in 1868 a permanent lease was given to Mukti, that on the faith of the clear declaration by the zamindar that the lease was perpetual, Mukti made considerable improvements by excavating a tank at a cost of about Rs. 8,000, by laying out gardens on an area of 8 acres at a cost of Rs. 2,000, by building pucca houses at a cost of about Rs. 10,000 and by erecting embankments of fields at a cost of about Rs. 2,000; that the zamindar stood by and allowed Mukti to make these improvements and cannot eject the defendant without making compensation; and that the plaintiff is estopped by this conduct from ejecting the defendant. The learned Divisional Judge has held that the defendant has failed to prove any express declaration on the part of the zamindar that the lease was a permanent one, and in this Court the contention is that the conduct of the zamindar in standing by creates a presumption of permanency and estops him from ejecting the defendant. Among the cases relied on for the appellant are *Dattatraya Rayaji Pai v. Shridhar Narayan Pai* (7) and *Yeshwadabai v. Ramchandra* (8), but, as pointed out in *Ismail Khan Mahomed v. Jaigun Bibi* (9). In the former case there were very special circumstances, while in the latter case the land was fazendari land from which the tenant could not be ejected.

The law on the subject has been clearly expounded by the Judicial Committee in *Beni Ram v. Kundan Lal* (10), where it was laid down that to raise an equitable estoppel against the lessor precluding him from suing, on the determination of his tenancy for possession, the tenant should show facts sufficient to justify the legal inference that the lessor has by plain implication contracted that the right of tenancy should be changed into a right of permanent occupancy. Here the learned Divisional Judge has held as follows:

"In the present case the lease was of an agricultural village, and even on a definite tenure

3. (1896) 12 Cal 82.

4. (1899) 26 Cal 761.

5. (1898) 25 Cal 896.

6. (1891) 15 Bom 657.

7. (1893) 17 Bom 746.

8. (1894) 18 Bom 66.

9. (1900) 27 Cal 570.

10. (1899) 21 All 496=27 I A 58 (P C).

for a fixed period, or an indefinite tenure from year to year with sic any assurance at all of extended tenure, the lessee was bound by his own interest to build residential houses and carry out certain routine improvements. Otherwise he would not have obtained the full benefit of his lease. In the absence of clear proof or strong presumption that the Zemindar allowed Mukti and Banmali to spend more money than he otherwise would, under the impression that the Zemindar acquiesced in the expenditure and tacitly guaranteed its benefit to the lessees, I am unable to hold that Banmali has proved that he is entitled to retain possession."

In the Privy Council case last quoted it was laid down that acquiescence is not a question of fact, but of legal inference, from the facts found, and upon it the judgments of the first and the appellate Court are not final. But I can see no reason whatever for dissenting from the conclusions of the learned Divisional Judge. It is a common occurrence for Zemindars to give leases of villages for the purpose of bringing them under cultivation, and of necessity the lessees undertake such works and erect such dwelling houses as are necessary but it does not follow that leases must therefore be deemed to be permanent, in the absence of an express contract to that effect. The last ground of appeal is that the appellant is entitled to compensation for the improvements. S. 51, T. P. Act certainly does not apply to tenants: vide *Ismail Khan Mahomed v. Jaigun Bibi* (9) and *Rajah of Venkatagiri v. Mukku Narsaya* (11), nor apart from the provisions of the Transfer of Property Act is a tenant entitled to this relief. The case of *Colliar v. Baron* (12) was not one of tenancy. Since the appeal was argued my attention has been drawn to an unpublished ruling of Skinner, A. J. C., in First Appeal No. 17 of 1910, in which he allowed compensation to a tenant for improvements by

"virtue of the provisions of S. 70, Contract Act, and of our Court's general power to impose equitable conditions on the relief they grant."

This ruling is unsupported by authorities, and speaking with due respect, I am unable to follow it. There is a series of connected appeals of the same nature from another District, and I had hoped before the delivery of this judgment to have the benefit of the arguments therein but those appeals have been postponed in the hope of a compromise and have not

yet been fully argued. The appeal is dismissed with costs.

P.N./R.K.

Appeal dismissed.

A. I. R. 1918 Nagpur 213

KOTWAL, A. J. C.

Laxminarayan—Decree-holder—Appellant.

v.

Mt. Purnabai and another—Judgment-debtor—Respondents.

Misc. Appeal No. 25-B of 1917, Decided on 10th April 1918, from order of 2nd Addl. Dist. Judge, Amravati, D/- 25th June 1917, in Exn. Case No. 23 of 1909.

Civil P. C. (1908), O. 21, Rr. 67, 68, 54 (2)—Copy of proclamation of sale to be affixed upon conspicuous part of Court house and sale to take place 30 days thereafter—Sale is vitiated if formalities are not observed—Civil P. C. O. 21, R. 9.

A copy of the proclamation of sale must, under R. 67 read with R. 54 (2) O. 21, be affixed upon a conspicuous part of the Court house, and under R. 68 of the Order the sale must take place after the expiration of at least 30 days from the day on which the copy of the proclamation is so affixed. An omission to comply with any of those formalities is a material irregularity in the publication of the sale within the meaning of O. 21, R. 90, and vitiates the sale.

[P 213 C 2; P 211 C 1]

K. V. Desai and *S. K. Duram*—for Appellant.

M. V. Joshi—for Respondents.

Judgment.—The appellant is the assignee of a decree for sale passed on foot of a mortgage in favour of one Sadaukh Jankidas. A house, the subject of the mortgage, was ordered to be sold on 29th March 1917. The appellant, who has been substituted as the decree-holder, bid at the sale, and the house was knocked down in his favour for Rs. 6,000. As he did not deposit the 25 per cent of the price of the sale, the sale Amin put up the house for sale again, but there was no bid. On the executing Court receiving the sale Amin's report, it ordered a fresh sale proclamation to issue and a fresh sale to be held on 14th May 1917. On this date the house was knocked down to the respondent for a sum of Rs. 650. The appellant applied to the executing Court to set aside the sale but the application was summarily dismissed. An appeal has now been filed to this Court by him. On looking through the record I find that there was a material irregularity in the publication of the sale. A copy of the proclamation of sale must, under O. 21, R. 67, read with R. 54 (2), be affixed upon a conspicuous part of the

11, A I R. 1914 Mad 564=7 I C 202=37 Mad 112. (1906) 2 N L R 34.

Court house, and under R. 68, the sale must take place only after the expiration of at least 30 days, from the day on which the copy of the proclamation has been affixed on the Court house of the Judge ordering the sale.

The proclamation announcing the 2nd sale bears an endorsement, dated 14th May 1917, that a copy of it is affixed to the board. I take this *prima facie* to mean that it was affixed on that day. The house was sold on the first occasion for Rs. 6,000 and is said to fetch a rent of Rs. 80 per month. Its sale for Rs. 650 only on the second occasion cannot but be said to have resulted in a substantial injury to the decree holder. I set aside the second sale of 14th May 1917 in favour of the respondent Purnabai. The question remains whether the first sale in favour of the decree-holder should be upheld. In view of the fact that the decree-holder took no steps to have the order of the executing Court, dated 5th April 1917, ordering a fresh sale set aside, I do not consider it necessary to interfere with that order. The result will be that a fresh sale will have to be held after the necessary preliminary formalities. As regards costs the appellant is to blame for not having taken proceedings to have the order of the executing Court, dated 5th April 1917, set aside. I direct that he will pay the costs of the respondent Purnabai throughout, including the costs of the sale certificate and Rs. 15 as pleader's fee in this Court. The appeal is allowed to the extent indicated above.

P.N./R.K. *Appeal partly allowed.*

A. I. R. 1918 Nagpur 214

FINDLAY, OFFG. A. J. C.

Ganpaty—Applicant.

v.

Chimnaji—Opposite Party.

Criminal Revn. No. 68 of 1911, Decided on 25th March 1928, from order of Divl. Judge, Nagpur, D/- 20th February 1918, in Misc. Civil Appeal No. 5 of 1918.

Provincial Insolvency Act (1907), S. 43 (2) (b)—Proceedings under S. 43 (2)—Insolvent informed of nature of proceedings, offence with which he was charged and its consequences—Essentials of criminal trial were complied with—Framing of charge was not necessary.

In a proceeding under S. 43 (2), Provincial Insolvency Act, it is not essential that there should be a definite charge, finding and a conviction as a foundation for a sentence under the

said provisions. All that the law requires is that the principles underlying a criminal trial should be observed in essentials: *A I R 1915 Cal 117, Disappr.*

[P 214 C 2]

Where an insolvent who was being proceeded against under S. 43 (2) (b), Provincial Insolvency Act, was informed of the nature of the proceedings, the offence with which he was charged and of its consequences:

Held: that the essentials of a criminal trial were complied with.

[P 215 C 2]

Gangadhar Sitaram—for Applicant.

Order.—The present applicant for revision Ganpaty was sentenced to three months' simple imprisonment by the Subordinate Judge, Nagpur, under S. 43 (2) (d), Provincial Insolvency Act, in respect of his having concealed in the insolvency proceedings certain property alleged to be his. His appeal to the Divisional Judge was dismissed on 28th February 1918. On revision to this Court the main position taken up has been that the proceedings, as held by the Subordinate Judge, were not carried on the analogy of proceedings under the Criminal Procedure Code, that the burden of proof was wrongly placed on the applicant and that the applicant was prejudiced by the evidence on behalf of the opposing creditors having been recorded after the applicant's evidence had been taken. I am not however with all deference prepared to accept the proposition, laid down by Jenkins, C.J., in *Harihar Singh v. Moheswar Prasad* (1), to the effect that in a proceeding under S. 43 (2), Provincial Insolvency Act, there must be a definite charge, finding and a conviction as a foundation for a sentence under the said provisions. It seems to me that so long as the principles underlying a criminal trial are observed in essentials, this is all that the law requires.

In the present case the applicant was adjudicated an insolvent on 20th April 1917. The learned District Judge who was then dealing with the case, thereupon framed what was termed "issue and charge." This fell into two parts and the following was the text of that second part:

"If the insolvent has property as alleged which is not entered in his petition, what punishment should be awarded to him under S. 43 (2) (b) of the Act?"

A note follows to the effect that these issues are read and explained to the insolvent and "it is made clear to him that they will be treated as charges. *He*

pleads not guilty." It is thus clear that to all intents and purposes a formal charge like that for a criminal offence was made against applicant, and further this charge and its possible consequences were explained to him. The Subordinate Judge however who subsequently dealt with the case in August 1917, made the mistake of recording the evidence for the present applicant before he recorded the evidence for the creditors. Were there any reasons to suppose that the applicant had been prejudiced by this procedure, I should undoubtedly have felt compelled to remand the case for a fresh inquiry on the charge against the applicant, but after carefully examining the evidence on the record I agree with the learned Divisional Judge in thinking that even if the oral evidence produced by the creditors be entirely disregarded, there has been ample proof that the applicant has fraudulently concealed the property. Any evidence the applicant desired to offer was duly taken and so far as the findings of facts go, there is not the slightest ground for disturbing the decision come to by the two lower Courts. A further point has however been raised, viz., that the circumstances of this case did not bring it within the purview of S. 43 (2), Provincial Insolvency Act, at all, and in this connexion I have been referred to the decision of their Lordships of the Privy Council in *Chhatrapat Singh v. Kharag Singh* (2) as well as to the judgment of Mookerjee, J., in *Udai Chand v. Ram Kumar Khara* (3).

As pointed out however by the learned Divisional Judge the Privy Council case just cited has obviously no application in the present instance. That case had no reference to proceedings under S. 43 of the Act and as regards the Calcutta Weekly Notes case just quoted it does not favour the applicant as order of adjudication had already been made. What that case laid down was that the conduct of the petitioner in relation to his creditor can be taken into account only at a later stage of the proceedings, when the question of his discharge arises for consideration. What we are dealing with under S. 43 is an offence which is committed against the Court inasmuch as the petitioner has fraudulently concealed

property which was in his possession or power and which it was his duty to bring to the notice of the Court. In these circumstances I see no cause to interfere and the application for revision is dismissed. The applicant must surrender to his bail and will be sent to the Court of the District Judge, which will have the necessary orders for his serving the remainder of the period of the sentence passed on him.

P.N./R.K. *Application dismissed.*

A. I. R. 1918 Nagpur 215

BATTEN, A. J. C.

Ramchandra and others—Plaintiffs—Appellants.

v.

Dattatraya—Defendant—Respondent.

Second Appeal No. 576 of 1917, Decided on 4th September 1918, from decree of Dist. Judge, Nagpur, D/- 8th August 1917 in Appeal No. 115 of 1917.

(a) Civil P. C. (5 of 1908), S. 100—Finding of fact not deduced from evidence, is liable to be upset.

A finding of fact, in order to be binding in second appeal, should be one that can be reasonably deduced from the evidence. If it is not such a finding, the High Court has authority to interfere with it. [P 216 C 1,2]

(b) Will—Draft, unsigned and undated can operate as will.

A draft will unsigned and undated may be legally a will if it contains the last wishes of the testator. (Case-law discussed.) [P 216 C 1]

B. K. Rose and M. B. Kinkhede—(for Appellants.

M. V. Joshi and G. B. Parakh—(for Respondent.

Judgment.—Appeal by the plaintiffs. The appeal arises out of a suit brought by the plaintiffs-appellants for the possession of a house which forms only one item of the property in dispute between the parties, but the suit relates only to the house. The plaintiffs' father Govind-rao was one of four brothers, Venkat Rao Makund Rao, Govind Rao and Gopal Rao. The defendant is the son of Gopal Rao. The plaintiffs' case is that the property was the self-acquired property of Venkat Rao, who was separate from his brothers. The plaintiffs' claim to the house is based on a will said to have been executed by Venkat Rao shortly before his death, which occurred on 12th August 1914. The will is in the handwriting of Venkat Rao, but is not signed or dated. If the document contains the final expression of

2. A I R 1916 P C 64=41 Cal 535=39 I C 788 (P C).

3. (1910) 7 I C 394.

Venkat Rao's final wishes as to the disposition of his property, the fact that it is not signed or dated would not prevent its being regarded as a valid will. The question before me is whether or not the District Judge was right in holding that the document did not contain Venkat Rao's final wishes. The learned advocate for the respondent contends that this Court as a Court of second appeal is bound to accept the finding of fact that Venkat Rao did not intend the document to be his final will, but left it unsigned because he wished to postpone the final disposal of his property and intended before signing it to vary it to some extent. The learned advocate for the appellants contends that though he is bound by the District Judge's finding that the evidence of witnesses 1 and 8 for the plaintiffs is true, yet the deduction to be drawn from their evidence is a mixed question of law and fact and this Court is competent to reconsider the question in second appeal.

He relies on the rulings in *Lachmeswar Singh v. Manowar Hussein* (1) and *Bishun Singh v. A. W. N. Wyatt* (2). In my opinion both of those cases are to be distinguished from the present case. In the first cited ruling their Lordships of the Privy Council found that the first Court had decided the question of adverse possession not merely as a question of simple fact but as involving questions of law also. The facts as found did not legally constitute adverse possession. In the second case cited it was held that the High Court in second appeal, though bound to accept the facts found, is entitled to examine whether the inference drawn from those facts is legitimate. In the present case the questions of law and fact are clearly distinct. The lower appellate Court has made no mistake about the law. It recognizes that even a draft will unsigned and undated may be legally a will if it contains the last wishes of the testator, but it has found on the evidence and as a fact that it did not contain the last wishes of the testator. This is a fact and not an inference to be drawn from a fact. The finding of fact is one that is binding on this Court, provided that the finding is one that can be reasonably deduced from the evidence. If it is not a fact that can reasonably be

deduced from the evidence, this Court has authority to interfere. I have read the evidence of witnesses 1 and 8 for the plaintiffs, which is the only evidence on the point. The District Judge has held that the witnesses are honest witnesses and as to this I see no reason whatever to disagree. From their evidence it appears that some days before Venkat Rao's death the will was produced before Venkat Rao, and of these two witnesses one pointed out that the will was unsigned and that the provision for the testator's wife was insufficient and on this Venkat Rao expressed his intention of considering the matter afresh and of signing the will after he had so reconsidered it. Witness 8, however, took away the draft will but has offered no intelligible explanation why he did so after Venkat Rao expressed his wish to re-consider the draft and to sign it after re-considering it. The District Judge has held as a fact that in these circumstances it was evident that Venkat Rao had plainly signified that the draft as it stood, was not his final will. I consider I am bound by this finding. It is certainly a reasonable one. If I am not so bound, I entirely agree with the conclusion of the facts arrived at by the District Judge.

The learned advocate for the appellants refers to the following cases: *Janki v. Kallu Mal* (3), *Aulia Bibi v. Ala-uddin* (4), *Pandurang Hari Vaidya v. Vinayak Vishnu Kane* (5), *Sahib Mirza v. Umda Khanam* (6) and *Gopaldas v. Mt. Bandan* (7). I accept the position that if it were clear that the draft contained the final wishes of Venkat Rao, the fact that he did not sign it, although he held expressed his intention of signing it, would not be a bar to its validity as a will, that each case has to be judged according to its own circumstances, and in this case the District Judge has held and I agree with him, that the testator plainly signified that the draft did not contain his final wishes but that he wished to consider it before he signed it. For these reasons I am of opinion that the learned District Judge was right in holding that the document written by

3. (1909) 31 All 236=2 I C 213.

4. (1906) 28 All 715.

5. (1892) 16 Bom 652.

6. (1892) 19 Cal 444=19 I A 83 (P C).

7. (1902) 15 C P L R 101.

1. (1892) 19 Cal 253=19 I A 43 (P C).

2. (1911) 11 I C 729.

Venkat Rao is not a valid will. It is next urged that the defendant is estopped, because he applied for mutation of one of the villages in his name on the ground that it had been willed to him by Venkat Rao. The question has been fully considered by the District Judge and I agree with his conclusions that there was no estoppel. When the defendant made the claim for mutation he had not seen the will and was unaware of the full circumstances relating to it. Moreover, mutation was granted in his favour on the ground that he was in possession of the village. The learned advocate for the appellants relies on the cases reported as *Durga Das Khan v. Ishan Chandra Dey* (8) and *Rajah Venkata Narasimha Appa Rao Bahadur v. Rajah Surnani Venkata Purushottama Jugganadha Gopala Rao Bahadur* (9). The circumstances of this case are entirely different. The person who holds property under a will may be estopped from disputing other person's claims under the same will, but here the defendant has elected to repudiate the will altogether and makes no claim whatever under it. In those circumstances there is no estoppel. For the above reasons the appeal is dismissed with costs.

P.N./R.K. *Appeal dismissed.*

8. (1917) 14 Cal 135=30 I L J 228.

9. (1909) 31 Mad 321.

A. I. R. 1918 Nagpur 217

KOTWAL, OFFG. A. J. C.

Sheoratan—Defendant Appellant.

v.

Biharilal Sewaram Marwadi—Plaintiff—Respondent.

Second Appeal No. 274 of 1917, decided on 26th February 1918, from decree of Dist. Judge, Chhindwara, D/- 17th February 1917, in Appeal No. 11 of 1917.

Transfer of Property Act (1882), S. 84—Valid tender—What does not amount to illustrated.

A mere readiness and willingness to pay not communicated to the creditor and without the accompanying circumstance of the debtor being in a position to pay immediately if the offer is accepted does not amount to a valid tender: 20 Cal 865, *Dist.* [P 218 C 2]

M. R. Bobde—for Appellant.

M. B. Kinkhede—for Respondent.

FACTS of the case will appear from the following extract from the judgment of the lower appellate Court:

"This is a suit on a mortgage executed by the father of defendant 1 in favour of

the adoptive father of plaintiff. The only contesting defendant is 4, who is in possession of the mortgaged property having purchased it in 1910 at a Court sale. The only point of contest is as to the liability of defendants for interest and costs. Defendant 4 alleged that he came to know of the existence of the mortgage after he had purchased the property. Accordingly on 14th July 1910, he sent a notice by registered post to the mortgagee, Sewaram, asking for an account and expressing his intention of redeeming the mortgage. On 5th September 1910, Sewaram replied by postcard which has been filed in original (Ex. 4 D.2). The reply was to the effect that defendant 4 must pay amount due under the mortgage either by money order or personally, otherwise he will have to pay the interest till realization. The amount due under the mortgage was not stated but it was mentioned that the mortgage was registered. Defendant 4 alleges that he sent a further notice to Sewaram on 7th September 1910. He filed a postal receipt which shows that he did send a registered letter to Sewaram on that date (Ex. 4 D.4). He has also filed what he states is a copy of the notice (Ex. 4 D.5). This alleged notice again calls for an account of the mortgage and says that in the absence of such account defendant would not be liable for costs of a suit when brought or for interest from the date of the first notice. A few weeks after sending this notice, as no reply had been received, defendant 4 alleges that he sent his brother Asaram, since deceased, to Sewaram's shop with Rs. 100 to pay an amount due on the mortgage, whatever it might be. Sewaram refused to accept payment. The plaintiff expressed ignorance of the alleged notices and tender of money. The Munsif found that notices and tender of money had been duly proved, and that the defendants were not liable for costs of the suit or for interest after the date of tender of the money. He further found that if tender were held to be not proved, defendant should not be liable for interest after the date of the second notice. Up to which date he actually paid interest is not clear. He passed a preliminary decree declaring the amount due on mortgage to be Rupees 80.8.0. The plaintiff has appealed.

It appears to me that the alleged tender of the mortgage money to Sewaram must

be regarded as a mere invention. The amount said to have been taken to Sewaram's shop exceeded the sum then due on the mortgage. As Sewaram had in his reply to defendant 4's first notice said that the money due should be sent by money order or brought to his shop, his refusal to accept it when offered would appear inexplicable. Defendant 4, as D. W. 2, admits that he was on bad terms with Sewaram, and that he did not know what amount was due on the mortgage and for all he knew nothing was due, yet he did not inquire particulars of the mortgage from the mortgagor or in the registration office. He merely sent Rs. 100 to Sewaram's shop and was apparently prepared to accept Sewaram's statement as to the amount due without further inquiry. Again if he actually sent the money and the mortgagee refused to accept it, the natural course for him to take was to ascertain the amount due by inquiry in the registration office and from the mortgagor and deposit the sum in Court under S. 88, T. P. Act. The story of defendant 4 is thus so inherently improbable that the evidence adduced in support of it must be scrutinized with some care.

Judgment.—The facts of this case are clearly given in the judgment of the lower appellate Court and need not be here repeated. It is urged that a presumption should have been made by the lower appellate Court against the plaintiff on account of his not having produced the notice which his agent, as D. W. 1, admitted. The lower appellate Court refers to this witness and says it finds no admission in his deposition that the alleged notice was received and I fully agree with it. Moreover, the defendant did not ask the plaintiff to produce the notice either before or after the deposition of D. W. 1, nor has he produced the plaintiff's postal acknowledgment. The alleged second notice not being proved we are only left with the first notice dated 14th July 1910 and the plaintiff's reply thereto Ex. 4 D-2. It is urged that the plaintiff's reply is evasive, and amounts to a refusal to render accounts which deprives him of his rights to costs. The first notice to which Ex. 4 D-2 is a reply is not on the record and from the reply Ex. 4 D-2 all that can be gathered regarding the contents of the notice is that it told the plaintiff that defendant 4

had purchased Ithu Manher's house in auction following a simple money-decree. There is no ground for holding that the notice did not ask for an account. As a matter of fact defendant 4 seems really to have relied upon the second notice for proof of his demand of an account. No misconduct thus appears to have been proved.

Lastly it is said that no actual offer of money was necessary to constitute a tender but it was sufficient that defendant 4 showed his readiness and willingness to pay, and reliance is placed upon *Shriram Rupram v. Madangopal Gowardhan* (1). This was a decision with reference to S. 51, Contract Act, which has no application to the present case. A mere readiness and willingness to pay, not communicated to the creditor, and without the accompanying circumstance of the debtor being in a position to pay immediately if the offer was accepted, does not amount to a valid tender. There is, however, no plea that the appellant expressed his readiness and willingness to pay, apart from the alleged tender which has been found not proved. Ground No. 5 is not pressed. The appeal fails and is dismissed with costs.

P.N./R.K. *Appeal dismissed.*
1. (1903) 30 Cal 865.

A. I. R. 1918 Nagpur 218

BATTEN, A. J. C.

Ganesh Maharaj Haddu—Defendant—Appellant,

v.

Pandurang—Plaintiff—Respondent.

Second Appeal No. 529 of 1917, Decided on 19th June 1918, from decree of Dist. Judge, Nagpur, D/- 9th August 1917, in Appeal No. 87 of 1917.

—(a) *Transfer of Property Act* (1882), S. 52—S. 52 is wide enough to include even agricultural lease.

The language of S. 52 is wide enough to include a lease and there is no difference in principle between a lease for agricultural purposes and a lease for any other purpose. [P 219 C 2]

(b) *Transfer of Property Act* (1882), S. 52—Lease—Burden of proof is on lessee.

It is incumbent upon any one taking a lease pendente lite to show that the rights of persons litigating in the suit are not thereby affected. [P 219 C 2]

M. R. Bobde—for Appellant.

M. B. Kinkhede—for Respondent.

Judgment.—The plaintiff respondent is the Malguzar of the village in the Umrer Tahsil of Nagpur District in which

the two fields in suit are situated. The defendant at the recent Settlement has been recorded as occupancy tenant of the fields, and the plaintiff sues for possession, alleging that the Settlement entry is incorrect. Sitaram was the original Malguzar and mortgaged the village to the plaintiff's predecessor-in-title in 1891 and a final decree for foreclosure was passed on 15th August 1903. At the date of the mortgage the fields were the occupancy tenancy fields of one Bhilai. Bhilai surrendered the fields on 8th May 1902. On 1st August 1903 during the pendency of the mortgage suit the Malguzar Sitaram executed a patta in favour of the defendant, recognizing him as occupancy tenant. The defendant has failed to prove that he was an ordinary tenant before he was made occupancy tenant. The defendant is a deity represented by Maniram, the brother of the former Malguzar Sitaram. For the purposes of this appeal Maniram may be regarded as the defendant, and as the tenant recognized at the recent Settlement. The Court of first instance held that the creation of the defendant's tenancy was *pendente lite* and, therefore, not binding on the plaintiff by reason of the provisions of S. 52, T. P. Act. It has been found by both the lower Courts that neither the plaintiff nor his predecessor-in-title, the foreclosing mortgagee, has ever recognized the defendant as tenant or accepted rent from him, though the defendant has been in possession of the fields since 1903. The learned District Judge observes:

"The third ground is that the lease was not fraudulent or intended to defraud a creditor. This is not exactly the point. S. 52 applies to transfers which are not fraudulent. It appears to me, however, in spite of the very definite head note to *Dhiraj Singh v. Dina Nath* (1) that it is still doubtful whether every lease of agricultural land is a transfer within the meaning of S. 52, T. P. Act. Skinner, A. J. C., expresses a doubt on this point in the body of the judgment on p. 144 and all the reported cases appear to refer to leases which were not *bona fide*."

He goes on, however, to say:

"In this case, however, there appears ample ground for holding that the lease was not granted merely to avoid loss of rent in the ordinary course of management. The grantor presumably knew that a final decree would be passed in a few days. The grantee was his brother. The time was the middle of the rains, and not the usual time for arranging for cultivation. In spite of the fact that the right to possession of the fields in consequence of surrender by the former tenant was a recent accession, I must hold that the lease was

not giving in the ordinary course of management."

In the ruling cited by the learned District Judge, Skinner, A. J. C., observed that he was not prepared to differ from the ruling of Ismay, J., C. in *Narain Patel v. Abdul Majid Khan* (2), that the language of S. 52, T. P. Act was wide enough to include a lease, and that there is no difference in principle between a lease for agricultural purposes and a lease for any other purpose. The following extract from the judgment of the learned Judicial Commissioner is very much to the point:

"The transfer of a right to enjoy a property cannot but affect the rights of the owner of that property and it is I think incumbent upon any one taking a lease *pendente lite* to show that these rights are not affected."

In accordance with this principle the burden of showing that the rights of the respondent were not affected by the lease, within the meaning of S. 52, T. P. Act, lay upon the appellant. The learned Advocate for the respondent contends that according to S. 70, T. P. Act, the mortgagee was entitled to all accessions to the mortgaged property and that the accrual of cultivating rights to the Malguzar on account of the surrender of a tenancy holding constituted an accession. The learned pleader for the appellant argues that there was no accession, since at the date of the mortgage, and even at the date of the institution of the suit for foreclosure, the fields were occupancy fields, and at the date of the decree they were occupancy fields, if the lease of 1903 be upheld, so that the mortgagee in spite of the lease has got exactly what was mortgaged to him. This is not in my view the correct aspect in which the question should be regarded. If it had not been for the lease the mortgagee would undoubtedly by his decree have had the right to take the fields as his *khudkasht* fields over which he as Malguzar had the right of cultivation, and the sole question is whether the lease adversely affected the rights of the new Malguzar. The lease, if upheld, would have the effect of his getting less by the decree than he otherwise would have got.

The learned pleader for the appellant contends that to lease out again fields that had recently been surrendered was an ordinary act of management, which cannot be regarded as putting the Mal-

guzar or his successor in a worse position. The learned pleader relies on certain remarks in the two cases already cited, where the facts were that waste land had been leased in perpetuity, to the effect that a fresh lease to avoid loss of rent of a holding that had been abandoned might possibly be regarded as an "ordinary and reasonable incident of interim beneficial enjoyment," an expression taken from *Radhikapatta Mahadevi v. Radhaman: Mahadevi* (3), where a perpetual lease of waste land was held not to be such an incident. Every case must be judged on its own facts and the question whether a lease is an ordinary act of management which will not prejudice the rights of the Malguzar's successor must be decided by the circumstances of the case. It is true, as represented by both sides in this appeal, that there was no express issue as to whether the lease was an ordinary/prudent mode of management, but the facts have been fully brought out by the evidence on the existing issues and even if the finding of fact of the District Judge that the lease was not an ordinary act of management cannot be regarded as a finding on issue 9, this Court can frame the necessary issue, and can fairly decide it on the record, and no possible advantage to either side could be attained by a remand. If the circumstances were such that the lease of the surrendered fields could be regarded as given in the ordinary course of management, I would hold that it did not prejudicially affect the rights of the new Malguzar. But I entirely agree with the District Judge that the circumstances mentioned by him show that the real intention of the former Malguzar was to save some of the mortgaged property for a member of his family, and that the lease would, in all probability, not have been given but for the pending foreclosure. The lease was intended to benefit the lessor's brothers at the expense of the mortgagee and now, if upheld, it would have this effect. For these reasons I am of opinion that the District Judge has taken a correct view, and I dismiss the appeal with costs.

P.N./R.K.

Appeal dismissed.

3. (1884) 7 Mad 96.

A. I. R. 1918 Nagpur 220

BATTEN, A. J. C.

Sogai—Defendant—Applicant.

v.

Warloo—Plaintiff—Non-Applicant.

Civil Revn. No. 188 of 1918, Decided on 20th November 1918, from judgment and decree of Junior Small Cause Court Judge, Bhandara, D/- April 1918, in Civil Suit No. 963 of 1917.

Contract—Person, not party, cannot take advantage unless in position of cestui que trust.

A person not a party to a contract and with whom there is no privity, cannot gain any advantage by it as a plaintiff or as a defendant unless he is in the position of a cestui que trust.

[P 220 C 2]

G. B. Deo—for Applicant.*Atmaram Bhagawant*—for Non-Applicant.

Judgment.—I agree with the view taken by the lower Court in this case, that the terms of the agreement between plaintiff and his partner, defendant 1, do not necessarily bear the meaning attached to them by the applicant. The clause, in my opinion, means that if a debtor of the firm pleaded that he had paid defendant 1, the plaintiff would, after the dissolution of the partnership which left him the sole owner of the business, settle the matter with the debtor and whatever the result, would not hold defendant 1, liable. It is impossible to believe that the plaintiff intended to agree to absolve any debtor who claimed to have paid defendant 1 whether that debtor had really paid him or not. The words *jama kharch karna* may no doubt mean "to book as received and struck off as applied," but this is not the literal or necessary meaning. Even if the words bore this meaning, which in my opinion they do not, the defendant-applicant, who was not a party to the contract and with whom there was no privity of contract, cannot gain any advantage by the contract as he certainly was not put in the position of a cestui que trust, vide *Laxman Bhat v. Govinda* (1) and *Seth Bamlal v. Seth Narsingdass* (2). It does not appear to make any difference that the applicant is not the plaintiff; he is seeking in the litigation to gain an advantage by a contract to which he was not privy. As to the fact of repayment it is a question of evidence, as to which

1. (1898) 11 C P L R 108.

2. (1901) 14 C P L R 22.

I will not interfere in revision. The application is dismissed with costs.

P. N. /R.K. *Application dismissed.*

A. I. R. 1918 Nagpur 221(1)

FINDLAY, OFFG. A. J. C.

Baija—Complainant—Applicant.

v.

*Babu and another—Accused—Non-Ap-
plicants.*

Criminal Revn. No. 55 of 1918, decided on 26th April 1918, against the order of Sess. Judge, Nagpur.

Penal Code (1860), S. 499, Excep. 9—Relevant statements made bonafide by party to suit is privileged unless express malice is proved.

A statement made by a party to a suit in good faith and for the protection of his interests, and which is relevant to the matter in issue, falls under Excep. 9, S. 499 of the Penal Code and is privileged. In order to take such a statement out of the exception, express malice must be proved. [P221 C 2]

G. R. Deo—for Applicant.

G. P. Dick—for the Crown.

M. R. Bobde—for Non-Appl.

Order.—The only point involved in this application for revision is whether a certain statement made by a party in a civil proceeding was privileged or not under the law applicable to the law of defamation. The non-applicants Babu and Sonya were prosecuted in the Court of the First Class Bench Magistrates, Nagpur, in respect of part of a written statement given in by them in a rent suits in which they were defendants. The statement being to the effect that Babu an applicant had had criminal intimacy and that later the applicant had had a paramour one Bahurao. The Honorary Magistrate held that the statement had been made without any malicious intent and discharged the non-applicants. An application on revision to the Sessions Judge was similarly unsuccessful, the learned Judge after a brief review of the conflicting caselaw on the matter of the extent of the privilege accorded to witnesses and parties in respect of their statements in civil proceedings holding that it was not a case where he should interfere. I find it unnecessary, however, in the present case to decide the point as to whether on this subject the view of the Madras High Court which accords absolute privilege to such statements or the more modified view of other High Courts should be followed, for it seems to me that the alleged defamatory pleading was

clearly relevant to the rent suit in question, as was held by the District Judge in his judgment dated 11th April 1917.

I fully concur in this connection with the decision of Sale and Shetty, J.J., in *Woolfun Behi v. Jesarat Sheikh* (1); it must be remembered that the Calcutta High Court has declined to follow the English rule of absolute privilege in this connection but even so in the case quoted, which is absolutely analogous to the present one, the decision was reversed. To take the opposite view would obviously lead to more upward results in the administration of justice and in the present case the alleged defamatory statement was clearly covered by Excep. 9, S. 499, I. P. C. The statement was clearly made in good faith for the protection of the interests of defendants in the suit and as such under any view of the law taken by the High Courts in this country was privileged. Express malice would have to be proved for applicant to succeed and this has not been done. The application is accordingly dismissed.

P. N. /R.K. *Application dismissed.*

(1) (1904) 67 Cal 242

*** A. J. R. 1918 Nagpur 221 (2)**

DRAGE BRUCKMAN, J. C.

Pandu and others—Defendants—Applicants.

v.

Sital Prasad—Plaintiff—Respondent.

Second Appeal No. 583 of 1917, Decided on 8th July 1918, from decree of Addl. Dist. Judge, Warananagar, D/ 28th September 1917, in Civil Appeal No. 130 of 1917.

(a) Civil P. C. (1908), O. 2, R. 2—Decree for specific performance of agreement to lease—Subsequent suit for possession is maintainable.

The relief for possession is not a part of the claim which a plaintiff suing for the specific performance of an agreement to lease is entitled to make in respect of the breach of the defendant's agreement to demise the land. [P 223 C 1]

Therefore, where a plaintiff obtained a decree for the specific performance of an agreement to lease and after the execution of the lease by the defendant brought a suit for possession of the land demised:

Held: that the suit for possession was not barred by the provisions of O. 2, R. 2, Civil P. C. [P 223 C 1]

* (b) Transfer of Property Act (1882), S. 52—Transfer after decree but before action is taken under O. 21, R. 34, Civil P. C.—Doctrine of lis pendens applies—Civil P. C. (1908), O. 21, R. 34.

Action taken by the Court under O. 21, R. 24, in execution of a decree for specific performance

of a contract of lease is a proceeding in the suit itself. [P 223 C 2]

Therefore, a transfer of the property in dispute by the judgment-debtor effected after the passing of the decree but before action is taken under O. 21, R. 34, would be affected by the doctrine of lis pendens. [P 224 C 1]

(c) C. P. Tenancy Act (1898), S. 35 (4)—Non-cultivation not voluntary but outcome of landlord's improper behaviour—S. 35 does not apply.

The provisions as to implied surrender embodied in S. 35 (4), do not apply to a case where the non-cultivation of land and non-payment of rent are not voluntary but are due to obstruction which is the outcome of the landlord's improper behaviour. [P 224 C 1]

(d) C. P. Tenancy Act (1898), S. 45 (2)—Agricultural lease—Sanction of Revenue Officer is not required.

Section 45 requiring the sanction of a Revenue Officer for lease of *sir* land had no application to an agricultural lease. [P 224 C 1]

Atmaram Bhagwant—for Appellants.

Balwantrao Pendharkar—for Respondent.

Judgment.—The suit out of which this second appeal arises was brought to obtain possession of *sir* field No. 38/1 in Manze Manikwara, the previous history of which may be briefly stated. On 16th January 1911 Narain and Withoba, the Malguzars of Manikwara, agreed in writing (Ex. P-6) to let their *sir* lands to Sital Prasad for 99 years. On 29th August 1911, Sital Prasad brought Suit No. 14 of 1911 in the District Court against the malguzars to obtain specific performance of their agreement and on 13th February 1913 obtained the desired decree which did not, however, fix the time within which the necessary lease should be executed. The relief claimed did not include possession of the fields. On 23rd June 1913, Sital Prasad applied for execution complaining that the malguzars had not executed the lease and praying action might be taken under R. 34, O. 21, Sch. 1, Civil P. C. This application was eventually dismissed, with undue haste as it appears to me, on 1st November following, on the ground that the draft put in by Sital Prasad did not show the date for which the term of the lease was to run and the omission had not been supplied. On that occasion Sital Prasad was represented merely by an agent, who might reasonably have been given time to consult his master on the important question thus raised.

A fresh application was preferred on 24th April 1914 and on 29th August following Narain executed the lease, which

had been drawn up in accordance with the decree-holder's final draft. The Court executed on behalf of Withoba in his absence on the same day. Registration was eventually effected on 26th June 1915 after both the lessors had denied execution. On 1st July following Sital Prasad went to take possession of field No. 38/1, but was obstructed by the defendants who set up a perpetual lease of that field given them by Narain and Withoba on 22nd February 1913. A number of pleas were raised in answer to the claim, but all have been decided against the defendants who have been directed to put the plaintiff in possession. Several are repeated in this Court and will now be dealt with *seriatim*.

The first point is that in the suit of 1911 the plaintiff should have included his claim for possession and is therefore debarred by R. 2 (2), O. 2, Sch. 2, Civil P. C., from obtaining that relief. *Narayana Kavirayan v. Kandasami Goundan* (1) is relied upon for the appellants. In that case the suit for possession was brought against the person who had executed a sale-deed in accordance with the decree passed in the suit for specific performance of an agreement to convey. It was held that the right to possession arose coincidentally with the right to the execution of a conveyance and that S. 43 Civil P. C., 1882 debarred the plaintiff from bringing the later suit for possession. This view was disapproved in *Krishnammal Manandiar v. Sundararaja Aiyar* (2), where it was held that the right to possession accrues on the execution of the deed of conveyance. The later Madras decision followed *Nathu v. Budhu* (3), where the conveyance was held to give rise to a new and distinct cause of action, the cause of action for the suit for specific performance being merely the breach of the contract of sale. The view taken by this Court in *Sheodin v. Godhi Bai* (4) is in accordance with the balance of authority in the other Courts mentioned. The appellants seek to distinguish the last mentioned case on the ground that specific performance was obtained on foot of an award made by the Debt Conciliation Board, not on the strength of a

1. (1899) 22 Mad 24.

2. A I R 1914 Mad 465=33 Mad 695.

3. (1894) 18 Bom 537.

4. (1908) 4 N L R 14.

private agreement between the parties. The ratio decidendi, however, applies equally to the case of an arbitration award and to that of a private contract, and the learned Additional Judicial Commissioner expressly preferred the Bombay view to that taken in the earlier Madras case. I am referred by the appellants to the following remarks made by Batten, A. J. C., in *Thakur Rewasingh v. Hardayal* (5):

"Can the agreement to execute a sale-deed and the agreement to put the plaintiff in possession be regarded as separate parts of the contract? I think not; for the agreement to put the vendee in possession, though mentioned as a separate agreement, is not really a separate agreement, but is ancillary to the agreement to execute a sale-deed, and the executant of the sale-deed would be bound to put the vendee in possession without any separate contract to that effect. This part of the contract is bound up in the other part, and the separate mention of it is a superfluity."

In that case the contract, as stated in the plaint, was both to execute a sale-deed and to put the plaintiff in possession, and the question was whether in view of S. 17, Specific Relief Act, the Court could direct execution of the sale-deed without also ordering delivery of possession. The answer given was in the affirmative. But it does not seem to me to furnish any authority for holding that the relief for possession is part of the claim which the plaintiff is entitled to make in respect of the breach of the defendants' contract to convey. I may also refer to *Abdul Majid v. Boida Nath Dhur* (6) as supporting the view that the cause of action, where the breach of a contract to convey has occurred, is different from that where resistance is offered to the transferee when he endeavours to take possession of the property conveyed to him. For these reasons I hold that R. 2 (2), O. 2 aforesaid does not operate as a bar to the respondent's claim for possession. It is next contended that the rule of *lis pendens* contained in S. 52, T. P. Act, has no application. The lower appellate Court, following the decision in *Moti Lal Pal v. Prem Nath Mitra* (7), has held that the suit for specific performance brought in 1911 must be considered to have been still pending when the appellants obtained their lease. Against this view it is now urged that after the decree for specific performance

nothing remained but to execute it and that under the present Civil Procedure Code proceedings in execution are not proceedings in suit. Judging, however, from sub-R. (5), R. 34, O. 21, Sch. 1, Civil P. C., action taken by the Court in execution of a decree for specific performance of a contract of sale is clearly a proceeding in the suit itself. In *Shivji Ram Sahelram Marwadi v. Waman Narayan Joshi* (8) Farran, C. J., remarked as follows:

"Now the general rule of law is that the *lis pendens*, except in administration suits and suits for an account and in suits of a similar nature in which the decree is the inception of subsequent proceedings, ends with the decree."

In that case the *lis* was instituted on foot of a mortgage, the relief claimed being sale of the mortgaged property, and the purchase said to be affected by the rule of *lis pendens* took place while the mortgagee's execution proceedings were actually pending. That a mortgage suit is pending until a final decree is passed is now well settled; see *Digambar v. Ganpat* (9). In *Bhoje Mahadev Parab v. Gangadhar Vithal Naik* (10) Batchelor, J., appears to have considered that the *lis* could not be regarded as having revived, unless the transfer said to be affected by it was made during the actual pendency of execution proceedings.

If this view to be acted upon, the defeated defendant in a suit for specific performance might convey to an outsider the very day after the decree was passed and so render the litigation nugatory; the prompter his defiance of the decree the more certainly would that result accrue. In the present case the transfer to the appellants was effected only 13 days after the decree for specific performance, i. e., in less than what may fairly be regarded as a reasonable time for preparation of the necessary conveyance and its execution by the defendants. Under R. 34, O. 21, Sch. 1, Civil P. C., the decree-holder cannot move the Court for execution of the requisite document until the judgment-debtor has neglected or refused to obey the decree and he has then prepared a draft of the document. It is not, and could not be, suggested that 13 days is a sufficient time for fulfilling this requirement, nor was it pleaded in the Courts below that the plaintiff was guilty of any undue delay

5. (1907) 3 N. L. R. 160.

6. (1902) 6 C. W. N. 314.

7. (1909) 2 I. C. 696.

8. (1899) 12 Bom. 939.

9. (1916) 12 N. L. R. 50=33 I. C. 496.

10. (1913) 37 Bom. 621=21 I. C. 54.

in taking out execution. In *Krishnappa v. Shivappa* (11) relied on for the appellants, it was assumed that inaction on the plaintiff's part might interrupt the operation of a lis, but on the findings of the Court of first appeal inaction on the plaintiff's part was negatived so that the question of laches appears to have been distinctly raised before the stage of second appeal. In these circumstances I think that the lis may properly be regarded as having been still under active prosecution when the appellants took their lease and that the rule of lis pendens has rightly been held to make that lease ineffective.

The next contention raised is that the plaintiff must be deemed to have impliedly surrendered the field under S. 35 (4), C. P. Tenancy Act, 1898, inasmuch as he neither cultivated it nor paid rent for two years after the date of his agreement. As to this I am clearly of opinion that the subsection cited has no application. The plaintiff was not in a position to claim possession till the lease in his favour was executed by the Malguzars on 29th August 1914, and his attempt to obtain possession on 1st July 1915 was frustrated by the appellants. The case is not one of voluntary inaction on the part of the tenant such as the subsection contemplates, but one of obstruction which was the outcome of the landlord's improper behaviour. The fourth ground of appeal is not pressed, and the fifth raises for the first time a question of fact which cannot be entertained at the present stage.

The last point that calls for notice is also a new one, namely, that the land being *sir*, the lease to the plaintiff required the sanction of a Revenue Officer under S. 45, Tenancy Act. If this plea had been taken in either of the Courts below, it would have been open to the plaintiff to show what already appears *prima facie* to be the case, that the lease is an agricultural one, so that S. 45 has no application: see *Bhagirathi Bai v. Anyaji Kunbi* (12). This contention, too, must be overruled. The result is that the appeal fails and is dismissed with costs. In the Courts below costs will be paid as already ordered.

P.N./R.K.

Appeal dismissed.

11. 31 Bom 393=3 Bom L R 530.
12. (1907) 3 N L R 159.

A. I. R. 1918 Nagpur 224

BATTEN, OFFG. J. C.

Govindrao and others — Defendants—Appellants.

v.

Ganpathi and others—Plaintiffs—Respondents.

Second Appeal No. 326 of 1916, Decided on 19th February 1918, against the decision of Divl. Judge, Nagpur, D/- 23rd February 1916, in Appeal No. 96 of 1915.

(a) Bengal Regulation (1825), S. 4 (1) — S. 4 does not require that accretion should be slow and imperceptible — All accretions by gradual alluvion are treated alike irrespective of rate of formation.

Plaintiff sued for possession of some land, on the ground that it had formed contiguous to his fields by alluvial deposits in the bed of the river which adjoined his occupancy holding. The accretions took place in successive steps in four years. It was contended for the defendants that the land could not be claimed by the plaintiff inasmuch as S. 4, did not apply to the case, the accretion not having accrued by gradual, slow and imperceptible means:

Held: that the plaintiff must succeed, as the only requirement in S. 4 is that the accretion should be gradual, not that it should be slow and imperceptible. All accretions by gradual alluvion are treated alike irrespective of the rate of formation. [P 225 C 2]

(b) Bengal Regulation (1825), S. 4 (1) — Original boundary line ascertainable — Still S. 4 applies.

The fact that the original boundary was known or ascertainable does not render the law of accretion inapplicable. 40 *Mad* 1063, *Foll.*

[P 225 C 2]

(c) Practice—Decree — Improper decree should not be given.

No decree should be given by the Courts which on the face of it is improper. [P 226 C 1]

B. K. Bose—for Appellants.

G. R. Deo and M. R. Bobde—for Respondents.

Judgment.—The plaintiffs respondents are occupancy tenants of two fields Nos. 3 and 4, which adjoined the bed of the river Khahan. From 1896 onwards land contiguous to these fields was formed in the bed of the river by alluvial deposit. The accretion amounted to 5.08 acres in 1896, an additional 10.07 acres in 1898, and an additional 3.30 acres in 1907. In 1908 the defendants, Malguzars of the village, took possession of this land, and in 1909 there was a further accretion of 85 acres. The defendants appellants are Malguzars of the villages on both sides of the river and at the last Settlement they were recorded as proprietors of the bed of the river. The plaintiffs sued for possession alleging that the accretions became part of their occupancy holding.

tional Judge to the Court of the Sub-Judge gave the plaintiffs a decree for possession but did not in his judgment refer to Bengal Regn. 11 of 1825. The appeal of the defendants was dismissed by the District Judge, who applied the provisions of the above Regulation to the case. The grounds of appeal are general, but the learned Advocate for the appellants has argued the appeal under four heads. In the lower appellate Court it was argued that the Bengal Regulation did not apply to the case, because the accretion did not accrue by gradual, slow and imperceptible means. The same contention forms the first ground of appeal argued in this Court. The learned District Judge after consideration of the authorities summarised his conclusions as follows:

"I am doubtful whether the Roman Law, in laying down that accretion must be gradual and by imperceptible increments, meant to insist on its being slow. The English law, as it appears in the resume given by their Lordships in *Laper v. Muddun Mohun Thakoor* (1), insists on 'slowness'. But their Lordships in speaking of the Regulation in *Nagender Chunder Ghose v. Mohamed Nooff* (2) omit the word 'slow'. In the recent Privy Council case of *Srinath Roy v. Debnahendra Sen* (3) their Lordships have gone further and stated that where under English conditions the rule applies to imperceptible alterations, Regn. 11 of 1825, Arts. 1 and 4, speak of gradual accretion. The analogy of the English rule can hardly be prayed in aid when Indian legislation has thus an established and different rule on the same subject. Certainly the word 'considerable' in Cl. 2, S. 4 suggests that accretion may be by small jumps and still come under Cl. 1, S. 4. This supports their Lordships' view in the recent case that the Indian Regulation is not confined to accretions gradual and imperceptible, much less to gradual, slow and imperceptible."

These conclusions of the learned District Judge are called in question in view of the fact that accretion took place by successive steps in four years. In every year when the flood subsided a considerable accretion was apparent, and it is contended that in these circumstances the land cannot be said to have been gained by gradual accretion within the meaning of Cl. 1, S. 4 of the Regulation. My task in deciding this question is much lightened by a recent decision of Ayling and Srinivasa Aiyangar, JJ., in *Secy of State v. Rajah of Vizayanagaram* (4), in which the authorities on the subject have been exhaustively discussed by Srinivasa

Aiyangar, J., whose conclusions are thus summed up by Ayling, J.:

"It seems to me the recognition of title by artificial accretion is largely governed by the fact that the latter is due to the normal action of physical forces; and the different condition of Indian and English rivers is such that what would be abnormal and almost miraculous in the latter is normal and commonplace in the former, as pointed out by their Lordships of the Privy Council in *Srinath Roy v. Debnahendra Sen* (3). Such a difference cannot be ignored in the application of the legal principles of artificial accretion; and it seems to have been their object in Bengal Regn. 11 of 1825. The only requirement in S. 4 of that Regulation is that the accretion should be gradual, not that it should be slow or imperceptible. Abnormal changes due to sudden alterations of course and extent of rivers are separately provided for, but all accretions by gradual alluvion are treated alike, irrespective of the rate of formation."

Speaking with due respect I am in entire accordance with the view expressed by the Madras High Court and the first ground of appeal, therefore, fails. It is next suggested that as the boundaries of the plaintiffs' fields Nos. 3 and 4 were already known and had been recorded by the Survey Department, the claim of uncertainty on which the principal of the Bengal Regulations is said to be based is absent. This question also has been dealt with in the judgment of the Madras High Court already cited. It is sufficient to quote the following passage from the judgment of Srinivasa Aiyangar, J.:

"He (the Government pleader) contended that as the extent and boundaries of the plaintiffs' lands in the first were accurately ascertainable from the map, any lands subsequently formed, even by gradual, slow and imperceptible alluvion in what was the bed of the river in 1870, belonged to the Crown; and relied chiefly on the observation of the Lord Chancellor in *Attorney-General v. Chambers* (5). This question was deliberately considered in *Attorney-General v. McCarthy* (6) already referred to and the conclusion reached that there was no such principle and the fact that the original boundary was known or ascertainable did not render the law of accretion inapplicable, and the observations of the Privy Council at p. 612 in *Attorney-General for Nigeria v. Holt & Co.* (7) are to the same effect. The surveys in this case were not within the category of the agricultural of the civil law. *St. Clair Co. v. Livingston* (8), Dr. Hunter's Roman Law, p. 276, and Law Quarterly Review, Vol. 12 at p. 353. This contention must, therefore, be disallowed."

This ground of appeal also fails. The next contention is that it is possible that what happened was that there was an exposure of the pre-existing bed of the

1. (1870) 14 W R 11=13 M I A 457 (P C).

2. (1872) 18 W R 13 (P C).

3. A I R 1914 P C 48=12 Cal 489=25 I C 157=11 I A 221 (P C).

4. (1917) 40 Mad 1083=40 I C 890.

5. (1859) 4 DeG & J 55.

6. (1911) 2 I R 263.

7. (1915) A C 593.

8. (1875) 23 Wall 46.

river and not a fresh deposit of silt as alleged by the plaintiffs. On looking at the record of the case, however, I find there is no foundation for this contention. The appellants themselves pleaded that the new land had been thrown up by the river. It is finally argued that the map filed in the case shows that not all the land claimed by the plaintiffs can be correctly described as an accretion to their fields Nos. 3 and 4. A glance at the map (Ex. P. 2.) indicates that only a portion of the land in suit is contiguous to other fields further down the course of the river. The learned District Judge in para. 3 of his judgment has noticed this; but he has not thought it necessary to adjudicate on the subject since there were no pleadings on these lines. I am, however, of opinion that no decree should be given by the Courts which is on the face of it improper. It is argued for the respondents that the new land adjoining fields which do not belong to the plaintiffs should nevertheless be considered as an accretion to the plaintiffs' fields because the bank of the plaintiffs' fields is low, while the bank lower down is precipitous. There is no force in this argument for the accretion must be considered to be an accretion to the land at the foot of the precipitous portion of the bank. I must remand the case to the lower appellate Court for a decision as to what portion of the land claimed is an accretion to the fields of the plaintiffs. Judging by the map, some of the land claimed is an accretion to land not the property of the plaintiffs. The District Judge will use his discretion as to whether further proceedings should take place in his Court or in the Court of first instance. Costs will be the costs in the suit. There will be no refund certificate.

P.N./R.K.

Case remanded.

A. I. R. 1918 Nagpur 226

BATTEN, OFFG. J. C. AND FINDLEY,
OFFG. A. J. C.

Tortan Bai and others—Defendants—
Appellants.

v.

Ballabhji Ojha—Plaintiff—Respon-
dent.

First Appeal No. 81 of 1917, Decided on 23rd April 1918, from decree of Aldl. Dist. Judge, Jabulpur, in Civil Suit No. 11 of 1917, D/- 10th September 1917.

(a) *Hindu Law*—On death of female succeeding to her son, estate goes to son's heirs.

Under the Mitakshara law as interpreted by the Benares School, when a female succeeds to the estate of her son, the heirs of the son, the last male holder, would succeed to the estate after the death of the female. [P 227 C 1]

The Mithila School is a branch of the Mitakshara School, the Mitakshara being the basis of the works which set out the law of the Mithila country. Therefore, it lies on those who allege to the contrary to prove that there is something in the Hindu law as interpreted by the Mithila School to justify their contention that when a woman succeeds to her son the immovable property goes on her death to the heirs of her husband, and not to the heirs of her son. [P 227 C 1]

There is no difference in this respect between the Benares and the Mithila Schools of Hindu law: 10 W R 31 (P C), Dist; 7 W R 25 (P C) and 3 W R 140, Foll. [P 227 C 1]

(b) *Hindu Law*—Widow—Moveable property purchased from income of estate inherited through son, forming part of estate and undisposed is not stridhan.

Where the circumstances are such as to show that a Hindu female purchased moveable property from the income of the estate inherited from her son, with a view of its becoming part of the main estate, it passes with the estate at her death, if previously undisposed of, to her son's heirs and not as her stridhan to her heirs: 23 Mad 1; 11 I C 971 and 35 All 551, Foll.

[P 228 C 2]

J. C. Ghosh, Damodar Das and Braj Mohan—for Appellants.

B. K. Bose, H. S. Gour, M. Gupta and K. B. Gupta—for Respondent.

Judgment.—The questions that arise in this appeal are purely questions of law. The parties are admittedly governed by the Mithila School of Hindu law, their ancestors having come into these provinces as priests of the Rajah of Mandla. The first six grounds of appeal, which are to be read together, refer to the ancestral immovable property in suit. Girdhari, the head of the family, died on 5th February 1894, and after his death the property was held by his son Jeonath, who died soon after in 1895. Jeonath was thus the last male holder and was succeeded by his mother, Girdhari's widow Mt. Kusumabai, who died on 31st January 1917. The plaintiff respondent is a cousin of Girdhari through the male line, and the defendants are Jeonath's three sisters, daughters of Girdhari and Kusumabai. The sole question is whether on the death of Kusumabai who succeeded to the property as heir of her son, the property goes to the heirs of her husband or to the heirs of her son. Admittedly if it goes to the heirs of her husband, the

defendants-appellants are the heirs and if it goes to the heirs of her son the plaintiff-respondent is the heir. Under the Mitakshara law as interpreted by the Benares School the heirs of the son, the last male holder, would undoubtedly succeed to the property. The Mithila School is a branch of the Mitakshara School, the Mitakshara being the basis of the works which set out the law of the Mithila country. It, therefore, lies on the defendants to show that there is something in the Hindu law, as interpreted by the Mithila School, to justify their contention that when a woman succeeds to her son the immovable property goes on her death to the heirs of her husband, and not to the heirs of her son. The question depends on the interpretation to be placed on certain passages in the Vivada Chintamani. The original text of Katyayana and the commentary by the author of the Vivada Chintamani are translated at pp 40 and 41 of the introduction to the translation of the Vivada Ratnakara by Golap Chandra Sarkar Sastri and Digambar Chattopadhyaya. This translation is as follows:

"The husband's daya (heritage or gift) the wife may use according to her pleasure when the husband is dead; but when he is living, she shall preserve it. Otherwise she shall pass her time in his family. A sonless (wife) preserving unsullied the bed of her lord, and abiding by her venerable protector, shall enjoy (the husband's property) until her death, being moderate; afterwards the heirs shall take."

The husband's daya is the husband's property; that again is (two-fold) either subject of the wife's proprietary right, by reason of the default of any other taker, on his death; or subject of the wife's proprietary right, by his permission, during his life. As regards the first, it is said (by Katyayana):

"The husband's daya, the wife may use according to her pleasure when the husband is dead."

This, however, refers to property other than immovable. But as regards immovable property it is said (by Katyayana):

"Shall enjoy until her death, being moderate; afterwards the heirs shall take."

"Being moderate" means not expending too much: the word "sonless" is an adjective indicative of the circumstances under which her right (of inheritance to her husband's estate) accrues. As regards the second, however, it is said (by Katyayana): "But when he is living, she

shall preserve it" the meaning of which is, when the husband is alive she shall preserve his property. The meaning of "otherwise, etc.," is, that in case there be no property left by the husband the widow shall pass her time in her husband's family only. Thus even when the deceased husband's property devolves on the wife, she has no independence in making gifts and like alienations by reason of the similarity of expectancy (to know the nature of the wife's right in property inherited by her from her husband); otherwise the expectancy (to know) what kind of interest she has therein would but remain unsatisfied. Hence also the inconsistency of the recital of this text in the chapter on Sandayaka Stridhana, with its application (to property inherited from the husband) is removed. Because the force of expectancy is stronger than that of the context. Just as in immovable property given by the husband, a woman has no right to make gift and the like, by reason of this text, so also in husband's immovable property inherited by the wife. The same is the opinion of the Prakasa and the Ratnakara. So also in (husband's) immovable property, inherited by the wife through the son, for herein also there is expectancy and there is no direct text (to the contrary). (The words within parenthesis are not in the original.) The above translation as regards the last sentence differs from the translation of P. C. Tagore, which is as follows:

"If the mother, on the death of her son, gets his immovable property, she cannot make a gift of it, or dispose of it at her pleasure."

The learned advocate for the respondent is quite willing to adopt the translation by G. C. Sastri. It is to be noted that the word (husband) in Sastri's translation of this sentence occurs in some texts and not in others. The argument of the learned counsel for the appellants is as follows: The original Slokas of Katyayana restrict the wife's right of disposing of property gifted to her by her husband, but the Vivada Chintamani by analogy (or expectancy) extends the restriction to property inherited from her husband and to property inherited from the husband through the son; a correct reading of the Vivada Chintamani leads to the further conclusion that as regards property inherited

from the husband through the son, the husband's heirs inherit the property after her death. The learned counsel is unable to cite any ruling in support of his interpretation and candidly admits that he has adopted it from G. C. Sastri's treatise on Hindu law, Edn. 4, p. 411. It appears to us however that G. C. Sastri's reasoning is fallacious. All that appears to us to be said by the Vivada Chintamani is that just as in respect of property inherited from the husband the widow has no power of alienation, so also in respect of property which she has inherited from the son, the son having inherited it from the father, she has no power of alienation. In our opinion the Vivada Chintamani was not referring to the devolution of the property after the woman's death, but to the restriction of the woman's power of alienation, and the learned author appears to us to read more into the Vivada Chintamani than is to be found there. He is himself adopting the principle of "expectancy" so learnedly expounded by him. The learned counsel for the appellants refers us to *Mt. Thakoor Deyhee v. Rai Baluk Ram* (1), but this does not really help him since the widow had succeeded her husband and not her son. On the other hand the learned Advocate for the respondent cites *Thakoorain Sahiba v. Mohun Lall* (2). A died leaving his son B and a daughter C. The son succeeded his father and left a widow D, who succeeded him. She made an adoption. C's son alleged he was the next reversioner and claimed that the adoption was invalid. It was held that as sister's son, he had no locus standi to sue and (the important point here) that the son B was the propositus. We have no doubt, though this is disputed, that the case was decided on the assumption that the parties were governed by the Mitbala School. In *Punchanund Ojhab v. Lalshan Misser* (3) it was taken for granted that the property went to the heirs of the son from whom the mother inherited it. The learned Advocate contends that in the passage of the Vivada Chintamani relied on for the appellants the husband is mentioned of necessity in order to arrive at the analogy for the restriction on alienating the son's estate. We consider this reasoning to be sound.

For these reasons we are of opinion that the learned Additional District Judge who has read the sanskrit text in the original, has taken a correct view of the law. The remaining ground of appeal relates to 14 bullocks purchased by Mt. Kusumabai out of the income of the estate. The learned Additional District Judge has held, no doubt correctly, that the bullocks were purchased to carry on agricultural operations, and has held that they must have been therefore intended to be part of the estate, and as an accretion to the estate. For the appellants it is argued that the bullocks, being moveable property, formed part of their mother's stridhan. Reliance is placed on *Birajun Koer v. Luchmi Narain Mahata* (4), but that was a case of alienation, not of succession. It is argued that the special rules of the Mithila relied on as regards immovable property leave it to be inferred that moveable property goes as stridhan to the widow's heirs. Reliance is also placed on *Subramanian Chetti v. Arunachalam Chetti* (5). The learned Advocate for the respondent cites *Sridhar v. Kalipada* (6) and *Wahid Ali Khan v. Tori Ram* (7). The correct view appears to us to be that where the circumstances are such as to show that a Hindu female purchases property from the income with a view of its becoming part of the main estate, it passes with the estate at her death, if it is previously undisposed of. We consider that the Additional District Judge has decided this question correctly.

The result is that the appeal is dismissed with costs.

P.N./R.K. *Appeal dismissed.*

4. (1884) 10 Cal 392.

5. (1905) 28 Mad 1.

6. (1911) 11 I C 971.

7. (1913) 85 All 551=21 I C 91.

A. I. R. 1918 Nagpur 228

DRAKE-BROCKMAN, J. C.

Rao Vinayak and others—Defendants—Appellants.

v.

Laxman and others—Plaintiffs—Respondents.

First Appeal No. 49 of 1917, Decided on 11th January 1918, from decree of Dist. Judge, Saugor, D/- 26th January 1917, in Civil Suit No. 4 of 1916.

(a) Hindu Law—Joint family—Relinquishment by coparcener of his share in favour of some others for benefit of entire body.

A relinquishment of his share by one member of the coparcenary body in a joint Hindu family

1. (1868) 10 W R 3=11 M I A 139 (P.C.).

2. (1867) 7 W R 25=11 M I A 386 (P.C.).

3. (1865) 3 W R 140.

in favour of some members of the body does not enure to the benefit of those members only but enures to that of the entire coparcenary body. 11 *Mad.* 406; 26 *I. C.* 211, *Dist.* and 34 *Mad* 262n; 16 *All.* 369, *Rel. on.* [F 230 C 2; P 231 C 1]

(b) **Hindu Law—Alienation—Coparcener—Alienation of Joint family property without consent of other coparceners is not valid.**

Under the law of the Mitakshara joint family property owned by all the members of the family as coparceners cannot be the subject of a gift, sale or mortgage by one coparcener except with the consent, express or implied, of all other coparceners. Any deed of gift sale or mortgage granted by one coparcener on his own account of or over the joint family property is invalid and the estate is wholly unaffected by it and in its entirety stands free of it: *A. I. R.* 1917 *P. C.* 61 and *C. P. L. R. Rel. on.* [F 230 C 2]

(c) **Hindu Law—Partition—Share of mother is not her stridhan—Heirs of husband succeed on her death—Obiter.**

A share taken by a mother on a partition of the

family property between her sons will not be her stridhan. It will devolve after her death upon all the heirs of her husband: 34 *All.* 233, (*P. C.*), *Rel. up.* [P 231 C 2]

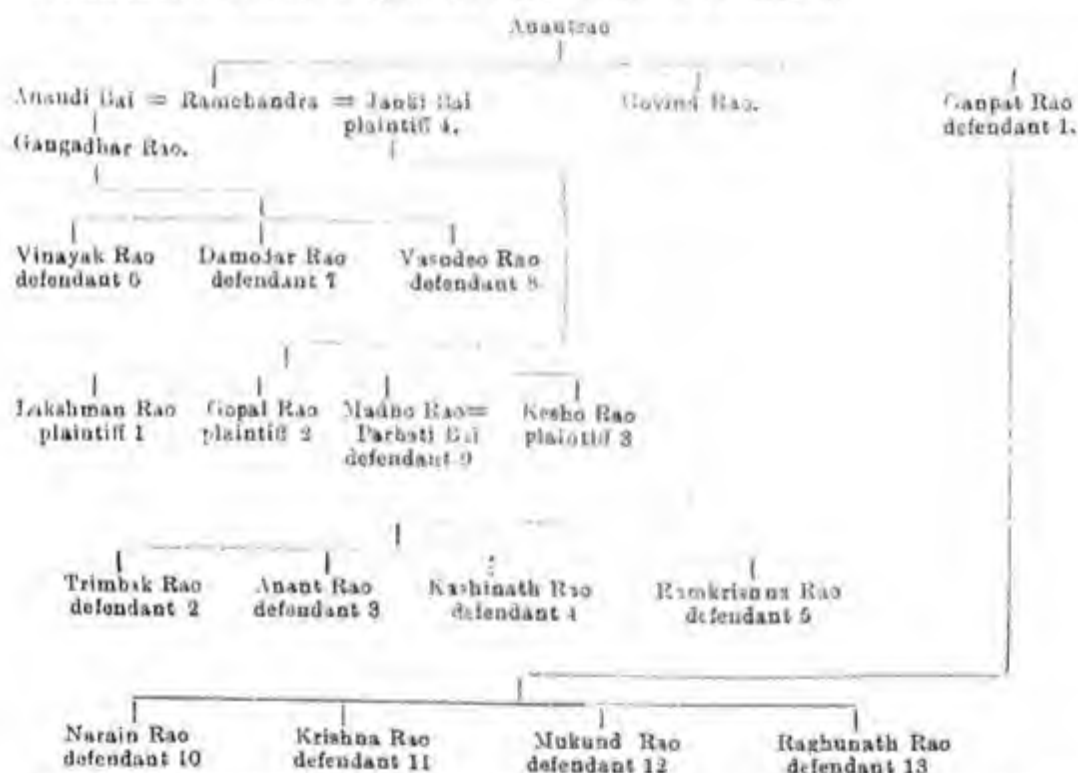
(d) **Civil P. C. (1908), O. 41, R. 33—Scope—Object of R. 33 is to enable Court to do complete justice.**

Order 41, R. 33, gives to an appellate Court power to pass any decree and make any order which ought to have been passed or made, the object of the rule being manifestly to enable the Court to do complete justice between the parties to the appeal; but the provision is not intended to enable a defendant to obtain for a plaintiff, not a party to the appeal a relief which the latter never asked for. [P 231 C 2]

M. B. Kinkhede and D. T. Mangalmoorti—for Appellants.

G. L. Sushedar—for Respondents.

Judgment.—The family tree of the parties to the suit out of which this appeal arises is as follows:



Anant Rao, Ramchandra Rao, Govind Rao, Anandi Bai, Gangadhar Rao and Madho Rao are all dead. The plaintiffs' claim is for partition of the joint family estate and they have obtained a preliminary decree which declares them entitled to $\frac{4}{15}$ ths of the property, the rest of the $\frac{1}{3}$ rd share to which Ramchandra Rao's branch is entitled going to defendants 6, 7 and 8. The plaintiff Janki Bai was declared entitled to the share $\frac{1}{5}$ into $\frac{1}{3} = \frac{1}{15}$, which her husband would have taken had he survived. The only question with which we

are concerned in this appeal relates to a deed of release (Exs. 6—8-D-1), executed on 22nd December 1913 by the plaintiff Gopal Rao in favour of his brothers Lakshman Rao and Kesho Rao. By this document Gopal Rao, who was about to become a Pleader, gave up his share in the money-lending business of the family to his surviving brothers. That share is described as $\frac{1}{12}$ th, the allotment of a share to Janki Bai not being then in contemplation: the correct figure $\frac{1}{15}$ th is not now disputed. It is also common

ground that the relinquishment cannot benefit any member of the family outside Ramchandra Rao's branch. In their written statement defendants, 6, 7 and 8, who are the appellants here pleaded that they should participate in the benefit of Gopal Rao's relinquishment. This plea gave rise to issue 7 which runs thus: What is the effect of the release made by plaintiff 2 on 22nd December 1913? Whether it enures for the benefit of defendants 6 to 8 also? The lower Court has held on the authority of *Feddayya v. Ramalingam* (1) and *Thangavelu Pillai v. Doraisami Pillai* (2), that the relinquishment must benefit those coparceners only in whose favour it was made and included the following clause in the preliminary decree for partition:

"(5) That the share of the money-lending business of the joint family to which plaintiff 2 would be entitled and which is specified in the deed of release dated 22nd December 1913 will be allotted to plaintiffs 1 and 3."

That the clause just quoted is misleading and should be amended is admitted by plaintiffs 1, 2 and 3 who are the sole respondents. As already remarked, the deed of relinquishment describes Gopal Rao's share in the money-lending as 1/12th, whereas the lower Court's decision puts it at 1/15th only. In any event the clause should be modified by deleting the words "and which is specified in the deed of release dated 22nd December 1913," and this will be done. That one coparcener may relinquish his share appears from the text of Manu and Yajnavalkya. Thus in Manu 9, 207. Sacred Books of the East, Vol. 25, p. 375, we read:—

"But if one of the brothers, being able to maintain himself by his own occupation, does not derive (a share of the family) property, he may be made separate (by the other) receiving a trifle out of his share to live upon."

And in Yajnavalkya 2, 116 quoted in the Mitakshara, Ch. 1, S. 2, 11:—

"The separation of one, who is able to support himself and is not desirous of participation, may be completed by giving him some trifle."

The next following placitum of the Mitakshara explains the reason for requiring a trifle to be given by a desire to prevent futile disputes. In *Peddayya v. Ramalingam* (1), the earlier of the two cases relied upon by the lower Court, the circumstances were peculiar. Two

out of four brothers relinquished their one-half share in the family moveables in favour of the 3rd in order to give effect to a wish expressed by their deceased father and the decision appears to proceed upon the strength of natural obligation to carry out the father's wish. In the later case the coparcenary consisted of two members only, a father and his son, and a relinquishment of his undivided half share by the father to the son was upheld. Neither case can, therefore, be said to be quite in point. The earlier one however contains the following passage:—

"According to the Smritis, then, renunciation operates as alienation of one coparcener's interest in favour of the others. If he can alienate in favour of the other coparceners as a body, there is no reason why he should not do so in favour of one of them, who alone may need such help."

With all respect to the learned Judge, I venture to doubt whether the Smritis treated the renouncement as equivalent to an alienation. In *Sahu Ram Chandra v. Bhup Singh* (3) it is laid down by their Lordships of the Privy Council that under the law of the Mitakshara the joint family property owned by all the members of the family as coparceners cannot be the subject of a gift, sale or mortgage by one coparcener except with the consent, express or implied, of all the other coparceners. Any deed of gift, sale or mortgage granted by one coparcener on his own account or over the joint family property is invalid; the estate is wholly unaffected by it and in its entirety stands free of it. The same view as to a gift had already been held by this Court in *Sobharam Teli v. Makdu* (4) and in *Mukund Ram Sukal v. Ram Ratan* (5) If the relinquishment in the present case is to be treated as a gift then it is invalid. On the other hand, if it is merely a renunciation its effect would be similar to that renouncing coparcener's death. In *Chandar Kishore v. Dampat Kishore* (6) it was held that one member of a joint Hindu family cannot transfer his undivided share in the joint family property to another member of the family without the consent of the rest of the co-sharers and that if the alienation be regarded as a surrender of the interest of the person making the alienation, it is a surrender to

3. A I R 1917 P C 61=39 All 437=39 I C 280=44 I A 126 (P C).

4. (1899) 13 C P L R 63.

5. (1906) 2 N L R 52.

6. (1894) 16 All 269.

1. (1888) 11 Mad 406.

2. (1915) 26 I C 211.

the whole of the coparcenary body and cannot enure to the peculiar benefit of one of them. This view appears to me to accord with the general principles laid down by the Privy Council in the passage above quoted from *Sahu Ram Chandra v. Bhup Singh* (3). It is no doubt true that the Allahabad High Court follows the strict doctrine of the Mitakshara which has been departed from in Bombay, Madras and the Central Provinces, on the ground of an equity favouring purchases for value, but we are concerned here not with a transfer for value but with a voluntary one as to the inefficacy of which there is no dispute.

In *Shivajirao v. Vasantrao* (7) will be found a recital of the facts of a case which is reported as *Vasantrao v. Anand Rao* (8). The decision of the Privy Council in the latter case appears as *Anand Rao v. Vasantrao* (9) and will be found printed in a note at pp. 262 and 263 (of 34 Mad) in *Vasantrao v. Anand Rao* (8) the joint family consisted of one Kashinath his two sons Ganpatrao and Madhavrao, Ganpatrao's six sons and Madhavrao's only son Vasantrao. Madhavrao being heavily involved in debt, executed a deed of release in his father's favour in return for having his debts paid. It was held in appeal by Jenkins, C. J., and Bitchelor, J., that the release should be treated not as for the benefit of Kashinath alone but for that of the whole coparcenary, the shares on partition being determined as though Madhavrao was dead. The decision as a whole was confirmed by their Lordships of the Privy Council, who remarked that the principles governing the case had been rightly applied in the appellate judgment: it was also expressly stated that the release did not operate to deprive Madhavrao's son of his right as a co-parcener. Differing from the lower Court, I hold that the relinquishment of December 1913 must be treated as benefiting the appellants no less than the plaintiffs, Laxshman Rao and Keshorao in whose favour it was executed; and (b) of the preliminary decree will, therefore, be modified not only by omitting the words "and which is specified in the deed of release dated 22nd December 1913" but by adding at the end the words and figures "and defendants 6, 7 and 8." Plaintiffs 1 and 3 will take

two-thirds of Gopal Rao's 1/5th share, defendants 6 to 8 taking the remaining 3rd.

I am asked by the respondents' learned counsel to modify the lower Court's decree so that the plaintiff Janki Bai also may participate in the plaintiff Gopal Rao's share in the money-lending business. The result of so doing would be to diminish the respondents' share from 2/3rds to one-half of Gopal Rao's portion and it is difficult to understand why such a request should be made on the respondents' behalf. According to the decision of the Privy Council in *Debi Mangal Prasad Singh v. Mahadeo Prasad Singh* (10), any share first may be taken by Janki Bai will not be her stridhan but devolve at her death upon all the heirs of her husband so that the appellants will inherit along with the respondents. Janki Bai is not even a party to this appeal and in the plaint made no claim to participate in Gopal Rao's share of the money-lending business to which the plaintiffs Lakshman Rao and Kesho Rao were alleged to be exclusively entitled. R. 33, O. 41, Sec. 1, Civil P. Co. gives the appellate Court power to pass any decree and make any order which ought to have been passed or made. But I cannot think that this provision was intended to enable a defendant to obtain for a plaintiff, not a party to the appeal, a relief which the latter never asked for. In *Rangamal v. Jhandu* (11) it was held by a Bench of three Judges that the object of the rule is manifestly to enable the Court to do complete justice between the parties to the appeal. The costs of this appeal will be paid by the respondents. The costs of the parties in the lower Court will be dealt with by that Court's final decree as already ordered by it.

P.N./H.K. *Appeal accepted.*

10. (1912) 34 All 221=11 1 C 1000=391 A 121 (P.C.).

11. (1912) 34 All 32=11 1 C 640.

A. I. R. 1918 Nagpur 231

BATTEN, A. J. C.

Nago and others—Defendants—Appellants.

v.

Paiku—Plaintiff—Respondent.

Second Appeal No. 566 of 1917, Decided on 31st August 1918, from decree of Addl. Dist. Judge, Wardha, in Civil Appeal No. 141 of 1917, D/- 26th September 1917.

7. (1900) 31 Bom 267=2 1 C 249.

8. (1904) 6 Bom L R 925.

9. (1911) 34 Mad 262 note.

C. P. Tenancy Act (1898), S. 35 (4)—Implied surrender—Female holder alienating without necessity and placing alienee in possession cannot affect rights of reversioner and action does not amount to implied surrender.

The doctrine of implied surrender contained in S. 35 (4), is intended to apply to normal circumstances where the landlord or the person put in by him holds adversely to the tenant. Where, however, a female holder alienates an occupancy tenancy and the alienation is not for legal necessity, the alienee does not begin to hold adversely to the ultimate reversioner until the death of the female holder, and the doctrine of implied surrender has no application to such a case.

[P 232 C 2]

Judgment.—The holding to which the appeal relates was the occupancy holding of Raghoba. He died on 27th August 1893, leaving a widow Lakshmi and a daughter Tulsi by another wife, Jai. Jai kept Lakshmi out of possession, and Lakshmi recovered possession by a decree, dated 29th March 1894. On 5th October 1894 Lakshmi transferred the holding to Nama, the 1st defendant-appellant's father, who was Raghoba's sister's son. The transfer was with the Malguzar's consent. The plaintiff respondent Paiku is Tulsi's son, and sued for possession about 5 months after Lakshmi's death. It has been found that the transfer to Nama was not for legal necessity. After the transfer Nama and his adopted son, the appellant, have been in continuous possession, the landlord has accepted them as tenants and received rent from them and at Settlement they have been recorded as occupancy tenants. The defendants pleaded, among other things, that in the circumstances there was an implied surrender by Lakshmi under S. 35 (4), Tenancy Act. The learned Additional District Judge has held, following *Vithu v. Mendri* (1), that the suit is maintainable and that the doctrine of implied surrender does not apply to the case. The suit in *Vithu v. Mendri* (1) was for a declaration during the lifetime of the female holder, but the principles enunciated are applicable to a suit brought by the reversioner after the death of the female holder.

The learned Advocate for the appellants relies on implied surrender, and points out that the question of implied surrender was not raised in *Vithu v. Mendri* (1); and he seeks to distinguish the present case on that ground. I have looked into the records of *Vithu v. Mendri* (1) and

find that though the question of implied surrender was not put in issue, the transferee from the limited female holder had been accepted by the landlord as tenant. It is difficult to believe that the learned Judicial Commissioner entirely overlooked the rule of implied surrender and would not have taken it into consideration, if he had considered it applicable. The circumstances of the two cases are identical. Both the suits are governed by the Tenancy Act of 1883, under which a transfer was voidable by the landlord unless it was consented to by him. It is argued that appellant 1, has become a tenant as he was put in possession by the landlord, and, therefore, can plead implied surrender according to the rulings of this Court, and that there has been constructive surrender by the widow by non-cultivation and by non-payment of rent for over two years. It has been held in *Gunpat v. Trimbak* (2) that a minor's rights are lost by a transfer by his guardian followed by possession by the landlord for over two years with failure to cultivate or to pay rent on the part of the minor tenant, and it is argued that a reversioner is not in a better position than a minor. This is one of the cases where a difficulty arises in reconciling the Hindu law with the special provisions of the Tenancy Act. It appears to me, as at present advised, that the doctrine of implied surrender contained in S. 35 (4), Tenancy Act, is intended to apply to normal circumstances where the landlord or the person put in by him holds adversely to the tenant. Where the alienation is not for legal necessity the alienee does not begin to hold adversely to the ultimate reversioner, until the death of the female holder. It is true that Nama was accepted as a tenant by the landlord, but it appears to me that this must be held to have been subject to the claim of the reversioner on Lakshmi's death. For these reasons, I think, the Additional District Judge was right in following the case of *Vithu v. Mendri* (1), and I dismiss the appeal with costs.

P.N./R.K. *Appeal dismissed.*
2. (1913) 9 N L R 51=19 I C 759.

A. I. R. 1918 Nagpur 233

MITTRA, A. J. C.

Dhondiram Manghiram — Defendant — Appellant.

v.

Ramgopal Kaniram — Plaintiff — Respondent.

Second Appeal No. 95-B of 1917, Decided on 26th November 1917, from decree of First Adm. Dist. Judge, Akola, D/- 11th December 1916, in Appeal No. 15 of 1916.

(a) Civil P. C. (3 of 1908), O. 21, R. 63 — No special form is prescribed for framing suit under R. 63 — Decree-holder can set aside fraudulent transfers by judgment-debtor.

Order 21, R. 63, Civil P. C., does not provide anything about the frame of the regular suit instituted under that rule and does not embrace any provision excluding any particular prayers out of the scope of such a suit. [P 233 C 2]

A decree-holder deriving in a sense his title from the judgment-debtor has a right to attach property which has been fraudulently or collusively conveyed by the judgment-debtor and also a right to set aside fraudulent transfers and collusive decrees, even though they may be binding upon the judgment-debtor. [P 234 C 1]

(b) Civil P. C. (1908), O. 1, R. 13 — Objection cannot be entertained in second appeal.

No objection as to misjoinder of causes of action and parties can be entertained for the first time in second appeal, especially where the parties have not been prejudiced in any way. [P 234 C 3]

(c) Decree — Validity — Collusive decree explained.

The mere fact that a decree is based on special oath does not make it a collusive decree and the fact that the sale-deed on the basis of which a decree is obtained is nominal, does not necessarily lead to the conclusion that the decree is a collusive one. [P 234 C 2]

M. R. Rohde — for Appellant.

M. V. Joshi — for Respondent.

Judgment. — The plaintiff-respondent obtained a decree against defendant 2 Balmukund and in execution of that decree attached the houses in dispute on 12th September 1912. Balmukund and his brother Kisandas had executed on 17th December 1901 a sale-deed purporting to convey the house to defendant 3 Dhondiram, who is the appellant before me. It also appears that Balmukund executed another sale-deed on 25th July 1912 in favour of one Rajaram, his son-in-law. Dhondiram's sister has been given in marriage to Kisandas, brother of Balmukund. In 1913 Civil Suit No. 88 of 1913 was filed by Dhondiram as plaintiff, making Balmukund, his brother Kisandas, Rajaram and the present plaintiff Ram Gopal defendants in that suit. For

some reason or other Ram Gopal's attachment fell through, and thereupon he was discharged. Dhondiram obtained a decree for possession of same against the defendants in that suit. The case of the plaintiff is first built too sales by Balmukund are nominal transactions and that the decree obtained in Suit No. 88 of 1913 was a collusive decree. The plaintiff has succeeded in the Court of the Additional District Judge on appeal and this second appeal has been filed by Dhondiram. In para. 1 of the plaint it is stated that defendant 2 is a person who is setting up a title to the property under attachment. It is stated that the suit is made under O. 21, R. 63, as the parties to the proceedings under O. 21, R. 63, were the defendants, Balmukund and Rajaram, the present appellant Dhondiram is not a proper party. In support of this the learned pleader for the appellant relies upon the case of *Patil Kamari v. Ghanshyam Misa* (1). That case is a decision upon the court-fee payable in a suit of this description, and has no bearing upon the point now at issue. I may note that this objection that the plaint discloses no cause of action against the appellant was not taken in the Courts below nor in the memorandum of appeal. The plaint sufficiently sets forth a cause of action, inasmuch as it says that this defendant is interested in and has been setting up a title to the property in dispute. Therefore the plaintiff was entitled to a declaration under S. 42, Specific Relief Act, apart from any suit under O. 21, R. 63. In *Sarda v. Ram* (2), Talang, J., points out the scope of S. 293, Civil P. C. 1882, which corresponds with O. 21, R. 63. The section does not provide anything about the frame of the regular suit which has to be instituted, and certainly does not embrace any provision excluding any particular prayers out of the scope of such a suit. The utmost that could be urged on behalf of the appellant is that there has been a misjoinder of causes of action and parties. But no such objection can now be entertained, specially in view of the fact that the parties have not been prejudiced in any way.

It is contended that Suit No. 88 of 1913 operates as res judicata, because the plaintiff is a person who derives his title

1. (1908) 35 Cal 202 = 35 I A 22 (P.C.).
2. (1892) 16 Bom 608.

from Balmukund who is bound by the previous decree. No authority in support of this has been produced before me. All the authorities cited before me show that the parties to a collusive decree are bound by it. None has been produced to show that a person who is not a party to the decree and against whose interest the collusive decree has been obtained is bound by such a collusive decree. The decree holder can just be said to be a person deriving his title from the judgment-debtor. His right to attach property which has been fraudulently or collusively conveyed by the judgment-debtor is recognized in law and he can set aside such a fraudulent transfer even though the transfer is binding upon the judgment-debtor. Similarly, he is at liberty to set aside a collusive decree which stands on no higher footing than a collusive transfer, even when that collusive decree is binding on the judgment-debtor.

It is contended that the finding of the lower appellate Court, that the transactions represented by the sale-deeds of 1901 and 1912 are bogus, is bad in law and without any evidence to justify such a finding. I cannot agree with this contention. The lower appellate Court was at liberty to place reliance upon the testimony of Balmukund as given in this suit, even though Balmukund has been held to be a person who was a party to a collusive decree in suit No. 88 of 1913. Moreover, there is evidence brought out in the cross-examination of the appellant himself, examined as a witness, which would lead to the inference that there was no consideration for the sale-deed. It is conceded that Balmukund remained in possession though the sale took place in the year 1901. No rent was ever recovered, and it was only after the plaintiff's attachment that Suit No. 88 of 1913 was filed. Under these circumstances I think that the finding of the lower appellate Court regarding the nominal character of the appellant's sale-deed is one which must be accepted in second appeal.

It is urged, and I think with some force, that the mere fact that the decree was based upon a special oath does not make it a collusive decree. It is also urged that the fact that the sale-deed was nominal does not necessarily lead to the inference that the decree was ob-

tained collusively. I agree with these contentions, but I think there is sufficient material on the record to justify the inference that the decree was obtained collusively. When once it is proved that the transaction is nominal, the plaintiff has to a certain extent laid the foundation for proof that the decree was also collusive. The case was decided upon the admission made by Kisandas and upon a special oath taken by the appellant on the suggestion of Balmukund, and so far as the evidence is concerned it was decided solely upon the testimony of Kisandas who admitted consideration. It may be that against Rajaram there was a real decree and a real contest. The only matter decided between Dhondiram and Rajaram was that Dhondiram's transfer being prior it takes precedence over the latter's. Now the decree has not been executed; I am informed that there has been an injunction against the execution of the decree so far as possession is concerned. But even the decree for rent has not been executed. I cannot say that the facts of the case did not justify the lower appellate Court in drawing the inference which it has drawn. The appeal fails and is dismissed with costs.

P.N./R.K.

*Appeal dismissed.***A. I. R. 1918 Nagpur 234**

MITTRA, A. J. C.

Narsingh Das—Plaintiff—Appellant.

v.

Aladad Khan and others—Defendants—Respondents.

Second Appeal No. 94 B of 1917, Decided on 25th July 1917, from the decree of Addl. Dist. Judge, Amraoti, D/- 4th December 1916, in Civil Appeal No. 283 of 1916.

(a) Berar Inam Rules, Rule 14 (2)—Lease of service grant being temporary alienation is valid under R. 14.

Rule 14 (2) of the Berar Inam Rules, laying down that service grants are not liable to be alienated by purchase or otherwise, refers to permanent alienations such as gift or exchange, and not to a temporary alienation such as a lease or a usufructuary mortgage. The sanction of the Deputy Commissioner is not, therefore, necessary for any such temporary alienation. [P 235 C 1]

(b) Hindu Law—Religious Endowment—Manager—Temple property—Lease by manager is valid if proper circumstances exist.

A lease of temple property by the Manager of a Hindu temple can be validly granted only if (i) the money is borrowed for the purpose of the temple, (ii) the loan is justified by an existing necessity, (iii) and the lease is one which a

prudent owner would be justified in making:
14 B. L. R. (P C), *Foll.* [P 235 C 2]

V. R. Pandit—for Appellant.

K. G. Deshpande—for Respondents.

Judgment.—The inam certificate shows that Mouza Wazar has been granted as a jagir for the upkeep of the temple of Gajanan Swami at Akot. The Hindu defendants in this case are hereditary Managers Defendant 3, Ganapatrao, while such Manager, gave a lease to the plaintiff for Rs. 100 paid in advance, of the right to remove tikadi grass for twelve years commencing from 1911. This defendant was subsequently removed from the managership, and his infant son, under the guardianship of his uncle, was appointed Manager in his place. The plaintiff's case is that he was in possession and enjoyment of his rights under the lease for a few years, when he was disturbed by the defendant 1 acting under the authority of the remaining defendants. According to the plaintiff, the money was borrowed for the purposes of the temple. The plaintiff, though successful in the first Court, has lost his suit in the lower Appellate Court. The view taken by the learned Additional District Judge is that this was a service inam, which was inalienable, and that a lease for more than five years required the sanction of the Deputy Commissioner and as no sanction was obtained, it was held to be invalid. According to R. 14 (2) of the Inam Rules service grants are not liable to be alienated by purchase or otherwise. This rule clearly refers to a permanent alienation, such as a gift or exchange. In the instructions given by the Local Government in the Revenue Book Circular, S. 6, Serial No. 2 it is pointed out that:

"no definite order can be issued regarding the effect of temporary alienations of the grant by lease or usufructuary mortgage, and each case must be dealt with on its own merits. All cases of transfer by usufructuary mortgage or by lease for more than five years must be reported through the Commissioner for the Chief Commissioner's orders."

The rules do not confer, plat sanction to a temporary alienation being obtained by the alienor or alienees. They merely lay down that the Deputy Commissioner should report certain cases for the Local Government to decide whether the inam should be resumed or not. It is not for the Civil Court to decide any such question. The result is that the view taken by the lower appellate Court upon which the case has been decided is wrong. The case, how-

ever, must be decided with reference to the validity of the lease by the manager of a Hindu temple, and the law on the subject will be found in the Privy Council ruling in *Presanna Kumari Debba v. Golab Chand Baboo* (1). The questions to be asked are: (1). Was the money borrowed for purposes of the temple? (2). Was the loan justified by an existing necessity? (3). Was the loan one, which a prudent owner would be justified in making? The lower Court's attention is also directed to the 1928 of Mayne's Hindu Law, § 6-6m. The decree of the lower appellate Court is reversed, and the case is remanded to that Court for a fresh decision on the merits. Costs will follow the result. The appellants will get a certificate for refund of Court-fees.

P. S. (P. C.)

Case remanded.

L. 1475/14 B. L. R. 4000; W. R. 26, 27 A 145 (P. C.).

A. I. R. 1918 Nagpur 235

PRIDEAUX, A. J. C.

Sham Rao Kumbhar—Plaintiff—Appellant.

v.

Sitaram Maharaj—Defendant—Respondent.

Second Appeal No. 147-B of 1915, Decided on 17th June 1916, from decree of Addl. Dist. Judge, East Berar, D/- 2nd January 1915, in Appeal No. 332 of 1914.

(a) **Landlord and Tenant—Antejagir tenant is owner of land and so long rent is paid he cannot be evicted by jagirdar.**

An antejagir tenant is the owner of his land subject to the payment of the rent to the Jagirdar as long as this is paid the Jagirdar cannot evict him. [P 236 C 2]

(b) **Landlord and Tenant—Trees—Trees planted in antejagir holding by tenant—Jagirdar cannot claim either land or trees so long rent is paid.**

Any trees planted in his antejagir holding by tenant or planted with his permission by any one else do not affect the Jagirdar who, so long as the rent is regularly paid, cannot claim either the land or the trees. [P 236 C 2]

(c) **Landlord and Tenant—Trees—Proprietorship of land carries with it ownership of trees.**

In the absence of an express agreement to the contrary the proprietorship of the land carries with it the ownership of the trees thereon. [P 236 C 2]

(d) **Landlord and Tenant—Trees—No custom in Berar by which half fruit of trees planted by tenant can be claimed by him even after lease.**

There is no custom in Berar that a lessee planting fruit trees on his holding is entitled to

half the fruit of the trees even after the termination of his lease. [P 236 C 2]

V. R. Pandit—for Appellant.

H. S. Gour—for Respondent.

Judgment.—One Balaji obtained from the defendant, a Wahiwaradar of Walgaon Jagir, a lease of Survey No. 68 of the village, for 15 years, in 1886. During the period of that lease Balaji planted between 1887 and 1889 some 48 mango trees in the field. About 1893 Mr. Francis, the Director of Land Records in Berar, who was settling the village, declared that this field belonged to one Bhagwan, and declared him to be an ante-jagir tenant. The lease which was in Balaji's favour was not however disturbed but Bhagwan was to get possession on expiry of the same. Balaji died some two years after his lease expired and on 6th October 1906 the present plaintiff appellant took a sale-deed from Balaji's brothers, Nathoo and Ramchandra, conveying an 8-annas share in the mango trees. The appellant now sues for possession of 24 out of the 48 trees on the strength of this sale-deed. He states that the defendant had obstructed him in collecting the fruit of his trees. The defence is that the trees having been planted by Balaji as the defendant's lessee he had no ownership over them and that the defendant had been in possession of the trees claimed for over 12 years prior to the institution of the suit in his own right. The plaintiff's case is that the person planting on another's land is by customary right entitled to a half share in the trees, the other half share going to the owner of the soil. The trial Court has held that the plaintiff has failed to establish the special custom set up and that where a lessee plants fruit trees, the property in this is, by the general law, vested in the proprietor of the land. The Judge held that Balaji merely by reason of his having planted the trees in suit, could not be the owner of the trees. On expiry of the lease in his favour, the owner of the soil became the owner of the trees.

It is unnecessary for the purposes of this appeal to enter into the other questions decided by the first Court. Against the decisions of the first Court the plaintiff appealed to the Court of the Additional District Judge, Amraoti, and the defendant filed cross-objections. The defendant inter alia objected to the finding of the first Court that the kararnama

filed by him was a forgery. The lower appellate Court has confirmed the finding of the first Court that Balaji was joint with his brothers, the plaintiff's vendors, and also agreed in the finding that there was no evidence in support of the allegation that by a custom in Berar the tenant may plant trees on his tenancy land and acquire a right to the trees for ever afterwards. The Judge held that though Bhagwan was an ante-jagir tenant, yet the land primarily belonged to the defendant and so also the property in the trees and that the plaintiff had no title, as his vendors had no title to sell the trees. The Judge, though finding that the kararnama relied on by the defendant was a very suspicious document, came to no express decision that it was a forgery and held that it was immaterial for the present case. He confirmed the dismissal of the suit. I cannot support the lower appellate Court's opinion as to the position of an ante-jagir tenant. Ante-jagir tenant is the owner of his land subject to the payment of the rent to the Jagirdar. As long as this is paid the Jagirdar cannot evict him. Any trees planted in his ante-jagir holding by such tenant or planted with his permission by any one else is not a question that affects the Jagirdar who, as long as the rent is regularly paid, cannot claim either the land or the trees.

In the present case it is admitted that Bhagwan was the ante-jagir tenant, but it is shown that his tenancy was not declared until after the Jagirdar had been in possession and had leased the fields to Balaji. When the lease expired, those fields with the trees thereon would go to the ante-jagir tenant. Both the lower Courts have held that the plaintiff has failed to prove the special custom alleged, whereby a lessee planting trees in the leased land, at the expiry of his lease, has a half share in the trees. The contention is absurd. In some 25 years' experience of the Province from which the case comes, I have never heard such contentions advanced before. I do not say that a lessee by express agreement with his lessor could not claim a half right in the trees but until that express agreement is established, the general law that proprietorship of the land carries with it ownership of the trees thereon must prevail. Unless Balaji had a right to the half share claimed, it is obvious that his brothers had no right to sell it. Balaji might

during the lease take the fruit and the defendant may have allowed him to take such share in the produce until his death. It is obvious that the period between the expiry of the lease and the filing of the present suit is insufficient to give Balaji or his brothers the right of ownership by adverse possession. Whether Bhagwan or his representatives at his death or the Jagirdar are the real owners of the trees is immaterial in the present suit. What is clear is that Balaji had no right to half the trees and his brothers therefore could not sell that share to the present appellant. This short ground disposes of the appeal. The appeal fails and is dismissed with costs.

P.N./R.K.

*Appeal dismissed.***A. I. R. 1918 Nagpur 237**

STANYON, A. J. C.

Mt. Puhpi Bai and another—Defendants—Applicants.

v.

Mt. Ansuya Bai—Plaintiff—Non-Applicant.

Civil Reven. No. 298 of 1916, Decided on 31st August 1917, from order of District Judge, Chattisgarh Divn., D. 10th November 1916.

(a) Civil P. C. (1908), Sch. 2, Para. 16—Parties to pending suit cannot make private reference and seek assistance of Court to enforce award.

The parties to a pending litigation were not competent, without any reference to the Court, to refer the subject-matter of that litigation to private arbitration, and having obtained an award thereon, to seek the assistance of the Court in having the same filed and enforced by a decree. [P 238 C 2]

(b) Civil P. C. (1908), O. 23, R. 3 and Sch. 2, Para. 16—Agreement to refer without intervention of Court or disputed award thereon do not come under O. 23, R. 3.

Neither an agreement to refer, without the intervention of the Court, the subject-matter of a pending suit, nor a disputed award made thereon, also without the intervention of the Court, can be brought within the purview of R. 3, O. 23, Civil P. C. [P 239 C 1]

(c) Precedents—Subordinate Courts are bound to follow decision of their High Court.

While it is open to the subordinate Courts in the Central Provinces to assist themselves on questions of law by a study of the rulings of all the High Courts in India published in any authorized series of reports, they are absolutely bound, irrespective of their own opinion and the dissentient opinion of any other High Court, to the decisions on such questions of the Judicial Commissioner's Court while such decisions are not expressly overruled by the paramount authority, namely, His Majesty in Council. The subordinate Courts have no option to choose between a decision of the Judicial Commissioner's Court,

published or unpublished in the local or any other law reports, and the decision of any other High Court in India or elsewhere. [P 238 C 1]

*H. S. Gaur—For Applicants.**J. C. Ghose—For Non-Applicant.*

Order.—The suit out of which this application has arisen was filed by the plaintiff against two defendants on 2nd May 1914 in the Court of the District Judge of Nagpur. It was proceeded with in due course, and the trial was proceeded to conclusion, when on 25th December 1914 defendant 2 put in a written statement stating that his dispute with the plaintiff had been referred to arbitration, and an award had been made, and asking that the suit be dismissed. The plaintiff contradicted and disputed the alleged arbitration and award and made a preliminary objection that the parties were incompetent to carry out an arbitration beyond the back of the Court concerning a matter sub judice of the Court. The Sub-Judge disposed of this objection on 14th May 1915, holding that the parties to a pending suit are competent, without any reference to the Court, to refer the subject-matter of the suit to private arbitration and that the alleged award should not be rejected on that ground. Thereafter, the first Court proceeded with an inquiry into the merits of the plaintiff's objections to the filing of the award. Meanwhile the plaintiff appealed in the Court of the Divisional Judge against the order of 14th May 1915, and the learned Divisional Judge entertained the appeal on the ground that the order was one falling within the purview of S. 104 (f), Civil P. C., 1908, and holding that the parties to a pending suit are not competent to refer the subject-matter of the suit to a private arbitration beyond the control of the Court, he reversed the order appealed from, and directed that the award should be rejected and the trial of the suit concluded by the Subordinate Judge.

Thereupon, both defendants applied to this Court for revision of this order of the Divisional Judge on the ground, inter alia, that it was premature. That was Civil Revision No. 276 of 1915, and I decided it on 25th March 1916. Upon the sole ground that the appeal to the Divisional Court was premature, I set aside the order of that Court as ultra vires and directed that the Subordinate Judge should continue his proceedings on the application to file the award until he

had made an appealable order. On the case going back, the Subordinate Judge made an order that the award should be filed. From that order an appeal was properly made to the Divisional Judge, who maintained his former view of the law, and again directed the rejection of the award and the conclusion of the trial by the Court. The defendants have again applied to this Court to revise this order, and the case is now ripe for the decision of the question whether the parties to a pending litigation are competent, without any reference to the Court, to refer the subject-matter of that litigation to private arbitration, and, having obtained an award thereon, to seek the assistance of the Court in having the same filed and enforced by a decree.

The learned Divisional Judge is quite correct in saying that this question is res integra so far as this Court is concerned; but some of the remarks made by the Judge in his judgment now under consideration make it expedient to point out that while it is open to the subordinate Courts in these Provinces to assist themselves on questions of law by a study of the rulings of all the High Courts in India published in any authorized series of reports, they are absolutely bound, irrespective of their own opinion and the dissentient opinion of any other Indian High Court, by the decisions on such questions of this Court, while such decisions are not expressly overruled by the paramount authority, namely, His Majesty in Council. The subordinate Courts have no option to choose between a decision of this Court, published or unpublished in the local or any other law reports, and the decision of any other High Court in India or Burma.

The case of *Kaluram v. Ram Dayal* (1) had no bearing whatever upon the question at issue in this case, and the citation of it was purely misleading. Similarly, in my order in Civil Revision No. 276 of 1915, I expressly abstained from recording any opinion thereon. I have now given my best consideration to the question at issue, and I find that the authorities are all one way. The case of *Ghulam Khan v. Muhammad Hassan* (2) contains an obiter dictum of their Lordships of the Privy Council upon the construction and effect of the provisions of the Code

of Civil Procedure, 1882, relating to arbitration. But that dictum, obiter though it be, forms a useful guide to the Courts in this country in construing the provisions of the present Code of Civil Procedure on the same subject. In *Venkatachellam Reddi v. Rungiah Reddi* (3) it was held that an agreement to refer to arbitration a pending litigation, made without the intervention of the Court, cannot be filed under para. 17 Sch. 2 to the said Code. It seems to follow from this that where an award has been made privately upon the basis of such an agreement, that award is equally inadmissible for treatment by the Court under the schedule. This indeed was expressly held by the Bombay High Court in the recent case of *Vyankatesh Mohadev v. Ramchandra Krishna* (4). Beaman, J., pronounced a very clear and cogent judgment upon the question, and I may say at once that I concur with every word written by him. No doubt, in a later case from the same tribunal, namely *Shavaksha Dinsha Davar v. Tyab Haji Ayub* (5), Macleod, J. at p. 390 (of 40 Bom) seems to have thought that an arbitration between the parties to a suit, without an order of the Court, comes under the provisions of the said schedule which deal with arbitrations without the intervention of the Court. But with due respect, I prefer the judgment of Beaman, J., in the earlier case as more correct exposition of the law.

I, therefore, hold that the parties in the present case were not competent to refer the subject-matter of the suit to arbitration without the authority of the Court, so as to bind the Court and obtain its assistance in enforcing the resulting award. I do not mean to say that once a suit has been instituted the parties are, in any way, prevented from making a settlement of it out of Court. Such settlements may take the form of a direct agreement disposing of the suit, in which case the Court will give effect to that agreement under O. 23, R. 3, Civil P. C. But if the private adjustment takes the form of referring the subject-matter of the suit to arbitration, the parties can only have the assistance of the Court in carrying out that adjustment by adopting

3. (1913) 36 Mad 353=1 I C 372.

4. A I R 1914 Bom 184=28 Bom 687=27 I C 46.

5. (1916) 40 Bom 356=37 I C 140.

1. (1909) 5 N L R 107=3 I C 55.

2. (1902) 29 Cal 667=29 I A 51 (P C).

the procedure provided by the first 16 paragraphs of Sch. 2. They are not bound to seek the assistance of the Court, and therefore, they may carry out all the arbitration proceedings without the intervention of the Court. But in that case they must make their own arrangements not only for having the award made, but also for its execution. In the present case, the parties are said to have made an agreement to refer, and to have had the proceedings by the arbitrators carried out in pursuance of that agreement without the sanction or intervention of the Court. The award which is said to have been made is therefore not one which the Court can recognize, at all events, while it is disputed. No procedure under Sch. 2 is allowable in respect of such an arbitration award.

Next comes the question whether an award of this kind can be treated as an agreement adjusting the suit for the purposes of O. 23, R. 3, Civil P. C. As to this, the authorities are again one way only. In *Tincoury Dey v. Fakir Chand Dey* (6) and in all the cases already cited above, the view is unanimous that neither an agreement to refer to arbitration, nor a disputed award concerning the subject-matter of a pending suit, constitutes such an agreement or adjustment as is contemplated by O. 23, R. 3. Where the parties to a pending litigation privately refer the subject matter of the litigation to arbitration, and without any intervention by the Court, obtain an award which they both accept as valid, and binding, it may be possible to argue that such an award, agreed to by both parties, might properly form the basis of procedure under O. 23, R. 3. But that is a point which I do not decide. I do decide that neither an agreement to refer, without the intervention of the Court, the subject matter of a pending suit, nor a disputed award made thereon, also without the intervention of the Court, can be brought within the purview of that rule. For these reasons the decision of the Divisional Judge seems to me to be perfectly correct. But even had it been otherwise it represents a view of the law well within the jurisdiction of the Judge and unaffected by any irregularity of procedure. Hence, even if I had taken a view different from that of the learned Judge that

would have been no ground for interference in revision under S. 115, Civil P. C. Therefore, this application is dismissed with costs, I allow Rs. 30 as pleader's fees in this Court.

P.N./R.K.

Appeal dismissed.

A. I. R. 1918 Nagpur 239

BATTEN, A. J. C.

Madan Gopal Deokaran—Applicant.

v.

Secy., Municipal Committee, Nagpur—Non Applicant.

Criminal Revn. No. 55 of 1916. Decided on 10th May 1916. From judgment, finding and sentence passed by Magistrate, 1st Class, in Criminal Case No. 675 of 1916, D/- 21st March 1916.

(a) C. P. Municipal Act (1903), Ss. 67 (1) and (2), 122 and 139—Encroachment old—Prosecution under S. 122 in respect of old encroachment is not legal—Remedy for such encroachment is provided by S. 139.

What is made originally punishable under S. 122, C. P. Municipal Act is the act of making an encroachment. The section cannot reasonably be construed as making punishable an existing encroachment not made by the accused person. [P 240 C 1]

In the case of an encroachment not made by the accused, sub-S. (2) of S. 67 of the Act provides full means of redress which can be enforced by the penal provisions of S. 139. [P 240 C 2]

(b) C. P. Municipal Act (1903), S. 67 (2)—Word "such" refers also to old encroachment.

The word "such" in sub-S. (2) of S. 67 of the Act refers back to the words "structure encroaching on any street" in sub-S. (1), and not only to new encroachments as is clear from the proviso in which encroachments of very old standing are referred to. [P 240 C 2]

W. H. Dhabe—for Applicant.

A. C. Roy—for Non Applicant.

Judgment.—The applicant was prosecuted by the Nagpur Municipality under S. 122, Municipalities Act for encroaching on a public street. According to the learned Magistrate who tried the case summarily there is a pacca chabutra of dressed stones, which itself constitutes an encroachment, and beyond the chabutra is a line of loosely hacked stones (which I am told, correctly or not I cannot say, can be used as steps) projecting even further into the street; but the prosecution is in respect of the line of stones only. It is not denied by the learned pleader for the applicant that the stones constituted a structure within the meaning of S. 67 (1), Municipalities Act. The case for the prosecution was that the applicant himself had placed this structure in the street, but among other conten-

tions the accused alleged that the stones have been there for a long time, from before the date on which he inherited the house. The City Magistrate in the course of a very reasonable and careful judgment says:

"The fact is that no one known exactly when these stones were added, because they do not form a conspicuous addition to the building. The main argument for the defence is that even if the land is Municipal, Madan Gopal, the present accused, cannot be prosecuted for the encroachment because he inherited the house as it stands at present. The wording of S. 122, Municipal Act, is 'whoever encroaches', and it is argued that only the person who originally made the encroachment can be prosecuted. This is of importance because in view of the conflict of the evidence I cannot hold that the prosecution have proved that it was Madan Gopal who actually put the stones there. It seems to me clear that the word 'encroach' includes the continuing of an encroachment as well as the making of it and that Madan Gopal can be prosecuted even though it was not he who put the stones there."

The prosecution referred to by the Magistrate, of course, refers to the prosecution under S. 122 of the Act. That part of S. 122 which relates to obstructions or encroachments upon streets made in connexion with a house without the written permission of the Committee, must be read with S. 67 (1), which enacts that

"No person shall, without the written permission of the Committee, place in front of any building any structure encroaching on any street."

The words "place in front of any building" in S. 67, and the word 'encroachment' in S. 122 *prima facie* mean "commits an act of encroachment"; a man cannot be held liable for an act or omission unless such act or omission is definitely declared to be an offence. What is made criminally punishable under S. 122 is the act of making an encroachment; the section cannot reasonably be construed as making punishable the omission to remove an existing encroachment not made by the accused person. The learned District Magistrate who characterises the view that the word 'encroach' applies only to the original intention as a "ridiculous proposition," says,

"any other view (than his own) would reduce this provision of the law to absurdity. Any individual could otherwise steal property not his own, and convey a good title to another, or certainly transmit a good title to a successor."

It seems hardly necessary to demonstrate the fallacy of this argument; the law provides ample remedies against a guilty receiver of stolen property, and

provides means of restitution of the property to its lawful owner, and an innocent receiver of stolen property cannot be prosecuted criminally, although the law can force him to make restitution. Such analogies, however, are wide of the mark. The District Magistrate writes as if the Municipality in the case of an old standing encroachment, not made by the present owner of the adjoining premises, were without a remedy if a prosecution under S. 122 is not available. Such is not however the case. Sub-S. (2) of S. 67 of the Act provides full means of redress, and these means can be enforced by the penal provisions of S. 139, and otherwise. The word "such" in the subsection refers back to the words "structure encroaching on any street" in sub-S. (1), and not only to new encroachment, as is clear from the proviso in which encroachments of very old standing are referred to. The Municipality has therefore ample means of enforcing the Municipal law without employing S. 122 in a case to which that section does not apply. On the ground that a person cannot be convicted under S. 122 of encroaching in respect of an encroachment not proved to have been made by himself, I find the conviction to be illegal. I set aside the conviction and sentence and acquit the applicant. The fine, if paid, must be refunded.

P.N./R.K. Conviction set aside.

A. I. R. 1918 Nagpur 240

MITTRA, A. J. C.

Annapurnabai—Plaintiff—Appellant.

v.

Ramchandra and others—Defendants—Respondents.

Second Appeal No. 53-B of 1917, Decided on 22nd November 1917, from appellate decree of Addl. Dist. Judge, Akola, D/- 18th September 1916.

Execution—Sale of property out side decree—Suit to set aside sale in part is not maintainable—Civil P. C. S. 47—Election.

A party cannot take the benefit of a transaction and at the same time repudiate a part of it when the transaction is one and indivisible [P 241 C 1]

Where the property of a judgment-debtor is sold in execution of the decree and the proceeds go in satisfaction of the decree, the judgment-debtor having accepted the payment of the decree is no longer in a position to impeach a part of the sale. [P 241 C 1]

M. Chuckerbutty—for Appellant.

M. V. Joshi—for Respondents.

Judgment.—The plaintiff-appellant obtained a mortgage decree in the Court of the Subordinate Judge, Akola, directing the sale of two fields and half of Survey No. 77. The execution of the decree was transferred to the Collector. By a mistake three entire fields were put for sale and sold by the Tahsildar. Upon the plaintiff's application the Collector set aside the sale and ordered a fresh sale of two and a half fields. Again the same mistake was repeated and the three entire fields were sold to defendant 4. Possession of all the field was given to him. The present suit was dismissed on the preliminary ground that under S. 47, Civil P. C., a separate suit did not lie. I think the decree dismissing the suit can be supported upon another ground without deciding the question whether a separate suit lay in this case. Now the fields were sold in one lot. The purchase money went in satisfaction of the plaintiff's mortgage decrees. The plaintiff has got the benefit of that payment and is now seeking to repudiate a part of the sale. The sale can only be set aside as a whole. A party cannot take the benefit of a transaction and at the same time repudiate a part of it when the transaction is one and indivisible. The plaintiff having accepted the payment of her mortgage decree is no longer in a position to impeach a part of the sale. To use the words of Scotch lawyers, "A party cannot approbate and reprobate." The plaintiff, I understand, is now willing to recover possession of half-share of Survey No. 7 on the payment of the full market value. This appears to me to be the only possible way of equitable adjustment of the respective claims of decree-holder and the the auction purchaser.

P. N./R.K. *Appeal dismissed.*

A. I. R. 1918 Nagpur 241 (1)

MITTRA, A. J. C.

Kashi Bai and another—Appellants.

v.

Sheoram Khupchand—Respondent.

Second Appeal No. 354-B of 1917, Decided on 13th September 1918.

Civil P. C. (5 of 1908), O. 2, R. 2—Applicability—Suit against one debtor—Subsequent suit against different debtor is not barred.

Order 2, R. 2, Civil P. C., applies only where the defendant in the subsequent suit was also the defendant in the previous suit. The rule does not apply where the subsequent suit is brought against a different defendant. [P 241 C 2]

1918 N/31 & 32

*G. L. Subhedar and M. V. Joshi—*for Appellants.

*H. S. Gour—*for Respondent.

Judgment.—The two defendants and one Rajaram executed a bond on 28th June 1913. Rajaram was at that time a minor and the defendants acted as his guardians. They also personally covenanted to repay the money. In a previous suit the plaintiff has recovered one-third of the amount due under the bond by a judgment against Rajaram. The point for decision is whether the present suit for recovery of the remaining two-thirds is barred by any rule of law. Admittedly there is no statutory provision which bars the suit. O. 2, R. 2, only applies if the second suit is brought against the same defendant. However, it is contended that the rule of English law recognized in *King v. Hoare* (1) should be applied. The lower Courts have held that the rule does not apply to the Mofussil of India. This view is well supported by the decisions of the Allahabad and Madras High Courts: *Muhammad Askari v. Rashe Ram Singh* (2) and *Ramanulu Naidu v. Aramulu Iyengar* (3). There is no other ground pressed in this second appeal. I accordingly dismiss it with costs.

P.N.B. *Appeal dismissed.*

1. (1844) 13 Q. J. W. 201=14 L.J. Ex. 20.

2. (1900) 22 All. 307.

3. (1910) 31 Mad. 317=5 I.C. 736.

A. I. R. 1918 Nagpur 241 (2)

PRIDEAUX, A. J. C.

Bhikari Chamar—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 128 of 1918, Decided on 12th April 1918.

Criminal P. C. (1898), Ss. 380 and 562—Subdivisional Officer under S. 380 can acquit person referred to under S. 562.

A Subdivisional Magistrate dealing with a case under S. 380, Criminal P. C., has power to acquit a person convicted by Court making reference under S. 562 of the Code. [P 242 C 1]

*G. P. Dick—*for the Crown.

Order.—Bhikari Chamar was challaned in the Court of the Second Class Magistrate, Bematara, accused of an offence under S. 454, I. P. C. The Second Class Magistrate found him guilty of an offence under S. 379, I. P. C., and the value of the property stolen being small and accused being a young man considered the case was one to be dealt with by the Sub-

divisional Magistrate under S. 562, Criminal P. C. The Subdivisional Magistrate found accused not guilty and acquitted him. The District Magistrate reports the case for he thinks that the finding and the sentence of acquittal is illegal on the ground that a Subdivisional Magistrate dealing with the case under S. 380, Criminal P. C., has no power to acquit a person who had been convicted by the Court making the reference under S. 562. The Burma cases referred to by the District Magistrate are not in this library. The Standing Counsel for the Crown does not support the reference. It seems to me that S. 380, Criminal P. C., gives the Subdivisional Magistrate power to acquit. The section itself states:

"Such Magistrate may thereupon pass such sentence or make such order as he might have passed or made if the case had originally been heard by him."

This in my opinion includes an order of acquittal. The concluding portion of the section in my opinion makes the point clear. The Subdivisional Magistrate has the power to make further inquiry and take additional evidence on any point he deems necessary. The words 'any point' must include the guilt or the innocence of the accused. For these reasons I decline to interfere with the order of acquittal.

P.N./R.K.

Order accordingly.

A. I. R. 1918 Nagpur 242

MITTRA, A. J. C.

Raghu—Appellant.

v.

Gujai—Respondent.

Second Appeal No. 267-B of 1917, Decided on 4th July 1918, from decree of Special Addl. Dist. Judge, Akola, D/- 12th March 1917.

(a) Civil P. C. (1908), O. 2, R. 2—Separate orders under S. 145, Criminal P. C., in two cases constitute distinct causes of action.

In a suit for possession the order of the Magistrate under S. 145, Criminal P. C., is a material fact. When there are separate orders in two cases, each constitutes a distinct cause of action, and separate suits are not barred under O. 2, R. 2: 25 Mad. 785 and 6 All. 616, Ref. [P 243 C 1]

(b) Civil P. C. (1908), O. 2, R. 2—Possession and mesne profits can be claimed separately.

Claims for the recovery of possession of immovable property and for mesne profits are distinct claims and separate suits will lie in respect of each claim: 19 Cal. 615 and 31 Mad. 405, Rel. on. [P 243 C 1]

(c) Limitation Act (1908), Art. 47—Non-party.

The person who was not a party to the pro-

ceedings is not bound by the order and Art. 47, Lim. Act, has therefore no application.

[P 243 C 1]

J. C. Ghosh—for Appellant.

M. B. Niyogi—for Respondent.

Judgment.—The suit was originally instituted by Gujai and Sakwar, two widows of Hamraji, against his brother and nephews. The plaintiffs seek possession of shares in survey No. 20 of mauza Shelwadi and survey No. 18 in mauza Lodhipur. The plaintiffs also claimed mesne profits of these fields as well as of other fields which they have recovered by previous suits. It has been found by the Courts below that Hamraji separated from his brother long before his death and that the fields in suit belonged exclusively to him. It has also been found that for one year the plaintiffs remained in possession after the death of Hamraji. There were only three points in this second appeal, and it is immaterial to state the other pleas raised by the defendants in the Court below. The first point is whether the suit for possession is barred under O. 2, R. 2, by reason of suits Nos. 113 and 114 of 1913. These two suits were instituted after the plaintiffs were dispossessed from survey Nos. 18 and 20. The first Court mainly on this ground held the suit barred, but the lower appellate Court has pointed out that the causes of action were distinct and separate. Suit No. 113 was for possession of fields Nos. 17 and 22. These formed the subject-matter of an inquiry under S. 145, Criminal P. C., in which an order was passed on 22nd December 1911 maintaining the defendants in possession. Similarly the share in survey No. 20 now in suit formed the subject-matter of a separate inquiry in which a similar order was passed on 4th January 1912. Before the order of the Magistrate the parties were disputing regarding the possession. The fields being dealt with in separate criminal cases the cause of action for the present suit is not identical with the cause of action in suit No. 113. In *Dampanaboyina Gangi v. v. Addala Ramaswami* (1) Bhashyam Ayyangar, J. says:

"The words 'cause of action' have all along been held to mean 'every fact' which it is material to be proved and entitle the plaintiff to succeed; every fact which the defendant would have a right to traverse, and have no relation whatever to the defence, but refer entirely to the grounds set forth in the plaint as the cause of action."

1. (1902) 25 Mad 785.

Here the order of the Magistrate was a material fact to be proved and as there were separate orders in the two cases each constituted a distinct cause of action. No doubt, they could have been joined in the same suit but O. 2, R. 2, does not bar the present suit. As regards the share in field No. 18 the dispossession took place in July 1911. Suit No. 111 was concerned with the possession of survey No. 26 in which the dispossession occurred in July 1912. There is thus an interval of one year between the two acts of dispossession. The lower appellate Court was therefore justified in holding that these two constituted distinct acts of ouster. This view is supported by *Riayatullah Khan v. Nasir Khan* (2). The next question relates to the claim for mesne profits for the shares in survey Nos. 17 and 22 for 1912-13. I will assume that the cause of action for this year's mesne profits accrued before suit No. 113 was filed. As pointed out in *Lalessor Babui v. Janki Bibi* (3) claims for the recovery of possession of immovable property and for mesne profits are distinct claims and separate suits will lie in respect of each claim: see also *Gutta Saramma v. Maganti Ramnudu* (4). The claim for mesne profits is therefore not barred by O. 2, R. 2.

The last point for consideration is whether the suit as regards survey No. 20 is barred by Art. 47, Lim. Act. The suit has been instituted more than three years from 4th January 1913, the date of the order in the criminal Court. Sukwar was however not a party to the criminal proceedings. She died pending the suit and Gujai succeeded her again as her representative. Art. 47 applies to any one bound by the order in the criminal case or any one claiming under such person. Prima facie Sakwar as being a party is not bound. Nothing has been alleged nor proved to show that Gujai was conducting the proceedings on behalf of her co-widow. I hold therefore that Sakwar, was not bound nor is her representative Gujai. The suit therefore is not barred by limitation as regards survey No. 20. The appeal fails and is dismissed with costs.

P.N./R.K.

Appeal dismissed.

2. (1884) 6 All 616.

3. (1892) 19 Cal 615.

4. (1908) 31 Mad 405.

A. I. R. 1918 Nagpur 243

MITRA, A. J. C.

Madhu—Appellant.

v.

Ahmadkhan—Respondent.

Second Appeal No. 60/B of 1917, Decided on 22nd August 1917, from decree of Addl. Dist. Judge, Amravati, D/- 11th December 1917.

Mortgage—Decree against mortgagor—Prior transferee of mortgagor cannot be dispossessed by auction-purchaser in mortgage decree—Transferee has right to possession till foreclosure.

The sale in execution of a mortgage decree against a mortgagor who had lost all right in the property by a prior conveyance gives the auction-purchaser no right to possession but only the mortgagor's rights under his mortgage. The vendee under the conveyance who has also a right to redeem has a legal right as owner of the property subject to the mortgage a right to possession till foreclosure. [P 244 C 1]

Dalwantrao Pendharkar—for Appellant.

M. B. Niyogi—for Respondent.

Judgment.—In 1887 defendant 6 mortgaged the property in dispute to defendants 2 to 5. In 1907 the plaintiffs purchased the property from defendant 6. On 23rd July 1910 defendants 2 to 5 instituted a suit on the mortgage making the present defendant 6 as the sole defendant. It was pointed out in the course of the suit by the mortgagor that the property has been already sold to the present plaintiffs. No steps were taken to have the present plaintiffs brought on the record, and it is now conceded that this was because the suit as against the present plaintiffs was barred by limitation on 8th August 1910, that is, before the mortgagor put in an appearance in Court. The property was sold by auction and purchased by defendant 1, who somehow or other managed to obtain possession through the Collector. The plaintiffs sue to recover possession on the ground that they have been illegally dispossessed by defendant 1. The plaintiffs do not seek to redeem the mortgage but only sue for ejectment. The lower appellate Court has decreed the claim, and this appeal has been filed by defendant 1. The argument on behalf of the appellant is that this case is distinguishable from *Raghunath v. Sheolal* (1) on the ground that the person who acquired a right under the mortgage decree in which parties were not fully represented, is defendant 1. (1917) 13 N L R 69.

in possession and not seeking the assistance of the Court as plaintiff. The mortgage did not authorise the mortgagee as such to demand possession. I do not think the position of the appellant is improved by reason of his having got illegal possession from the Collector: *Ganeshdas v. Khumansingh* (2). The sale, in execution of a decree against a mortgagor who had lost all right in the property by a prior conveyance gave the auction purchaser no rights to possession, but only the mortgagee's rights under his mortgage. I have already pointed out that the mortgagee as such was not entitled to possession. Now the plaintiffs are clearly entitled to possession. They have also the right to redeem. The appellant says that as the plaintiffs seek equity they must do equity. The plaintiffs however, are seeking to enforce a legal right, their rights as owners of property subject to a mortgage, a right to possession which they are entitled to, till they are foreclosed. Practically the defendant asks me to pass a decree for foreclosure against the plaintiffs in this suit when the defendant could not have instituted a suit for foreclosure.

The plaintiffs were in possession, and this possession was constructive notice to the mortgagees before they filed a suit. It is no doubt a hardship that the auction-purchaser has to bear the consequences of the mortgagees' want of due diligence in ascertaining who should be made parties. The first case cited before me on behalf of the appellant is *Shaik Abdulla Saiba v. Haji Abdulla* (3). In this case the High Court passed practically a foreclosure decree against persons who were not made parties in a previous suit, but it does not appear that a claim of this kind would have been barred at the date of the institution of the second suit. The appellant also relies upon *Luchmiput Singh v. The Land Mortgage Bank of India* (4). This was a case of an English mortgage under which the defendant mortgagee could set up the right to possession as mortgagee until redeemed. The case of *Gouri Churn Patni v. Sita Patni* (5) cited for the appellant has no bearing on the question. As far as it goes it is against the appel-

lant. There is one point on which the appeal admittedly succeeds. The plaintiffs had claimed mesne profits for two years and the learned District Judge is wrong in allowing mesne profits for three years. The result is that the decree of the lower appellate Court will be modified by substituting Rs. 140 as the mesne profits. The appeal substantially fails and the appellant should pay the costs of this appeal.

P.N./R.K.

Decree modified.

A. I. R. 1918 Nagpur 244

BATTEN, A. J. C.

Doma Kotwal—Applicant.

v.

Ganpat Kunbi—Opposite Party.

Civil Revn. No. 257 of 1917, Decided on 16th April 1918, from the order of Sm. C. C. Judge, Wardha, D/- 13th August 1917.

Wajibularz—Construction.

The provision for the taking of the hides by kotwars in Cl. 14 of the village Wajibularz refers only to cases in which the owner of the dead animal does not dispose of the carcase.

[P 245 C 1]

W. H. Dhabe—for Applicant.*S. R. Pandit*—for Opposite Party.

Order.—This is a sequel to Civil Revision No. 297 of 1915. The further proceedings in the lower Court have thrown absolutely no fresh light on the case, but it has now been decided that though by custom the Kotwar has right to take the hides of all cattle belonging to tenants which die in the village of Wahitpur even if they are not abandoned by the owner, the custom is an unreasonable one and the suit has been dismissed. The plaintiff now applies in revision. I have now procured the original Wajibularz of the village; Cl. 14 runs as follows:

"Disposal of hides and carcases of dead cattle. As the disposal of carcases of dead animals is necessary in the interests of sanitation and such disposal cannot usually be effected by the owners, it is the customary duty of the Kotwars and Mahars (or Pandhari mahar) to dispose of such carcases."

For this service it is the custom that all hides of cattle which die in the limits of the village are taken by the Kotwar and Mahar as follows:

1. The Kotwar gives one warthi (leather rope) for each bullock of Malguzar which dies. 2. The Kotwar takes the hides of the cattle belonging to tenants which die. 3. The Pandhari Mahar is given his daily wages and is made to do the bigar work. 4. The carcases of cattle which have died within the village boundaries belong to the mahars and kotwars of the village. Provided

2. (1894) 7 C P L R 3.

3. (1880-81) 5 Bom 8.

4. (1887) 14 Cal 464.

5. (1910) 14 C W N 346.

that the owner of a dead animal may take hide or carcase or both, if he suspects the animal has died from unnatural causes, and communicate his suspicion to the mukaddam. The mukaddam shall enter such communication in the village note book."

I have no hesitation whatever in saying that the real meaning of the clause is that the provision relating to the taking of the hides by kotwars or mahars refers only to cases in which the owner of the dead animal does not dispose of the carcase. I do not read the clause to apply to cases in which the owner of a dead animal is able and willing to dispose of the carcase himself. If I was of opinion that the clause related to a custom which extended even to the hides of animals which the owner himself disposes of, I would hold the custom to be a bad one and not enforceable by law. I see no reason whatever to alter the opinion which I expressed in *Bhiva v. Hagha* (1). That was a Berar case but the circumstances do not differ. Precisely the same view was expressed by Sir Bipin Bose, A. J. C., in *Janjee v. Sadya* (2). I think it advisable to discuss the aspect of the case which has not been raised by the learned pleader for the applicant. Under S. 47 A, C. P. Land Revenue Act (18 of 1881), rules have been made for the remuneration of Kotwars. Rule 9 (a) recognizes the remuneration of a Kotwar by dues payable in kind. The rules as a whole which have been sanctioned by the Chief Commissioner show that the remuneration of a village watchman is regarded as a cess. Under S. 153 a civil Court may give a decree for the recovery of a village cess sanctioned by the Chief Commissioner and entered in the *Wajib-ul-arz* at a settlement. We have to see therefore whether under the *Wajibularz* of this village part of remuneration of the village watchman consists of the hides of cattle which die in the village. Under Cl. 4 of the *Wajibularz* of the settlement of 1891-1892 the Kotwar used to get hides of cattle as part of his remuneration. Cl. 4 of the current Settlement runs as follows:

"(1) Appointment and remuneration of the village kotwar. The person named on the margin is appointed the kotwar in this village. He will get his remuneration at 7½ pies per rupee yearly on the amount of rent, from the Malik Makbuz and other tenants and he will get his dues at the same rate yearly from the malguzars also calculated on the jama of his *sir* and *khudkast* lands. But the malguzars will pay yearly not less

than the total amount of Rs. 7. (2) The kotwar's remuneration of this village has been fixed at Rs. 3. (3) The kotwar will also get his dues for this village on account of *napai japai* and *corrupts*. (4) The undermentioned *mauzas* have been attached to this village as far as the kotwar and his dues are concerned:

Name of Mauza	Rate of fee.	to be recovered from the	
		Malguzar.	
Wahitpur ...	7½ pies	Rs. 7-0-0	Rs. 31
Waghapur ...	7½ "	" 4-0-0	" 17
Total.		11-0-0	48

There is no mention of the hides of cattle dying in the village as forming part of the remuneration of the kotwar. The plaintiff's claim therefore if it be regarded as one under S. 153 of the former Land Revenue Act cannot succeed. The application is dismissed with costs.

F.N./R.R. Order accordingly.

A. I. R. 1918 Nagpur 245

PRIDEAUX, A. J. C.

Gadhaji Rao—Appellant.

v.

Dnyanoba—Respondent.

Misc. Appeal No. 7/B of 1916, Decided on 31st January 1917, from order of Dist. Judge, East Berar, D/- 28th January 1916.

(a) Civil P. C. (1908), O. 21, R. 93—Refund of purchase money—Fraud alleged—Separate suit is maintainable.

Where a purchaser seeks on the ground of fraud to have refunded the price paid by him for the property sold in execution of the decree on the ground that at the time of the sale, the judgment-debtor had no saleable interest therein it is competent to him to proceed by way of a regular suit and he is not confined to the special remedy provided by the Civil Procedure Code.

[P 216 C 2]

(b) Civil P. C. (1908), S. 47—Suit by auction-purchaser to set aside sale on ground of fraud is barred by S. 47.

A suit of an auction-purchaser to have the sale set aside on the ground of fraud is barred by S. 47, since the remedy is by an application in execution proceedings; but subject to an objection as to limitation or jurisdiction the suit can be treated as an application in the execution proceedings.

[P 247 C 1]

Chakrawarti—for Appellant.

M. V. Joshi and Balvant Rao Pendharkar—for Respondent.

Judgment.—The plaintiff in this case alleges that the property in dispute belonged to defendant 2 Motisa who on 30th July 1906 mortgaged it with one Kaluram Birbal for Rs. 700 and mortgaged it again on 25th August 1908 with defendant 1 Sakharam now dead for Rs. 1,200. On 31st March 1910 the prior mortgagee

1. (1912) 8 N L R 53.

2. S A No. 280 of 909.

obtained a conditional mortgage decree on his mortgage, the said decree being made absolute on 16th March 1912 after due notice to both defendants. Sakharam then in 1912 brought a suit on his mortgage against the mortgagor. He sued to recover Rs. 500 only and having relinquished his rights as a mortgagee, obtained a simple money decree. These two persons acted in collusion; the claim was admitted, a decree passed and Sakharam attached the house in suit and got it auctioned. Plaintiff purchased the same for its full value and the sale was confirmed on 1st July 1913. The rights of Motiram in the house in dispute had already passed to the first mortgagee by virtue of his final decree. Sakharam at the time of the attachment and proclamation of sale or at the auction sale concealed the fact that the property was encumbered with the prior mortgage. He acted fraudulently and plaintiff now sues for recovery of the money he paid for the house. He asks that the sale be set aside and that the defendant be directed to pay Rs. 626 being the amount withdrawn by Sakharam in execution of his money decree from the sale proceeds with Rs. 50 interest thereon by way of damages and that Rs. 899 still lying in deposit in the Court be repaid to him.

He asks in the alternative that if the attachment and the sale effected are not set aside, defendants 1 and 2 be directed to pay the sum of Rs. 1525 with Rs. 125 as interest. These facts have been held established by both the lower Courts. It is found to be a clear case of fraud and the lower appellate Court confirmed the first Court's decree setting aside the sale. The lower appellate Court held that the suit is not barred either by S. 47, Civil P. C. or by O. 21, R. 92 (3), Civil P. C. The suit lies on the ground of fraud that fraud by defendant 1 is proved; and Sakharam was primarily responsible for any loss suffered by the plaintiff and is liable to recoup in full unless there is any reason why his liability as regards parts of the money has ceased. The Rs. 899 which plaintiff said were in deposit were found to have been withdrawn by defendant 2 and the case was remanded by the District Judge on the following grounds. I give his reasons for the remand in his own words:

"the only question remaining is whether as a matter of fact there is any special reason why

defendant 1's liability as regards Rs. 899 has ceased and this is the only point to be gone into. I cannot frame issues on the point as I am not in a position to know what has happened and it is only when the facts are before the lower Court that issues can be framed. The lower Court will take up this point and hear pleadings on it and if necessary frame issues and will settle the final liability of defendant 1 and defendant 2, as to the money due to plaintiff. I therefore set aside the decree of the lower Court and remand the case for re-admission under its original number and decision of its merits after going into the one point still left for decision."

The present appeal is filed against the remand order. I may add that the trial Court has since come to a fresh decision against which I understand an appeal is now pending in the District Court, Amraoti. The arguments advanced here are these: It is contended for the representatives of Sakharam that the plaintiff should have made an application under O. 21, R. 91 and that not having done so, Cl. 3, O. 21, R. 92 forbids the present suit; or if the suit is not to be barred on this account the matter was one relating to the execution of the simple decree and an application should have been made to the Court under S. 47, Civil P. C. and that not having been done, the suit cannot lie. The authority quoted with regard to the first half of the argument is *Shib Singh v. Mukhat Singh* (1) which holds that a person who had been the auction purchaser at a sale set aside by a Collector could not sue to have the sale restored and confirmed. Against this case may however be quoted the recent case of *Mohamad Najibulla v. Jainarain* (2) a case in some respects similar to the present one, in which it is held that where a purchaser seeks to have refunded the price paid by him for the property sold in execution of the decree on the ground that at the time of the sale, the judgment debtor had no saleable interest therein, it is competent to him to proceed by way of a regular suit and he is not confined to the special remedy provided by the Civil Procedure Code. I prefer to follow this case.

The case seems to me to be one really outside the provisions of R. 91, O. 21. It does not seem to me to cover a case where the sale is impeached on the ground of fraud. The only ground on which the application is to be made under R. 91 is where the judgment debtor has no saleable interest in the property sold. In

1. (1896) 18 All 437

2. A I R 1914. All 252 = 26 I C 69.

the case here, relief is not sought for on the ground that the judgment-debtor had at the time no saleable interest in the house, but the recovery of the money is claimed because the fraudulent conduct of the two defendants in concealing that fact led the plaintiff to purchase. The question is not without difficulty and it is not without hesitation that I have come to this decision. But under the authority of the case quoted in 36 *Al.* I think that plaintiff could bring the present suit, as far as *Br.* 91 and 92, *O.* 21 are concerned. The next point is whether plaintiff should have applied under *S.* 47 and act having applied, is the present suit barred? I am referred to *Mohondro Narain Chaturaj v. Gopal Mandal* (3), *Shreprasad Maiti v. Nundolal* (4), *Sarada Churan Chuckerbutty v. Mohamed Isufmzah* (5) and *Viraraghavan Ayyangar v. Venkat Achariar* (6). This contention is correct. The suit was really one to set aside the sale on the ground of fraud and comes under *S.* 47, *Civil P. C. Bhuvan Mohan Pal v. Nanda Lal De* (7). The section however states:

"The Court may subject to any objection as to limitation and jurisdiction treat the proceeding under this section as a suit or as a proceeding and may if necessary order payment of any additional court-fees."

It is not contended that any question of jurisdiction arises. An application to set aside a sale on the ground of fraud is governed by *Art.* 178, *Lim. Act: Lalmandas v. Jagannath Singh* (8) and *Bhuvan Mohan Pal v. Nanda Lal De* (5). The plaint in the present suit was filed within three years of the confirmation of the sale and the whole of the suit can be treated as execution proceedings. They must be treated as such. The order of remand appealed from seems to me to have been clearly necessary to determine the separate liabilities of defendants 1 and 2 and for this reason this appeal is dismissed with costs. I fix pleader's fee Rs. 30.

P.N./R.K.

Appeal dismissed.

2. (1890) 17 Cal 769.
4. (1891) 18 Cal 139.
5. (1886) 11 Cal 377.
6. (1882) 5 Mad 217.
7. (1899) 26 Cal 324.
8. (1900) 22 All 376.

A. I. R. 1918 Nagpur 247

BATTEN, A. J. C.

Balkrishna Lakshman — Plaintiff—Appellant.

v.

Bala and another—Defendants—Respondents.

Second Appeal No. 197 of 1916, Decided on 25th July 1917, against decree of Dist. Judge, Wardha, D-1274 January 1916, in Civil Appeal No. 512 of 1915.

Limitation Act (8 of 1908). *S.* 6—*Applicability*—*S.* 6 does not apply to suits under *C. P. Land Revenue Act* (1881). *S.* 69 (4) (1).

Section 6, *Lim. Act*, *prima facie* applies only to period of limitation prescribed in the *Schedule of Limitation Act*. It does not therefore apply to a suit brought under *S.* 69, *sub-S.* 4 (1), *C. P. Land Revenue Act*, the limitation for which is provided in the section itself. [*P.* 247 C 2]

K. K. Gaudhey—for Appellant.*M. B. Kinkhole*—for Respondents.

Judgment.—The sole question in this case is, whether the provisions of *S.* 6, *Lim. Act*, 1908, apply to a suit brought under part 1, sub-*S.* 4, *S.* 69, *C. P. Land Revenue Act*. Both the lower Courts have held that they do not. I am of opinion that their views are correct. Both of them refer to the terms of *S.* 6, *Lim. Act*, and to those of *S.* 29 (1) (b) of the same Act. Even if *S.* 29 (1) (b) only applies to the period of limitation apart from the question as to the date from which that period should be computed, *S.* 6 *prima facie* only applies to the period of limitation prescribed in the *Schedule of the Limitation Act*. The limitation of the present suit is not prescribed in the *Schedule of the Limitation Act* but in *S.* 69, *Land Revenue Act*. This is the view adopted in many cases of which I may cite *Akhoy Kumar Soor v. Bejoy Chand Mohapatra* (1). But the learned pleader for the appellant seeks to make some special distinctions as regards *S.* 69. He argues that suits brought under part 1, sub-*S.* 4, are to be governed by the same principles of limitation as appeals under *S.* 22 to *S.* 26 referred to in part 2 of the subsection. I think it is sufficient to observe that the two parts of sub-*S.* (4) have nothing whatever to do with each other, and that the limitation prescribed by the subsection for a suit cannot be governed by the principles of limitation laid down for an appeal to a Revenue Officer and its provisions cannot be imported into suits in a civil Court. It is also argued that

1. (1902) 29 Cal 813.

S. N. DAX, B. A. LL. B.
Vaidi High Court.
SRINAGAR (Kashmir)

suit under part 1, sub-S. 4, S. 69 is a suit brought under S. 83, and that other suits brought under S. 83 are governed by the ordinary law of limitation. It is suggested that this suit must also be governed by the ordinary provisions of the Limitation Act. It does not appear to me that his argument needs any discussion. A special period of limitation is prescribed for suits of a particular nature and this special provision is not affected by the fact that suits of another nature have no special period of limitation prescribed for them. The appeal is dismissed with costs.

P.N./R.K.

*Appeal dismissed.***A. I. R. 1918 Nagpur 248**

DRAKE-BROCKMAN, J. C.

Narayan Kashinath Vaidya
v.

Emperor

Criminal Appeal No. 166 of 1918, Decided on 2nd November 1918, from decision of Dist. Magistrate, Damoh.

(a) Criminal P. C. (1898), S. 196—Chief Commissioner cannot delegate power and discretion—Presumption under S. 114 (1), Evidence Act, applies—Evidence Act (1872), S. 114 (e).

The Chief Commissioner cannot delegate the power and discretion vested in him by S. 196, Criminal P. C., and when an order under S. 196, Criminal P. C., is passed the presumption allowed by Illus. (a) to S. 114 may be properly applied; 37 Cal 467 and 35 Cal 141, *Ref.* [P 251 C 1]

(b) Criminal P. C. (1898), S. 196—Order need not be in writing.

Section 196, Criminal P. C., does not prescribe any particular form of order and does not require the order to be even in writing: 32 Bom 112 and 22 Mad 3, *Ref.* [P 251 C 2]

(c) Evidence Act (1872), S. 114. Illus. (e)—No presumption arises that particular act is done in absence of evidence.

Illustration (e) to S. 114 does not raise any presumption that an act was done of which, there is no evidence and the proof of which is essential for the plaintiff's case: 32 Cal 1107, *Ref. on.* [P 251 C 2]

(d) Evidence Act (1872), S. 114 (e)—Presumption exists as to official acts being done in regular and proper manner.

There is a presumption that every man in his official character acts in a regular and proper manner until the contrary is proved. [P 252 C 1]

(e) Criminal P. C. (1898), S. 196—There need not be identity as regards facts contemplated by order under S. 196 and facts set out in complaint.

The wording of S. 196, Criminal P. C., is not such as to require the identity of the fact contemplated by the order under S. 196 and the fact set out in the complaint. [P 252 C 2]

(f) Criminal Trial—It is duty of prosecution to prove facts constituting offence—Nature of presumption under S. 114 that can be

raised indicated—Evidence Act (1872), S. 114.

It is always for the prosecution to make out the facts constituting the offence which is alleged to have been committed and the presumption under S. 114, Evidence Act, can more fittingly be applied to the prosecution than to the defence. It is only where a strong *prima facie* case has been made out against an accused person that he is bound to offer an explanation of his conduct or of circumstances of suspicion which attached to him. In such a case, when it is in the accused's power to offer evidence in explanation of the suspicious appearances which would show them to be fallacious and explicable consistently with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence not adduced would operate adversely to his interest: 42 Cal 422, *Ref. on.* [P 251 C 2]

(g) Penal Code (1860), S. 124-A—Speeches or writing of seditious character on former occasion can be proved for showing intention.

In proving the intention of a person in delivering a speech, pronouncements made by him on a prior occasion and writings of a seditious character can be proved. [P 255 C 1]

(h) Penal Code (1860), S. 124-A—If doubt as to guilt exists, status of accused as pleader negatives seditious intent.

A pleader is bound by an express oath of allegiance to the Government established by law in this country even more than an ordinary citizen is bound to keep within the law. This last consideration, if the charge were established, would furnish good ground for meting out severe punishment, but if doubt as to his guilt exist his status must surely be allowed some weight in the direction of negating any seditious intent. [P 255 C 2]

(i) Penal Code (1860), S. 124-A—Whole speech should be looked at to decide whether it is seditious.

In determining whether a speech is seditious the whole should be looked to without attaching undue weight to isolated passages which seem objectionable. [P 255 C 2]

(j) Defence of India Act (1915), R. 30—For initiation of proceedings precise words used by Government need not be indicated in order.

For initiation of proceedings, by R. 30, it is enough that consent in writing of the Government is obtained; it is not necessary that the precise words used by the Government should be indicated in the order. [P 256 C 1]

(k) Defence of India Act (1915), R. 23—"Dissuade" covers only successful action of dissuasion.

The word "dissuade" in R. 23 is intended to cover only successful action of dissuasion, even though in ordinary language "dissuade" is employed to indicate alike a successful and an unsuccessful attempt to divert another from any course by persuasion. [P 256 C 1]

(l) Criminal Trial—In case of doubt accused and not prosecution is entitled to have benefit of doubt.

Where there is room for doubt it is the accused person, and not the prosecution, who must have the benefit of that doubt. [P 256 C 2]

(m) Defence of India Act (1915), R. 23—Extent of—Right of freedom of speech indicated—Dissuading people from answering call of Government to enter into military service is infringement of legal right.

The right to freedom of speech or discussion means that any person may write or say what he pleases, so long as he does not infringe the law relating to libel or slander, or to blasphemous, obscene, or seditious words or writings. This right cannot extend to advising persons not to enter the military service of the Crown when the Crown has declared its need of such service. And the Crown has undoubtedly a legal right to address its subject in this way; and by discussion from answering the calls the legal right may fairly be regarded as infringed. [V 257 C 1]

(n) Defence of India Act (1915), S. 2 and R. 23—Legislature has power to delegate to executive Government authority to constitute offence covered by R. 23.

The Indian legislature is competent to pass the Act of Defence of India Act and to delegate to the executive Government authority to constitute such an offence as covered by R. 23 of the rules under the Defence of India Act. [V 256 C 2]

Judgment.—Narayan Kashinath Vaidya, the appellant is a first grade pleader practising at Nagpur, having been admitted to that grade in November 1912 after making a declaration of allegiance to His Majesty and the Government established by law in British India. He was admitted to the second grade in April 1905 and so had been practising for more than 13 years when on 6th June last he appeared with another member of the Nagpur Bar for the defence of one Bhaiyalal, who was being tried at Damoh by a Subordinate Magistrate of the first class on a charge of dissuading or attempting to dissuade persons from entering the military service of His Majesty the King Emperor in corps.

There were hearings in the trial of Bhaiyalal on 6th, 7th and 8th June. On the last mentioned date a notice (Ex. D-1) was circulated that a meeting would be held at a temple in the town in the course of which lectures on the subject of "Swaraj" would be delivered by the appellant in the capacity of Secretary to the Provincial Home Rule League and by other persons. Mohamad Ashraf Khan (P. W. 2), the Circle Inspector of Police, was directed by the District Superintendent of Police between 5 and 9 o'clock that afternoon to attend the meeting, his instructions as described by himself being to take down notes if any thing objectionable was said by any speaker. He was accompanied by Ishar Singh (P. W. 3) Sub-Inspector of Police in charge of the Damoh Station House, who attended in

the course of his ordinary duties. The meeting was held and lasted from 7-30 to 9-30 p. m. The night was last of the dark half of the month and the Police Officers sat close to the Chairman having between them a hand lantern by the light of which their notes were recorded. These officers with one Suraj Prasad (P. W. 4), Sanitary Inspector, Damoh Municipality, are the only persons attending the meeting who were examined for the prosecution. Exs. P-1 and P-2 consist of the notes recorded on the spot by the Circle Inspector and the Sub-Inspector respectively. The first is in Hindi and the second in Urdu. Neither officer has any acquaintance with shorthand. The Circle Inspector's method of recording his notes is thus described in his own deposition :

"While taking down notes I heard each sentence fully before proceeding to write. The accused was all the while speaking while I was taking notes. The Sub-Inspector's object was to take down notes of anything objectionable or important and sometimes to take down word for word what the speaker said."

Each of the Police Officers prepared a report from his notes independently of the other. The Circle Inspector's report is Ex. P-3, the draft of which was prepared the same night, the fair copy being made and submitted to the District Superintendent of Police next morning. The Sub-Inspector's report also was submitted to the District Superintendent of Police the next day, but it was not produced at the trial. There is no dispute as to the course of the proceedings at the meeting. On the proposal of a schoolmaster named Budhulal, Seth Kisborilal an Honorary Magistrate, took the chair and called on first Nathuram pleader of Jabulpur, second M. R. Bobde, pleader of Nagpur and third the appellant to address the meeting. The appellant's speech was followed by one from the Secretary of the Gorakshan Sabha on the preservation of cows after which a vote of thanks to the lecturers and the Chairman was passed and the Chairman then closed the meeting. The speeches of Nathuram and Bobde are said to be occupied about 35 and 25 minutes respectively while the appellant spoke for a little more than an hour. Ex. P-3 was submitted by the District Superintendent of Police to the Secretariat at Pachmarhi and there Mr. G. G. Wright (P. W. 1), a Deputy Inspector General of Police, received orders to complain against the appellant in the

Court of the District Magistrate, Damoh, for offences punishable under S. 124-A, I. P. C., and R. 23, read with R. 29 of the Defence of India (Consolidation) Rules, 1915, made under the Defence of India Act, 1915. Mr. Wright received from the Chief Secretary Ex. P-3 with a translation (Ex. P-6) of so much of that document as purports to represent appellant's speech and also written orders (Exs. P-4 and P-4) made essential to the validity of the complaints by S. 196, Criminal P. C., and No. 30 of the rules just cited respectively. Separate complaints were presented under these orders on 1st July.

The charge framed against the appellants comprises two heads. The first alleges that in the course of the speech on 8th June 3 statements, quoted at length, were made and that thereby the appellant attempted to bring into hatred and contempt and also attempted to excite disaffection towards His Majesty the King-Emperor and the Government established by law in British India. The second sets out that in the same speech a statement to the following effect was made :

"Hindus and Musalmans are asked to join the Labour Corps. It is a dishonour to us. Why are we not sent to the fighting line? We are prepared to fight and die. We are not coolies,"

and that the appellant thereby dissuaded or attempted to dissuade persons from entering the military service of His Majesty the King-Emperor in the Labour Corps. By way of defence to the charges the appellant put in a written statement complaining that his speech had not been fully reported and that the reports in evidence do not faithfully represent what they purport to reproduce. He also offered explanations in respect of the passages quoted in the charge. No witnesses were called for the defence. The District Magistrate convicted the appellant of both the offences charged against him and sentenced him to suffer 18 months rigorous imprisonment for each, these punishments to run concurrently. The finding as regards sedition is thus worded in para. 18 of the District Magistrate's Judgment:

"I have carefully considered the speech as a whole including the passages charged. I consider the passages 1, 2 and 3 under the charge under S. 124-A, I. P. C., to be such as to dis-affect the people towards the Government in order that they may join the Home Rule League and

agitate for a change in the administration of the country."

The other finding appears in para. 19; after repeating the passage quoted in the charge the judgment continues thus:

"There can, I think, be no doubt that this was said with the object of dissuading persons from entering the military service in the Labour Corps. This audience was a mixed one, and to say to them "we are not coolies" is clearly indicative of dissuading them from enlistment in the Labour Corps. It must not be forgotten that accused was defending Bhayalal who was also charged under R. 33 of the Defence of India Rules, 1915, and so it is apparent that his intention was to excite feelings of disaffection towards Government on this point also and to hold it up to contempt of the people. There was no occasion to make use of the expression "coolies." It was contemptuously used as an insult to the people by Government under whose orders people are enlisted in the "Labour Corps."

The memorandum of appeal is a lengthy one and the appellant's counsel occupied in all two days with his addresses to the Court. He has also deposited for my perusal a small library of books which support the various positions in political and economic matters which have been taken up by the Home Rule League. I will deal first with the conviction for sedition which is attacked on 3 technical grounds as well as on the merits. For the apprehension of the technical points it is necessary to set out the terms of Ex. P-4. That document being short may conveniently be reproduced here in extenso:

No. C. 415.

CENTRAL PROVINCES SECRETARIAT.
Political and Military Department.

To.

G. C. WRIGHT, ESQR.,
Deputy Inspector General of Police,
Central Provinces, Nagpur.

Under S. 196, Criminal P. C., you are hereby ordered to present a complaint in the Court of the District Magistrate, Damoh, against Narayan Rao Vaidya, son of unknown, pleader, Nagpur, of an offence under S. 124-A, I. P. C. in respect of a speech delivered by the said Narayan Rao Vaidya at the Madan Mohan Temple, Damoh, on, 8th June 1918.

Dated Pachmari,

Sd. F. SLOCOCK.,
Chief Secretary to the
Chief Commissioner,
Central Provinces

The 27th June 1918.

The first point urged is that whereas S. 195, Criminal P. C. requires a complaint under S. 124-A, I. P. C., to be made by order of or under authority from the Local Government, i. e., in the Central Provinces, the Chief Commissioner, does not purport to be an order passed by the Chief Commissioner. I am referred in this connexion to the following

cases : *Queen Empress v. Tilak* (1), *Apurna Krishna Bose v Emperor* (2), *Barindra Kumar Ghose v Emperor* (3). The orders of Government in these cases will be found at pp. 122, 143 and 487 of the respective reports above cited and stress is laid on the fact that in each the emanation of the order from the Head of the Local Government is explicitly declared. It is urged that Mr. Wright on his own showing received his order from the Chief Secretary, not from the Chief Commissioner, and that no presumption arises that the Chief Secretary acted in obedience to an order received from the Chief Commissioner. For the prosecution the contention is that Ex. P-4 cannot reasonably be supported to emanate from the Chief Secretary in his private or merely personal official capacity. It is also pointed out that no objection to the validity of the order was taken before the Magistrate and no cross-examination directed to that point.

No authority precisely apposite was cited at the Bar. It is common ground that the Chief Commissioner could not delegate the power and discretion vested in him by S. 196, Criminal P. C., and for this position there is the high authority of Jenkins, C. J., in *Barindra Kumar Ghose v. Emperor* (3). According to the argument of the appellant the Court is not entitled to presume under S. 114, Evidence Act, that the Chief Secretary acted as the accredited agent of the Chief Commissioner and the defect in Ex. P-4 should have been remedied by direct evidence that the Chief Secretary acted under the Chief Commissioner's orders. In my opinion this is a case in which the presumption allowed by illustration (e) to S. 114 may properly be applied. As remarked by Caspersz and Chitty, JJ., in *Apurba v. Emperor* (4):

"the Head of the Government must necessarily and ordinarily does act and communicate his orders through his accredited and gazetted officers", and it is not denied that the Chief Secretary was in June last in charge of the Political and Military Department. There is a presumption too that the common course of business has been followed in a particular case : see illustration (f) to S. 114. Moreover when issu-

ing an order expressed to be passed under S. 196, Criminal P. C., the Chief Secretary did in effect assert that the Chief Commissioner had already given the requisite authority. It may be that the Chief Secretary is empowered to dispose of certain matters on his own authority, but it cannot reasonably be supposed that he would arrogate to himself the power of granting such an authority as that conferred by S. 196, Criminal P. C., or that the Chief Commissioner would delegate that authority. It was laid down by Woodroffe, J., in *Narendra v. Jogi* (5) that illustration (e) to S. 114 does not raise any presumption that an act was done of which there is no evidence and the proof of which is essential for the plaintiffs' case. In the present instance however we are not entirely without evidence. Pachmarhi is the seat of Government in the hot weather and Ex. P-4 was issued there in a form which, but for the omission complained of, would admittedly have been entirely suitable for an order emanating from the Chief Commissioner himself. The Deputy Inspector-General of Police accepted the order as one binding upon him and evidently lost no time in complying therewith for he reached Damoh on 29th June; thus he would hardly have done had he not been satisfied that his authority was such as the law requires. S. 196, Criminal P. C., does not prescribe any particular form of order and does not require the order to be even in writing : see *Queen Empress v. Bal Gangadhar Tilak* (6) and *Chidambaram v. Emperor* (7). Having considered all the circumstances laid before me I am satisfied that Ex. P-4 represents an order passed by the Chief Commissioner himself.

The next point pressed is that S. 196, Criminal P. C., requires the Chief Commissioner himself to exercise his discretion as to whether prosecution should take place at all and also as to the particular acts or words in respect of which a complaint should be lodged. It is urged that Ex. P-3 obviously cannot represent the entire speech made by the appellant and that although Ex. P-4 refers generally to that speech there is no direct evidence that the Chief Commissioner ever saw Ex. P-3. That exhibit however certainly

1. (1893) 22 Bom 112.

2. (1903) 30 Cal 141.

3. (1910) 37 Cal 467.

4. (1903) 35 Cal 141.

5. (1905) 32 Cal 1107.

6. (1908) 32 Bom 112.

7. (1909) 32 Mad 3.

came to the hands of the Chief Secretary and I do not see my way to holding that the Chief Commissioner ordered the prosecution of the appellant's speech without seeing some report of it. That no other report reached Pachmarhi, seems clear from the evidence of the Circle Inspector and the Sub-Inspector for they retained their own notes (Ex. P-1 and P-2) until Mr. Wright took them over on or after the 29th June. There is a presumption that every man in his official character acts in a regular and proper manner until the contrary is proved; and so in *Van Omeron v. Dowick* (8) Lord Ellenborough said he would presume a license had been given to export goods which could not be exported without a license if proof were given that they had been entered for exportation at the custom house. I will deal later with the question of the extent to which Ex. P-3 may safely be taken to represent the appellant's speech.

The third point for consideration is that while Ex. P-4 directs the filing of a complaint in respect of "a speech delivered by the appellant on 8th June 1918" the complaint actually relates only to certain statements made in the course of that speech. Under S. 196, Criminal P. C., the complaint made has to be ordered or authorized by the Chief Commissioner. Under sub-S. (1) (a), S. 190 of the Code, a complaint must indicate facts which constitute an offence. The deduction pressed for is that the precise facts contemplated by the order under S. 196 and the facts set out in the complaint filed must be identical. This position is said to find support in *Barindra Kumar Ghosh v. Emperor* (3). In that case the learned Chief Justice held that inasmuch as the order under S. 196 authorized preferment of a 'complaint alleging offences under Ss. 122, 123 and 124, I. P. C., no complaint under S. 121 was thereby authorized although the order went on to authorize alternatively a complaint under any other section of the said Code which might be found applicable to the case. This decision appears to be in conflict with that of the Bombay High Court in *Bal Gangadhar Tilak's case* (6) in which the Government ordered a complaint against Tilak

"under S. 124-A, I.P.C., and any other section of the said Code which may be applicable to the case"

and the order was upheld by Strachy, J., as valid. In my opinion the wording of S. 196, Criminal P. C., is not such as to require the identity contended for. Moreover the following passage in the cross-examination of Mr. Wright (P. W. 1) seems to me to show clearly that the passages set out in the complaint were not selected by him:

"I have no personal responsibility in this case. I received orders to lodge the complaint and I have to do it. I am not even officially responsible for selecting the passage forming the subject-matter of prosecution."

The words "in respect of a speech" (in Ex. P-4) may cover either the whole speech or parts of the speech, and if certain passages in the speech were indicated to Mr. Wright at Pachmarhi, as I think they must have been, the discrepancy on which the appellant's contention rests does not really exist. The technical objections raised being thus overruled, I pass to the merits in connexion with which the first point taken for the appellant is that the entire speech should be looked at as a whole, freely and fairly, without giving undue weight to isolated passages, and that neither Ex. P-3 alone nor that document supplemented by the oral evidence of P. W's. 2, 3 and 4 suffices to adequately represent the entire speech. In para. 18 of his judgment the District Magistrate writes that he has carefully considered the speech as a whole, including the passages charged. With a view to ascertain how far Ex. P-3 can reasonably be regarded as representing the appellant's entire speech I have had it declaimed as if by a speaker in public and have thus found its delivery to occupy 11 minutes.

I have also had the number of words in the speech as given in Exs. P-1, P-2, and P-3 carefully counted and found the numbers to be respectively 1182, 630 and 1223. It will be realized from these figures that Ex. P-2 is very much briefer than Ex. P-1 and that Ex. P-3 embodies but little amplification of Ex. P-1. Making due allowance for the fact that though the appellant's mother-tongue is Marathi he spoke in Hindi and for any interruptions caused by the cheers mentioned in Exs. P-2 and P-3, I think it clear that the total number of words spoken could not have been short of 6000. The appellant spoke for 65 or 70 minutes at any rate for over an hour and 100 words per

minute is a very slow rate of public speaking. Ex. P-3 thus cannot represent even so much as one quarter of what the appellant said. I have already set out circumstances in which the notes were recorded and the principles by which the writers were respectively guided. It is obvious that the circumstances were not such as to facilitate the making of an accurate record even if the substance of selected passages only was taken down. The Circle Inspector deposed that at some places he took down verbatim what was said and it seems inevitable that while thus engaged the writer lost much, if not all of what immediately followed.

In all the important trials for sedition in which the now well established rules for the construction of matter alleged to be seditious have been laid down, the matter in question was given to the Court verbatim and in extenso being included in newspaper articles. I refer particularly to *Reg v. Sullikal* (9), *Queen Empress v. Jogendra Chandra* (10), *Queen Empress v. Tilak* (1), *Queen Empress v. Vinayak* (11), *Queen Empress v. Amba Prasad* (12). The only case cited at the Bar in which notes of speeches were relied upon is *Chidambaram v. Emperor* (7); the notes given in the judgment of the High Court are considerably more connected and intelligible than those available in the present case and I am unable to find from the report what proportion the contents of each note bore to the full speech of which it aimed at producing the important parts. In *Emperor v. Tilak* (13) decided on 9th November 1916, the translation in English of the lectures delivered in Marathi are so long and there is so complete an absence of any break in the sense that I can only suppose that the originals were taken down in shorthand as delivered or that having been written out in full before delivery the lecturer's text had somehow become available to the prosecution.

The difficulty of doing justice to the appellant in the present case is thus great and this important fact does not appear to have been appreciated by the District Magistrate, whose judgment indeed contains no indication that the ap-

pellant's own explanation of his object was understood. According to the case for the Crown as stated in this Court, the appellant endeavoured to excite hatred and contempt in his hearers against the present form of Government on the ground that it had enabled Englishmen to exploit India to the disadvantage of Indians and showed its distrust of Indians by shutting them out from the use of arms. For the appellant the speech is said to have been directed to pressing a popular demand for the introduction of Self Government under the British Empire, the burden of the arguments used being that both India and England would benefit if the wishes of the people were duly consulted in all matters concerned with the administration of the country. I have studied Exs. P-1, 2 and 3 carefully and I am satisfied from them that by "Swaraj" the appellant meant no more than self-rule under the British Government. His position was certainly not that taken up by the principal accused Subramania Siva in *Chidambaram v. Emperor* (14) where absolute "Swaraj" involving the departure of foreigners and all things foreign from India was the goal indicated as desirable. The Circle Inspector indeed made an express admission in the appellant's favour on this point: see sheet 86 of the Magistrate's record. On sheet 97 will be found an admission by the Sub-Inspector that the appellant might have described his "Swaraj" as stated by the Circle Inspector. The first speaker (Nathuram) asked for Home Rule such as had been granted to Australia and Canada and the second (Bobde) relied upon the promises of British Sovereigns and Viceroy and exhorted his hearers to press their claims for Home Rule upon the attention of the present King Emperor.

The appellant in his turn denied that the movement of "Swaraj" embodied any design to expel Europeans. He contended that the realisation of "Swaraj" would benefit England even more than India and conceded that if Indians so wished Englishmen should be allowed to hold even such comparatively low posts as Naib Tahsildarships. The very desire for "Swaraj" is attributed to education imparted by the British Government. Further the need for the continued presence in India of the

9, 11 Cox Cr Cases 44.

10. (1892) 19 Cal 35.

11. (1900) 2 Bom LR 298.

12. (1891) 20 All 55.

13. (1917) 19 Bom LR 211.

14. (1909) 32 Mad 31.

English race was admitted on the ground that Indians had yet much to learn, particularly in the art of Government. In his 18th paragraph the District Magistrate went so far as to hold that the appellant intended to excite disaffection towards the King Emperor himself: but no such position was maintained by the learned Standing Counsel for the Crown in this Court, and I am clearly of opinion that there was nothing to justify the District Magistrate's view on this point.

The only direct reference to His Majesty made by the appellant occurs in the third of the passages reproduced in the charge, which like the second was concerned with the subject of commerce between India and Europe. This is described by the District Magistrate as 'unprelanted' but so far as I am able to understand the passage it is no more than a rhetorical way of representing that India is in no way responsible for the loss of goods caused by the enemy's sinking of ships. This part of the report is evidently very incomplete. The sentence immediately before the question does not appear in Ex. P-1 at all though it finds place almost in its entirety in Ex. P-2. On the other hand, inasmuch as the speaker's goal was Home Rule under British suzerainty, it is not at all likely that any disrespect to His Majesty was intended. I can find in this remark of the District Magistrate no light upon the general intention of the speaker. I will now deal in more detail with Ex. P-3 and particularly with the extracts embodied in the charge. (After discussing the effect of the extracts from the speech of the accused, the judgment proceeded.) Before stating my final conclusion regarding the conviction on the first charge I desire to make some observations on the appellant's omission to call any witnesses. When dealing with the appellant's application for release on bail I remarked that it would have been easy for him to call members of his audience so that they might give some account of the impression made upon their mind by his speech. I had then in mind the presumption allowed by S. 114, Evidence Act, that evidence which could be, and is not, produced, would if produced be unfavourable to the person who withholds it. On further consideration I doubt whether this presumption properly arises here.

It is always for the prosecution to make

out the facts constituting the offence which is alleged to have been committed and the presumption under S. 114, Evidence Act can more fittingly be applied to the prosecution than to the defence. The duty of the prosecution to call all essential evidence was pointed out in *Emperor v. Dhunno* (15), and in *Ram Ranjan Roy v. Emperor* (16). It is only where a strong *prima facie* case has been made out against an accused person that he is bound to offer an explanation of his conduct or of circumstances of suspicion which attach to him. In such a case, when it is in the accused's power to offer evidence in explanation of the suspicious appearances, which would show them to be fallacious and explicable consistently with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence not adduced would operate adversely to his interest: see the remarks of Lord Ellenborough given at pp. 305 and 306 of *Wills on Circumstantial Evidence* (Edn. 6). In the present case I consider that the prosecution would have done well to call some non-official witnesses to testify as to the impression produced on their mind by the speech. Such persons would have been better able than police officers occupied in recording what they considered objectionable or important to give a general account of the effect produced by what the appellant said. It is also to be remembered that some 4 weeks intervened between the delivery of the speech and the appellant's arrest and he may well have doubted whether the members of his audience retained any adequate recollection of his lecture.

The District Magistrate has remarked unfavourably upon the appellant's omission to set out what he actually said. There is, however, no suggestion that the appellant committed his speech to writing and failing such a record he could hardly be expected to do more than furnish just such a summary as appears in his written statement. I have endeavoured to consider the appellant's speech not only in detail but also as a whole. In so doing I have borne in mind the fact that so far back as 20th August 1917 the Secretary of State for India had announced in the House of Commons that sub-

15. (1882) 8 Cal 121.

16. (1915) 42 Cal 422.

stantial steps should be taken as soon as possible in the direction of increasing the association of Indians in every branch of the administration and gradually developing self-governing institutions with a view to realization of responsible government in India. The Secretary of State after visiting India in pursuance of this announcement returned to England and the conclusion reached by him in consultation with the Viceroy and many representatives of public opinion in this country was awaited. The appellant is Provincial Secretary of the Home Rule League, a body framed in September 1916, came from Nagpur to Damoh to defend a person charged with attempting to dissuade persons from entering the military service of the King Emperor and took the opportunity afforded by his presence there to press upon the inhabitants of a town which he regarded as indifferent to its political rights the advantages of joining the League and the duty of subscribing to its funds. As Ex. P-3 shows he was aware of the presence of police officers at the meeting and conscious of being under surveillance. There is no evidence that he had previously given vent to any speeches or writing or writings which were seditious in character, though there is authority for the view that any such pronouncements might be proved for the purpose of showing the intention with which the speech in question was delivered. Similarly there is no evidence that the town of Damoh was at the time in an inflammatory condition such as to impose upon the lecturer more than the ordinary care in selecting his language or that any disaffection actually resulted from his speech. With regard to the composition of the audience the evidence for the prosecution is much less full than it should have been.

It appears however that it included several pleaders, an Honorary Magistrate and a schoolmaster, some clerks and brokers and at least one cloth dealer. So much at any rate of the audience probably had some knowledge of those views regarding the present condition of India to which the appellant gave expression. By way of showing that some changes in the present constitution of the Government and its methods of working were necessary the appellant pointed to certain facts which he regarded as indicating the need for those changes. He recommen-

ded no recourse to unconstitutional means and at more than one place acknowledged the debt which India owed to Europeans. That changes are necessary and will very shortly be brought about has been recognized by the highest executive authorities and the particular views enunciated are such as have been and are being held and publicly announced by leaders of Indian opinion. Moreover as a pleader bound by an express oath of allegiance to the Government established by law in this country the appellant was even more than an ordinary citizen bound to keep within the law. This last consideration, if the charge were established, would furnish good ground for meting out severe punishment, but if doubt as to his guilt exist his status must surely be allowed some weight in the direction of negating any seditious intent. So far as I am able to gather from the imperfect record of what he said his main intention was to procure adherents for, and subscribers to the Home Rule League and to excite a desire for Home Rule itself. Applying to what we know of his speech and to what may reasonably be inferred as included therein the well settled rule that the whole should be looked to without attaching undue weight to isolated passages which seem objectionable I find myself unable to hold with the District Magistrate that an attempt to excite hatred or contempt or disaffection towards the Government established by law in British India has been made out. I therefore set aside the appellant's conviction and sentence under S. 124-A, I. P. C., and acquit him of the offence of sedition. I will now turn to the second head of the charge which relates to an offence punishable under R. 23, read with R. 29 of the rules framed under the Defence of India Act, 1915. I will deal first with certain technical objections, to the sufficiency of Ex. P-5, the order relied upon by the prosecution as conveying the consent of the Local Government to the appellant's prosecution. The rule cited runs as follows:

"30. Save as otherwise provided in R. 25 (1) no Court shall take cognizance of any offence punishable under these rules unless the Local Government, a Chief Presidency Magistrate, a District Magistrate or competent military authority not being below the rank of a Lieutenant Colonel has by order in writing consented to the initiation of the proceedings."

Exhibit P-5 is drawn up in precisely the same way as Ex. P-4 and the objec-

tions that the order does not purport to emanate from the Chief Commissioner himself and that it does not indicate the exact statement regarded as punishable are repeated. As to the form of the order, I think for reasons similar to those given in respect of Ex. P-4 that the Chief Commissioner's consent was obtained. The rule cited merely requires the Local Government's consent 'in writing' to the initiation of the proceedings, and I am not prepared to read into it a requirement that the precise words used must be indicated in the order. R. 23, said to have been contravened, is in the following terms:

"23. No person shall dissuade or attempt to dissuade any person from entering the military or police service of His Majesty. Provided that nothing in this rule shall apply to advice, true in substance and given in good faith for the benefit of the individual to whom it is given."

The District Magistrate's finding is that the appellant dissuaded or attempted to dissuade others from entering the military service of His Majesty. In ordinary language the word dissuade "is employed to indicate like a successful and an unsuccessful attempt to divert another from any course by persuasion. But the treatment in the rule of "an attempt to dissuade" as distinct from dissuading' seems to me to show that the latter term is intended to cover only successful actions of the kind mentioned. There being no evidence that any member of the appellant's audience was actually led to refrain from enlistment in the Labour Corps by anything the appellant said, I may confine myself to considering whether any attempt at dissuasion was made. (After discussing the evidence the judgment proceeded). Under these circumstances I cannot think it satisfactorily established that the appellant attempted to dissuade his audience from joining the Labour Corps. A more reasonable view of his intention is what he has himself stated and is indicated in my order disposing of his application for bail. At the same time I cannot refrain from observing that the appellant would have done well to avoid using any language which might possibly be taken to attach discredit to joining the Labour Corps. There are among all peoples men of courage whose bodily condition unfits them for the fighting line and such are entitled to nothing but honour if they undertake the lowlier duties which they

are actually fitted to perform. Nor am I able to appreciate the District Magistrate's argument that because the appellant was defending Bbayalal, a person charged for contravening R. 23, of the rules under the Defence of India Act, his obvious intention was to stir up disaffection towards the Government by the general expression that all Hindus and Mussalmans are not coolies. I consider it much more reasonable to suppose that having special reason to know the probable result of contravening the rule and seeing two police officers taking notes of his speech, the appellant would be careful to refrain from bringing himself into danger of prosecution. In this as in other respects the Magistrate's judgment appears to me to make every possible presumption against accused and to omit any consideration of what the accused himself had to say by way of explaining his utterances. Where there is room for doubt it is the accused person, and not the prosecution, who must have the benefit of that doubt.

In my opinion the most that can be said for the prosecution is that a perusal of Exs. P-1 and P-3 by themselves may justify the supposition that the appellant intended to discourage enlistment in the Labour Corps. This supposition however seems to me to be rendered very doubtful by Ex. P-2, the oral evidence and the context of the passage under consideration. I must therefore set aside the conviction and sentence and acquit the appellant. In the view which I have taken of the merits it is unnecessary for me to deal with certain technical pleas taken for the appellant regarding the competence of the Indian Legislature to pass such an Act as the Defence of India Act of 1915 and to delegate to the Executive Government authority to constitute such an offence as that covered by R. 23 of the rules under that Act. I will however briefly notice the arguments adduced. The first is that the Indian legislature is a subordinate legislature whose powers are strictly limited by S. 22, Indian Councils Act, 1861, now embodied in S. 65, Government of India Act, 1915. The Governor General in Legislative Council has not unless expressly so authorised by Act of Parliament, power to make any law affecting the authority of Parliament or any part of the unwritten laws or consti-

tution of the United Kingdom of Great Britain and Ireland whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom. It is urged that freedom of speech is one of the privileges assured to the subject by the protection of the Sovereign and that the subject's allegiance to the Sovereign is by way of return for that protection which he receives. In this connexion reliance is placed on the judgment of Norman, J., in the case of *Ameer Khan* (17). That case however is not concerned with freedom of speech. The exact extent of the right of freedom of speech or discussion does not appear to be expressly defined in any law or code. But I find at p. 319, Vol. 6, Halsbury's Laws of England, the following description of it:

"The right to freedom of speech or discussion means that any person may write or say what he pleases, so long as he does not infringe the law relating to libel or slander, or to blasphemy, obscene, or seditious words or writings."

The learned author also lays down that the legal rights of others may not be infringed. It is difficult to believe that this right can extend to advising persons not to enter the military service of the Crown, whether as combatants or non-combatants, when the Crown has declared its need of such service and asked for recruits. The Crown has undoubtedly a legal right to address its subjects in this way and by discussion from answering the call this legal right may fairly be regarded as infringed. In England interference, direct or indirect, with the recruiting service of the regular forces is punishable under S. 98, Army Act, so that the ordinary law of the land does expressly prohibit dissuasion from recruiting. But I am not prepared to infer from this that dissuasion would be within the right of the subject if no such substantive provisions of law existed. With regard to the delegation of power by the Indian Legislature to the Executive Government of India the maxim *delegatus non potest delegare* is relied upon and it is contended that the Defence of India Rules by constituting offences go beyond the power given by S. 2, Defence of India Act. In this connexion I would refer to the words of Lord Selborne in *Queen v. Burah* (18):

"The Indian Legislature has powers expressly

limited by the Act of the Imperial Parliament which created it and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature as those of Parliament itself."

The British Parliament has delegated to the King in Council by the Defence of the Realm Consolidation Act, 1914, large powers of interference with the liberty of the subject and even according to the dissentient judgment of Lord Shaw in *King v. Halliday* (19) regulations requiring certain rules of conduct to be observed and authorizing punishment after trial for the breach are competent. The Indian Legislature has adopted very similar measures and I would also observe that when the Defence of India (Criminal Law Amendment Bill) was before the Indian Legislative Council no objection to the effect that it was ultra vires of the Indian Legislature appears to have been raised although the proceedings in Council evoked a number of amendments and must have been lengthy as the report in the Gazette of India occupies 42 printed pages see pp. 243 to 284, Part 6 of the Gazette of India for 1915. The Full Bench decision of the Patna High Court in *Parmeshwar v. Emperor* (20) was referred to at the hearing, but appears to throw no light on the questions raised in the present case. The appellant having been acquitted on both heads of the charge framed against him will now be set at liberty.

C.N./B.R. Accused acquitted.

19. 1915 A C 260.

20. (1917) 3 P L J 597.

A. I. R. 1918 Nagpur 257

Drake-Brockman, J. C.

Mansaram Tilokchand—Appellant.

v.

Namia—Respondent.

Second Appeal No. 314 of 1917, Decided on 30th October 1917, from the decision of Divl. Judge, Nagpur.

Evidence Act (1872), S. 114—Creditor not demanding debt—No presumption of satisfaction

No doubt delay on a suitor's part to enforce alleged rights afford evidence against their existence. Failure to sue is however insufficient to raise a presumption of satisfaction against the creditor, and failure to demand cannot be more effectual for that purpose. *Case laws considered.*

[P 258 C 1]

17. (1901) 6 B L R 892.

18. 3 A C 889.

W. R. Puranik—for Appellant.

S. Y. Deshmukh and A. C. Roy—for Respondent.

Judgment.—The facts of the case out of which this second appeal arises were fully stated in my judgment of 11th August 1916 in Second Appeal No. 245 of 1915. The appeal to the Court of the Divisional Judge has been reheard by the Judge who gave the decision which I set aside and he has again come to the decision that the mortgage has been extinguished. To reach this finding he has started with the assumption that in my previous judgment I intended to lay down that if the plaintiff took no action throughout a long period to recover his mortgage money and failed to satisfactorily explain his inaction the debt should be held to have been satisfied unless the plaintiff showed it to be subsisting. The facts eventually found are thus stated in para. 24 of the judgment:

"In this case though for 37 years after the debt became due to the mortgagee made no demand for his money, nothing was paid during this long interval and no attempt was made to enforce payment. In the interval the mortgagee failed in a suit brought on a sale deed against the mortgagor. The mortgagee has given up all the interest which accrued during 20 years of that time, so for 20 years his money has been lying idle. He is a money lender and could have made good use of the money. During the whole of the 37 years except for the short period when litigation regarding possession of the Kamptee field was actually proceeding, and the mortgagee, might doubt how he should frame his suit was there any obstacle to suit on the mortgage according to the plaintiff's story? I hold that the plaintiff's conduct rebuts the presumption of non-satisfaction.

It is now urged on behalf of the plaintiff that the facts found do not justify any presumption against the subsistence of the mortgage debt and in my opinion this contention is correct. There are, no doubt, cases in which delay on a suitor's part to enforce alleged rights should be taken as affording evidence against their existence. Instances in point are to be found in *Mt. Bachun v. Shaikh Hamid Hossain* (1) and *Rajendrao Nath v. Jogendra Nath* (2). In the former case a Mahomedan widow in assertion of her claim to dower took possession of valuable property and was allowed to hold it for ten years. The Privy Council held that the delay of the heir in disputing her possession indicated a consciousness on their part that the amount she claim-

ed was correct. In the other case a will was acted upon and recognized for a period of 27 years and a strong presumption was therefore drawn in its favour. In *Bihari v. Ram Chandra* (3) the plaintiffs, who were usufructuary mortgagees, were never given possession of the mortgaged property and did not attempt to recover possession until the period of limitation had almost expired. The defendants pleaded that no consideration had passed. It was held by Stanley, C. J. and Banerji, J. that the plaintiff's inaction for so long a period as nearly 12 years justified a presumption that they did not consider themselves entitled to possession. But the circumstances of the present case are entirely different. It is not denied that consideration was paid to the mortgagor and that some repayment was made. The balance is said to have been satisfied by the mortgagor's execution of a sale deed conveying part of the mortgaged property to the mortgagee, but the lower appellate Court has held that no such satisfaction took place. From 1887 when *Ghasiram v. Dulichand* (4) was decided till 1908 when the present Limitation Act was passed the plaintiff was entitled to consider that he had 60 years from the accrual of his cause of action in which to sue upon his mortgage. In *Juggar Nath v. Syad Shah Mohamed Hossein* (5) it was laid down by the Judicial Committee of the Privy Council that the laches of a mortgagee in taking no steps for many years to enforce his alleged rights may afford evidence against the existence of those rights but cannot estop him from asserting them, if they do exist, at any time within the period of 60 years allowed by the Limitation Act 1859. In delivering the judgment of their Lordships Sir J. W. Colville said:

"The law wisely or unwisely, has given to mortgagees the long period of sixty years within which to bring their suit; and no Court of justice would be justified in diminishing that period on the ground of the laches of a party in the prosecution of his rights."

This principle has been applied in numerous cases and has been recognized by this Court in *Nerbudda Prosad v. Gokuldas* (6) and *Moolchand v. Chittoo* (7). No cases has been cited at

3. (1911) 33 All 483.

4. (1889) 2 C P L R 57.

5. (1875) 14 B L R 396.

6. (1905) 1 N L R 158.

7. (1910) 6 N L R 12.

1. (1873) 10 B L R P U 45.

2. (1870-72) 14 M I A 67 (P C).

the Bar in which a presumption that the mortgage money has been actually paid was drawn. Nor is it conceivable that any actual payment would have been unknown to the mortgagor's son Rodia who was alive at the institution of the suit. It has never been suggested that the delay on the plaintiff's part led any of the respondents to suppose that he had abandoned his rights under the mortgage deed and that they changed their position in consequence of that belief. In *Lindsay Petroleum Co. v. Hurd* (8) which was relied upon not only in the later of the two cases above cited from the N. L. R. but also in *Kissan Gopal v. Kally Prosonno* (9) the importance of showing prejudice was insisted upon. Neither of the respondents who have purchased parts of the mortgaged property entered the witness box to show that he would not have brought, had he considered the mortgage to be subsisting. Nor has the lower appellate Court attempted to show that it will be unjust either to the heir of the mortgagor or to the purchasers to give the mortgagee the remedy which prima facie he is entitled to.

The lower appellate Court has found that there is no credible evidence of a demand for the mortgage money except just before the filing of the suit. As to this I need only say that it is for the debtor to seek out the creditor for purposes of payment; see *Ganesh v. Sidhakar* (10) and *Majraji v. Johnson* (11). If failure to sue is insufficient to raise a presumption of satisfaction against the creditor, failure to demand payment privately should not be more effectual for that purpose. I hold that there is no legal basis for a finding that the mortgage was satisfied and that the plaintiff should therefore be given a decree for sale on terms to be ascertained by an account made in the office. It remains to consider a contention advanced on behalf of the respondents Balaji and Lakshman each of whom has purchased half of the mortgagor's one-third share in old No. 34 of mauza Kamptee. That there is now represented by new No. 527. It is said that the plaintiff having taken a conveyance Ex. D.7 of that share cannot enforce the mortgage against it. Ex. D.7 bears date 14th De-

cember 1870. In 1879 the plaintiff brought a suit against Chinto (the vendor) to obtain possession of the land. This suit was dismissed and it is admitted that the plaintiff has never held possession of the land. The title of the respondents Balaji and Lakshman admittedly arose long after the suit was decided. They cannot therefore be in a better position than Chinto himself would have occupied, had he been still alive and in possession. As against Chinto the plaintiff cannot be said to have become absolutely entitled to the land in as much as his only attempt to enforce his title failed. S. 101, T. P. Act, has therefore no application to the case.

In drawing up the preliminary decree for sale the opportunity will be taken to correct certain errors in the schedule of mortgaged property prepared by the trial Judge. The first item of property will be new No. 527 in Mauza Kamptee area 1.56 acres rent Rs. 16-8-3, tenure absolute occupancy, including the well therein and crops and produce of all kinds; the fifth item will consist of New Nos. 193, 210, and 211 of mauza Johni the respective areas of which are 2.55, 1.41 and the acres: this is all occupancy land, Rs. 4/- being the rent of Nos. 193 and 211 and Rs. 2-4-0 the rent of No. 210. The mortgage account will be made up to 23rd January 1918 to which date the time for payment is extended. The plaintiff's costs in all three Courts will be included in the mortgage money and the defendants will have their own costs. Future interests on the decretal amount from the date fixed for payment till realisation will be paid at 6 per cent per annum.

P.N./R.K. Order accordingly.

A. I. R. 1918 Nagpur 259

MITTRA, A. J. C.

Krishnaji—Appellant.

v.

Ladhuram—Respondent.

Second Appeal No. 467/B of 1916, Decided on 13th December 1917, from decree of Dist. Judge, East Berar, D/- 18th August 1916.

Civil P. C. (1908), O. 21, R. 93—Auction purchaser cannot sue for refund of purchase money for want of saleable interest.

Apart from fraud or neglect of duty, a purchaser at an auction sale is not entitled to maintain a suit under the Code of Civil Procedure (1908) for return of the purchase money on the ground that the judgment-debtor had saleable interest in the property sold.

[P 262 C 1,2]

8. L R 5 P C 221.

9. (1909) 33 Cal 633.

10. (1900) 13 O P L R 71.

11. (1915) 11 N L R 189.

Balwantrao Pendharkar—for Appellant.

B. W. Joshi—for Respondent.

Judgment.—Defendant 1 in execution of a decree against defendant 3 attached certain fields which were sold in auction on 25th November 1909 to the present plaintiff. Subsequently, a suit was instituted by a third party for possession of the property and the plaintiff has been dispossessed in execution of the decree passed in the last mentioned suit on the ground that the judgment-debtor had no interest in the fields. The plaintiff now sues for refund of the purchase money and interest thereon. Both the Courts below have dismissed the suit on the ground that under the Civil Procedure Code of 1908 the plaintiff cannot maintain the suit. I agree with the lower Courts that there is not an iota of evidence to establish a case of fraud. So the question of fraud may be entirely left out of consideration so far as the present case is concerned. It was also urged before me that in any case the plaintiff is entitled to a decree against defendant 3 the original judgment-debtor, to whom it is said part of the purchase money was paid. Although defendant 3 is a party to the suit, yet the plaintiff has never asked for any relief against him. He asks only for a decree against defendants 1 and 2, defendant 2 being a member of the same

family as defendant 1. The plaintiff might have had a good cause of action subject to the Law of Limitation against defendant 3 if he had pleaded that the balance of the purchase-money was paid to him and if the plaintiff was seeking any relief against this defendant, I must, therefore, disallow this claim against defendant 3.

The main question for consideration is whether under the Civil Procedure Code of 1908 the plaintiff can maintain a suit for refund of purchase-money against a judgment-creditor on the ground that it has been subsequently found that the judgment-debtor had no saleable interest in the property put up to auction. In *Dhannoo Jingar v. Antoba Janardhan Kalar* (1) it was held that under S. 315, Civil P. C. of 1882, the purchaser is entitled to receive back the purchase-money from any person to whom it has been paid when the judgment-debtor had no saleable interest in the property sold and that the purchaser may either institute a suit for the purpose, or may apply to have the sale set aside within 60 days of the sale or may apply to have his purchase-money within three years under Art. 178, Lim. Act. The provisions of the present Civil Procedure Code are somewhat different from those of the repealed Code. These provisions are reproduced below :

"315—When a sale of immovable property is set aside under S. 310-A, 312 or S. 313 (or when it is found that the judgment-debtor had no saleable interest in the property which purported to be sold, and the purchaser is for that reason deprived of it), the purchaser shall be entitled to receive back his purchase-money (with or without interest as the Court may direct) from any person to whom the purchase-money has been paid. The payment of the said purchase-money and of the interest (if any) allowed by the Court may be enforced against such person under the rules provided by this Code for the execution of a decree for money."

The right to receive back the purchase-money arises under O. 21, R. 93, where a sale of immovable property is set aside under R. 92. The purchaser is not now expressly declared entitled to it "when it is found" that the judgment-debtor has no saleable interest in the property which purported to be sold and the purchaser is for that reason deprived of it, that is to say, where it is found in a proceeding other than one to set aside the sale under O. 21, R. 91. So far as the express provisions of the Code are con-

O. 21, R. 93—Where a sale of immovable property is set aside under R. 92, the purchaser shall be entitled to an order for repayment of his purchase money, with or without interest as the Court may direct, against any person to whom it has been paid."

cerned there can be no doubt that the purchaser's right to refund is enforceable only where a sale of immovable property is set aside under R. 92, O. 21. It is contended on behalf of the appellant that O. 21, R. 91, recognizes the right of an auction-purchaser to set aside the sale on the ground that the judgment-debtor had no saleable interest in the property sold, and it is argued that the use of the word "may" in that section shows that the auction-purchaser is not confined to

the remedy provided for by that section. The answer to this is that the right so far as it is recognized by the section is a right to enforce it by an application to have the sale set aside: O. 21, R. 91, does not deal with the right to return of purchase-money, but only with the right to have the sale set aside. There is nothing in that section to justify the inference that a right to refund of purchase-money is recognized by that section. It is only O. 21, R. 91, which deals with it, and as that section is inapplicable to the present case, we have to consider whether apart from the Civil Procedure Code there is a right to refund of purchase-money where the judgment-debtor has no saleable interest in the property sold.

The Full Bench case of *Sowdhamini Chomdhrai v. Kishna Krishna Desai* (2) though it dealt with a sale under Regulation 7 of 1825, shows that Judges with the exception of Kemp, J., held that a purchaser at a sale in execution under the Code of 1859 purchases the right, title and interest of the judgment-debtor and that there is no implied warranty of title in such a sale. According to Macpherson and Loch, JJ., S. 258, Act 8 of 1859 gives the purchaser a right to receive back the purchase-money where a sale of immovable property is set aside summarily before the confirmation of the sale and the granting of the certificate. Similarly in *Krishnappa v. Panchappa* (3) the Bombay High Court ruled that where after confirmation of a sale, a purchaser is ejected from the property in a subsequent suit, the decree in such a suit cannot be said to have the effect of setting aside the sale within the meaning of S. 258, Civil P. C., 1859. The learned Judges also laid down that there was no warranty in such a sale that the judgment-debtor had no right, title, or interest in the property sold. The case of *Sorab-Alikhan v. The Executors of Khoja Moheccuddin* (4) was an appeal from a decree passed on the original side of Calcutta High Court. At p. 813, their Lordships say:

"Now it is of course perfectly clear that when the property has been sold under a regular execution and the purchaser is afterwards evicted under a title paramount to that of judgment-

debtor, he has no remedy against either the sheriff or the judgment-creditor."

Muthuswamy Aiyar, J., in *Sundara Gopalan v. Venkataratna Ayyangar* (5) speaking of the Privy Council decision in *Dyab-Ali-Khan's case* says:

"The decision of the Privy Council seems to be an authority for the proposition that the implied warranty of title in respect of sales by private contract cannot be extended to court-sales, except so far as such extension is justified by the procedural law in being."

It would be entirely apart from fraud or negligence or other breach of duty, an auction purchaser has no right to return of the purchase-money except to the extent recognized by the Code of Procedure. As the present Code of Procedure like Act 8 of 1859 does not recognize such a right except when a sale is actually set aside under O. 21, R. 92, the plaintiff's suit has in my opinion been rightly dismissed. The learned District Judge has been misled by the head note in *Hastings Ardshire Teas v. Prasad Gangadhar Bhat* (6). At p. 34 of the judgment it is pointed out that the sale took place in 1900 and was confirmed on 3rd November 1902. The case was therefore governed by the Procedure Code of 1882. The appellant relies upon the following passage in the Judgment of Scott, C.J.:

"There can be no objection in treating the relation of the parties, namely, the judgment-creditor and the Court sale purchaser, as relations in the nature of contract."

The passage isolated from the rest of the judgment might be misleading, but it was certainly not meant to lay down in that case that there was any warranty of title in a Court sale such as there is in a private sale under the Transfer of Property Act. The question before the learned Judges of the Bombay High Court was as to the effect of misrepresentation in the auction sale. That is not a point before me, and I therefore express no opinion on it. I have read the case carefully, but I cannot find that it is any authority in support of the appellant's contention. The opinion of Napier J. in *Mohideen Ibrahim v. Mohamadmura Lewait* (7) which is cited with approval by Richards, C.J. and Lyle, J.; in *Sideswari Prasad v. Goshain Mayanand* (8) is against the appellant. Both were however cases governed by the old Code. The later decision of the Allahabad High Court

2. (1870) 4 B L R 11.

3. (1874) 6 B H C R Ap 258.

4. (1877-78) 3 Cal 800.

5. (1894) 17 Mad 228.

6. (1911) 35 Bom 29.

7. (1912) 24 Mad L J 487.

8. (1913) 35 All 419.

in *Muhamad Najibullah v. Jai Narayan* (9) to which Richards, C. J., was also a party seems to have been based upon the Full Bench decision in *Munna Singh v. Gajadhar Singh* (10) the authority of which decision the learned Judges felt themselves bound by, though they were disposed to differ from it. The learned Judges held with the Full Bench that the right of the purchaser to recover the money is the creation of the Civil Procedure Code. The fact that there is nothing corresponding to para. 2, S. 315, Civil P. C. of 1882, in the present Code does not appear to have been noticed in the judgment. The Full Bench recognizes that an innovation was introduced by S. 315 of the Code of 1877. The question before the Full Bench was whether "when it is found that the judgment-debtor had no saleable interest in the property" the auction-purchaser's remedy lay in an application or by a regular suit. The case of *Parvathi Ammal v. Govindswamy Pillai* (11) does not help the appellant. The learned Judges differ from the earlier judgment of Napier, J.—on the contrary it is fully recognized that

"the right of action to obtain a refund consequent on the want of saleable interest in the judgment-debtor, is not a right inhering in a purchaser but is only the creature of a statute and the right thus conferred can only be exercised within the limitations prescribed. Consequently, without getting the sale set aside through Court the purchaser has no right of action. The general principle of caveat emptor would affect the purchaser unless he chooses to adopt the remedy given him by the statute."

The case was actually decided on the ground that the decree-holder by neglecting the duty cast on him rendered himself liable to compensate the auction-purchaser for the loss which he had sustained. This, as was pointed out, was not a right created by a statute for the first time. I may also point out that the sale deed had been already set aside at the instance of judgment-debtor on the ground of irregularity before the suit was brought against the decree-holder. I have come to the conclusion that apart from fraud or neglect of duty, a purchaser at an auction sale is not entitled to maintain a suit under the present Code of Procedure for return of the purchase-money on the ground that the judgment-debtor had no

saleable interest in the property sold. The appeal is therefore dismissed with costs.

P.N./R.K.

*Appeal dismissed.***A. I. R. 1918 Nagpur 262**

DRAKE-BROCKMAN, J. C.

Banwarilal—Appellant.

v.

Gangaprasad—Respondent.

Second Appeal No. 45 of 1917, Decided on 24th June 1918, against decree of Dist. Judge, Jubbulpore, D/- 29th September 1916.

Civil P. C. (1908), S. 11, Expl. 4—*Ex parte rent decree—Decision operated as res judicata on point of relationship of landlord and tenant.*

Where a suit is brought to recover rent no decree for rent can be passed except upon a decision that the relation of landlord and tenant subsists between the plaintiff on the one hand and the defendant on the other. A decision of a rent suit therefore acts as *res judicata* in a subsequent suit regarding the relations of landlord and tenant between the parties. It is immaterial whether previous decisions were *ex parte*: 15 Cal 756 (P C) and 25 Cal 136, *Rel on.*

[P 263 C 1, 2]

Atmaram Bhagwant—for Appellant.*H. S. Gour*—for Respondent.

Judgment.—This second appeal arises out of a suit brought by one Gangaprasad to recover the rent of occupancy and ordinary land in mauza Silondi from Dalchand, his step-brother. There have been four previous suits between the parties relating to lands in Silondi and the plaintiff relied in support of his claim upon two which were for rent of the lands to which the present dispute relates and were decreed *ex parte* in his favour, the Court declaring in its judgment that he had proved his claim: see Ex. P. 4. The defendant on the other hand relied on judgments from which it appears that a proprietary right in mauza Silondi was acquired by foreclosure obtained on foot of a mortgaged executed in favour of his father Ram Niwaz and the plaintiff and that the family was an undivided one. According to Dalchand he was a co-owner with his step-brother Ganga Prasad in the entire village and not a mere occupancy and ordinary tenant of the land to which the suit relates. The Courts below have held on the documentary evidence, no oral evidence having been adduced by either side that Dalchand was a mere tenant of the land though without explaining how the tenancy originated. In neither Court was it explicitly held that the decisions

9. (1913) 25 All 529.

10. (1882) 5 All 577.

11. (1915) 29 Mad L J 467.

in the former suits for rent constituted a res-judicata upon the question of the relation between the parties. In second appeal it is urged that the plaintiff had the burden of showing how the alleged tenancy originated and that having adduced no evidence on this point his suit should have been dismissed. For the respondent it is contended firstly, that no second appeal lies; and secondly, that the decisions in the previous rent suits make the question as to the relation between the parties a res-judicata.

Upon the preliminary objection that no second appeal lies it is urged for the plaintiff that no question relating to a title to land has been determined "as between the parties having conflicting claims thereto" for the purposes of S. 81 (b), C. P. Tenancy Act, 1898. *Hemant K. Kanhai Lai* (1) is referred to in this connection. Reference is also made to a series of rulings under S. 102 of the Bengal Act 8 of 1892. The Bengal rulings, however, as shown in *Lachman Ram v. Bhimsen* (2), do not go further than this: "that where a tenant defendant sets up the title of a third person, who is not made a party, the decision cannot be considered a binding decision in respect of title as between parties having conflicting claims to land."

In the present case the plaintiff claims to be sole proprietor of the land while the defendant claims to be not a tenant but a co-sharer in the proprietary right. The Courts below have expressly held the plaintiff to be sole proprietor of the village. In these circumstances I am clearly of opinion that the condition in Cl. (b), S. 81, aforesaid is satisfied. Upon the question of res-judicata I think the decision must be in the plaintiff's favour. It seems to me that where a suit is brought to recover rent, no decree for rent can be passed except upon a decision that the relation of landlord and tenant subsists between the plaintiff on the one hand and the defendant on the other. That the decision in a rent suit may be binding in a subsequent suit of a purely civil nature was expressly held by their Lordships of the Privy Council in *Radhamadhup v. Manohar* (3), and this was followed by *Banerjee and Stevens, JJ.*, in *Kashiswar v. Mohendra Nath* (4). Is the position in the present case affected by the fact

that the defendant was not represented in the former suits? I am unable to find that the Civil Procedure Code makes any distinction between a case which proceeded ex-parte and one in which he appeared and contested the claim. The plaintiff should not in the former suits have obtained a decree for rent without showing that the defendant was really his tenant. The question whether this relation subsisted or not was therefore directly and substantially in issue, and if he had appeared, the ground of defence that he was not a tenant but a co-sharer was one which ought to have been taken by the defendant. Expt. 4, S. 2 Civil P. C. is applicable and the parties must be considered bound by the former decisions.

In this view the appeal must fail and it is accordingly dismissed. The plea of res-judicata not having been taken in either of the Courts below, I direct that the costs of this appeal be borne as incurred. In the Courts below costs will be paid as already ordered. In conclusion I would point out that the trial Judge would have done well to ascertain from the plaintiff how he alleged the tenancy to have originated. As already stated, the plea that the decisions in the former rent suits operated as res-judicata on the question of the relation between the parties was not advanced and the mere entries in the village papers were by no means conclusive as to the real positions of the parties. Prima facie the defendant as a son of Ram Niwaz had some ground for his claim to be a co-sharer while he could not ordinarily be a tenant unless he had become so by virtue of a specific agreement between himself and the plaintiff.

P.N./R.K.

Appeal dismissed.

A. I. R. 1918 Nagpur 263

MITTRA, A. J. C.

Bapu Balajee—Applicant.

v.

Dhanu and another—Non-Applicants.

Civil Revn. No. 102-B of 1917, Decided on 25th July 1918, for revision of judgment of Dist. Judge, West Berar, D/-10th April 1917, in Misc. Civil Appeal No. 6 of 1916.

Civil P. C. (1908), S. 115—Error of law—No ground for revision.

An error in a conclusion of law arrived at by the lower Court is no ground for revision under S. 115, Civil P. C.: *A I R 1917 P C 71, Foll.*

[P 264 C1]

1. (1901) 14 C P L R 31.

2. (1907) 10 C P L R 32.

3. (1888) 15 Cal 756 (P C).

4. (1892) 25 Cal 135.

M. V. Joshi—for Applicant.

Bipin Krishna Bose—for Non-applicants.

Order.—The lower appellate Court has set aside an auction sale on the ground that the judgment-debtors had no saleable interest in the property at the date of the sale. The auction-purchaser is a stranger. Admittedly there is no second appeal in the case. Assuming that the conclusion of law arrived at by the Court below is wrong in law, this is no ground for revision under S. 115, Civil P. C.: *Balakrishna v. Vasudeva Aiyar* (1). The application is, therefore, dismissed with costs. I fix Rs. 15 as pleader's fee in this Court.

P.N./R.K. Application dismissed.

1. A I R 1917 P C 71=40 Mad 793=40 I C 650=44 I A 261 (P C).

A. I. R. 1918 Nagpur 264

DRAKE-BROCKMAN, J. C.

Dharamchand and others—Plaintiffs—Appellants.

v.

Gorelal Mukandlal—Defendant—Respondent.

Second Appeal No. 450 of 1917, Decided on 28th January 1918, against decree of Dist. Judge, Saugor, D/- 26th July 1917, in Civil Appeal No. 12/111 of 1917.

(a) Civil P. C. (1908), S. 105 (2)—Remand order although passed without jurisdiction cannot be treated as nullity—Party cannot object to decision of appellate Court in subordinate Court to which case is remanded.

Section 105 (2) precludes a lower Court from treating the remand order of the appellate Court as a nullity owing to the want of jurisdiction in the latter to pass it.

A party who omits to raise the question of the jurisdiction of the appellate Court at the hearing of an appeal and to appeal from the decision reached, cannot be allowed to object to that decision in the subordinate Court to which the matter in dispute is remanded.

[P 267 C 2]

(b) Court-fees Act (1870), S. 17—S. 17 applies to alternative reliefs arising from more cause of action than one.

Section 17, Court-fees Act, applies to alternative reliefs claimed with reference to more causes of action than one. The operation of the section is not necessarily confined to cases where cumulative reliefs are claimed.

[P 267 C 1]

(c) Limitation Act (1908), Arts. 62 and 97—Suit by vendee for refund of purchase money—Art. 62 applies only where sale is void ab initio—Vendee in possession of property—Art. 97 may be applied.

It is only where a sale is void ab initio that Art. 62 can apply to a suit by the vendee for

refund of the purchase money. If however the vendee has actually obtained and held possession of the property, Art. 97 may be applied even if the sale turns out to be void ab initio, for otherwise the claim for refund might be barred although the vendee had been given no occasion to sue. The same article is applicable where there is a subsequent failure of consideration.

[P 268 C 1]

(d) Limitation Act (1908), Art. 116—Sale—Vendor having no title—Suit for refund of purchase money is governed by Art. 116.

Where the vendor has no title to convey, the article applicable to a suit for refund of the purchase money is Art. 116, and time in such a case begins to run from the date of the execution of the conveyance if there is no question of fraud.

[P 268 C 1]

(e) Transfer of Property Act (1882), S. 55 (2)—Implied covenant—Nature of.

The covenant implied under S. 55 (2) is merely that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same.

[P 268 C 1]

P. R. Naidu and G. R. Pradhan—for Appellants.

S. Ramdas—for Respondent.

Judgment.—For the apprehension of the questions which arise for determination in this appeal it is necessary to state at some length the history of the relations between the parties. On 19th October 1908 a party of persons, who will hereinafter be referred to as Duli Chand, obtained a decree for money against one Mukundi Lal, since deceased, and his son, the present respondent Gore Lal. In execution of this decree Duli Chand on 20th October 1908 attached Mukundi Lal's house in the town of Saugor. On the same day the judgment-debtors had conveyed the house to the present appellants, who may conveniently be indicated by the single name Dharam Chand, the price mentioned in the sale deed being Rs. 999. Dharam Chand objected to the attachment, but his objection was dismissed on 5th December 1908, the Court holding under S. 276, Civil P. C. 1882, that the sale was void as against all claims enforceable under the attachment. The house was then sold on 17th December 1908 in execution of Duli Chand's decree and on 14th April 1909 the auction-purchaser Muni Lal, who had paid Rs. 560, entered into possession.

Meanwhile on December 1909 Mukundi Lal and Gore Lal had preferred an appeal from the decree passed against them, with the result that the Divisional Judge remanded the case for the complete retrial. The claim of Duli Chand was

eventually dismissed on 13th September 1910 and exactly a year later the Divisional Judge affirmed that decision. On 15th August 1911 Dharam Chand brought against Muni Lal a suit of the kind contemplated by R. 63, O. 21, Sch. 1, Civil P. C. This was dismissed as time-barred by the District Judge on 28th February 1912 and his decision was upheld, first by the Divisional Judge on 15th July 1912 and finally by this Court in Second Appeal No. 539 of 1912 on 22nd July 1913.

Meanwhile in a suit for money (No. 99 of 1911) filed by Dharam Chand against Mukundi Lal and Gore Lal the character of the sale effected on 20th October 1908 was put in issue, the defence having denounced it as fictitious and designed to shield the house from sale in execution of Duli Chand's decree. The decision was in favour of Dharam Chand, the trial Judge deciding that the sale was real and for consideration, and his view was upheld in first appeal by the District Judge on 25th March 1913 and by this Court in Second Appeal No. 350 of 1913, on 16th April 1914. On 10th January 1912 Mukundi Lal and Gore Lal applied to the Court which had finally dismissed Duli Chand's suit of 1908 demanding restitution of the house bought by Muni Lal or alternatively Rs. 5,000 as its value. Dharam Chand was allowed to intervene in this proceeding and to plead that any order for restitution must be for his benefit, inasmuch as his title to the house had been held to be good in Suit No. 99 of 1911. Eventually his application was dismissed on 22nd December 1914 on the ground that he had no locus standi as against Duli Chand or Muni Lal. Dharam Chand's next step was to file the suit out of which the present appeal arises. Mukundi Lal had by this time died and Gore Lal and Duli Chand were joined as defendants. The following alternative reliefs were claimed: (1) Rs. 500, the auction-price of the house, together with such compensation as might be awarded to Gore Lal as the result of his application for restitution in Duli Chand's suit and an injunction restraining Duli Chand from paying this compensation when determined, to Gore Lal. (2) Rs. 999 from Gore Lal only by way of compensation for the eviction due to his defective title.

The plaint also contained the usual prayer for any other relief which the

Court might think fit to grant. The trial Judge held that the plaintiff's claim for restitution in Duli Chand's suit having been dismissed by the order of 22nd December 1914 which had not been appealed from, no relief could be granted against Duli Chand. The alternative claim he regarded as time-barred, more than three years having elapsed from 5th December 1908 when the plaintiff's objection to the attachment in Duli Chand's suit was disallowed. In appeal the District Judge allowed the plaintiff to withdraw from the suit as against Duli Chand. He then remanded the case for a fresh decision on the ground that the judgment did not comply with the requirements of R. 1 and 5, O. 20, Sch. 1, Civil P. C., and that the pleadings required amplification. The date of the remand order is 13th May 1916. By the time the further hearing in the Court of first instance began, the Divisional Judge had awarded Gore Lal Rs. 2,500 by way of restitution for loss of the house. The trial Judge then permitted the plaint to be amended so as to claim the following relief as against Gore Lal only. (1) A declaration that the plaintiff is entitled to receive the sum of Rs. 2,500 awarded to the defendant as damages for loss of his house and a direction for payment of the same by the defendant. (2) That on the aforesaid compensation being deposited in Court by Duli Chand it should be paid to the plaintiff.

The trial Judge again dismissed the suit. The first ground for his decision is that the District Judge had no jurisdiction to hear the appeal from the first decree of dismissal, the reason being that the value of the suit as originally framed was in excess of Rs. 1,000, and that consequently the first decree must be regarded as still in force and final, no proper appeal having been preferred against it within the time allowed by law. He went on to hold that the plaintiff had no cause of action, inasmuch as the defendant was in no way accountable for the dispossession and no covenant for quiet enjoyment is included in the sale deed. Lastly, he considered that even conceding that the plaintiff could have claimed refund of his purchase money from the defendant, the claim would be time-barred under Art. 116 of the Limitation schedule, the cause of action for such relief having arisen either on the date of the sale or on 5th

December 1908, when the objection to the attachment of the house was disallowed. In appeal the District Judge held that S. 105 (2), Civil P. C., precluded the lower Court from treating his predecessor's remand order of 13th May 1916 as a nullity. With regard to the merits he considered that no cause of action would arise until the defendant actually received the compensation claimed from Duli Chand and that until such receipt no question of limitation could arise.

The appeal was accordingly dismissed on 26th July last the parties being directed to bear their own costs in the District Judge's Court. On the same day the learned Judge passed an order on Gore Lal's application for restitution in Duli Chand's suit that Duli Chand should pay Gore Lal Rs. 2,154-9-7, a direction against which no appeal has yet been preferred. The plaintiff has appealed to this Court and Gore Lal has preferred cross-objections. In this Court it is contended for the appellant that the suit is one for breach of a covenant for title and that the defendant must be regarded as a trustee for any sum he may eventually recover by way of restitution from Duli Chand, also that the lower appellate Court has overlooked the general prayer under which the plaintiff would at any rate be entitled to get back his purchase-money. With regard to the question whether the defendant can be regarded as trustee of such money as he may hereafter recover from Duli Chand, Ss. 63 and 94, Trusts Act, 1882, are relied upon. The following are the terms of those provisions:

63 "Where the trustee has disposed of trust property and the money or other property which he has received therefor can be traced in his hands, or the hands of his legal representative or legatee the beneficiary has, in respect thereof, rights as nearly as may be the same as his rights in respect of the original trust property. 94 In any case not coming within the scope of any of the preceding sections, where there is no trust, but the person having possession of property has not the whole beneficial interest therein, he must hold the property for the benefit of the persons having such interest, or the residue thereof (as the case may be), to the extent necessary to satisfy their just demands."

It is said that the defendant should be regarded as having disposed of the house and as having held it until disposal by auction-sale in trust for the plaintiff. Neither of these propositions seems to me to be tenable. The house was in fact held by the plaintiff and it was disposed of not by but in spite of the defendant,

and from the moment of parting with the house to the plaintiff the defendant ceased to have anything to which a trust could attach. I am referred in this connection to *Torrance v. Bolton* (1). In that case certain property was put up for sale, and in the particulars, which were advertised it was described as an immediate absolute reversion in a free-hold estate, falling into possession on the death of a lady in her seventieth year; and by the conditions of sale, which were read in the auction-room immediately before the sale but were not printed or circulated among those present, the property was stated to be subject to three mortgages.

The property was bought by the plaintiff, who stated that he was deaf and did not understand that he was buying merely an equity of redemption. It was held on a bill filed by the plaintiff to have the contract for sale rescinded, that the description of the property and the particulars of sale were misleading, that the onus was therefore on the vendor to show that the purchaser was not actually misled and that as he had failed to do so the plaintiff was entitled to have the contract rescinded and his deposit returned. This decision was affirmed in appeal: see *Torrance v. Bolton* (2). There is evidently nothing in the circumstances of that case to support the contention that the vendor in the present case should be deemed to be a trustee for any restitution he may obtain in a suit of his own against the third person. The plaintiff-appellant in the present case has really no locus standi, of any sort with regard to the litigation between Gore Lal and Duli Chand, inasmuch as for the purposes of that litigation his purchase from Gore Lal is of no effect. For this reason, and not because it should be regarded as premature, I hold that the new relief asked for in the amended plaint has been rightly disallowed.

It will be convenient to deal at this stage with the cross-objection of defendant to the effect that the District Judge's order of remand, dated 13th May 1916, was without jurisdiction. That view was based upon the assumption that the value of the suit for the purposes of jurisdiction should be treated as exceeding Rs. 1,000, a court-fee being payable on each of the reliefs claimed

1. (1872) 14 Eq 124.

2. (1873) 8 Ch 118.

in the original plaint. *Neelakandhan v. Ananthakrishna Ayyar* (3) was relied upon. In that case it was held that the operation of S. 17, Court-fees Act, is not necessarily confined to cases where cumulative reliefs are claimed. The alternative claims there were: (1) for redemption based upon the alleged right of the plaintiff as mortgagor; (2) for various sums of money on the footing of a further mortgage to be executed by the plaintiff to the defendants in accordance with certain provisions contained in the earlier mortgage. It was held that these claims were distinct matters which could have been the grounds of separate suits and that they were, therefore, distinct subjects within the meaning of S. 17. The learned Judges also remarked as follows:

"The phrase 'two or more distinct subjects' in S. 17 may not admit of precise definition applicable to all cases, and it may be that where reliefs are claimed in the alternative with reference to the same cause of action, S. 17 would not govern the case. That may also be so where the relief claimed is one and the same, though the claim is sought to be made out on distinct or alternative grounds."

The present seems to be a case of alternative reliefs being claimed with reference to causes of action of which the plaintiff's loss of the house bought from the defendants Gore Lal forms part. The foundation of the claims are not, however, precisely the same. As pointed out by the trial Judge the relief against Duli Chand was based on the plaintiff's right as vendee to stand in Gore Lal's shoes, whereas refund of the purchase money was asked for on the ground that the sale had failed owing to a defect in Gore Lal's title. The position somewhat resembles that in *Hashmat-un-nissa Begam v. Muhammad Abdul Karim* (4), where S. 17, Court-fees Act, was held to be applicable. In *Kashinath Narayan v. Govinda* (5) there was clearly a single cause of action and the decision that S. 17 is applicable only to a case of cumulative reliefs sought by the plaintiff appears to go further than the language of S. 20 warrants. On the whole, then, I am inclined to think that the trial Judge was right as to the valuation of the suit in its original shape for the purposes of jurisdiction. I agree, however, with the lower appellate Court that the trial Judge had no power to treat the

appellate Court's order as passed without jurisdiction. The trial Judge relied on *Narayan Raje Ranade v. Gangaram Ratnachand Morwadi* (6) and *Rajalakshmi Dasee v. Kalyanani Dasee* (7); but in both those cases the objection to the jurisdiction of the appellate Court was raised in a higher Court and in neither had there been an order of remand protected by S. 105 (2), Civil P. C. In the Calcutta case the point was taken in a distinct litigation from that in which the appellate decree had for want of jurisdiction been passed. I know of no authority expressly covering the point under consideration. On the other hand it appears to me wholly unreasonable that a party having admitted to raise the question of jurisdiction at the hearing and to appeal from the decision reached should be allowed to object to that decision in the subordinate Court to which the matter in dispute has been remanded. The objection therefore, fails.

It remains to consider the alternative claim of the plaintiff for refund of his purchase money (Rs. 999). This though not expressly reproduced in the amended plaint is covered by the general prayer which appears there as in the original plaint. With this the lower appellate Court has entirely failed to deal. Nor has the trial Judge complied with the directions in the remand order of 13th May 1916. In connexion with the alternative relief which has already been disallowed the learned District Judge considered that Art. 62 or possibly Art. 29, of the Limitation Schedule might apply when the defendant recovers the money payable to him by way of restitution. Art. 29 has clearly no application, Gore Lal not being the person responsible for seizure of the property and the property being immovable. Art. 62 applies to a suit for money payable by defendant to the plaintiff for money received by the defendant for the plaintiff's use. But when the purchase money was paid Gore Lal had still a title which he could transfer and the position which subsequently arose amounted to a failure of consideration so that Art. 97 as more specific than Art. 62 would govern the case: see *Naghi v. Madholal Kalar* (8), *Hanuman Kamat v. Hanuman*

3. (1907) 30 Mad 61.

4. (1907) 29 All 155.

5. (1891) 15 Bom 82.

6. (1909) 33 Bom 664=2 I C 816.

7. (1911) 38 Cal 639=12 I C 464.

8. (1908) 4 N L R 49.

Mandur (9) and *Bahadur Lal v. Jadhao* (10).

It is only where a sale is void ab initio that Art. 62 can apply to a suit like the present: see *Venkatanarasimula v. Peramma* (11). And if the vendee has actually obtained and held possession, Art. 97 may be applied even if the sale turns out to be void ab initio for otherwise the claim for refund might be barred although the vendee had been given no occasion to sue: see *Narsing Shrivakas Marwadi v. Pachu Rambakas* (12). In this Court it is urged that Art. 116 applies. That this is so where the vendor has no title to convey appears from numerous authorities of which it will suffice to cite *Bahadur Lal v. Jadhao* (10), *Arunchanda Aiyar v. Ramasami Aiyar* (13) and *Pirbhu v. Wazirbi* (14). According to the later of the two decisions of this Court time in such a case will run from the execution of the conveyance if there is no question of fraud. In the present case, however, it cannot be said that the defendant had absolutely no title and it is no part of the plaintiff's case as against the defendant that the attachment of Duli Chand preceded his purchase. The covenant implied under S. 55 (2), T. P. Act, is merely that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same. The defendant has now in fact established by securing dismissal of Duli Chand's suit that the attachment which he all along resisted should not have been made and in the circumstances I do not think it can be held that he has been guilty of any breach of the implied contract at any rate if the sale to the plaintiff preceded Duli Chand's attachment. The plaintiff on the other hand failed to do all that he might have done in that he delayed suing to establish his title to the house until the suit allowed by R. 63, O. 21, Sch. 1, Civil P. C., had become time barred. The case then reduces itself to one in which the consideration has failed and is, therefore, governed by Art. 97 of the Limitation Schedule: the plaintiff having been dispossessed on 14th April 1909, the suit is long time barred

and must fail accordingly. If however, it be taken that Duli Chand's attachment was effected before the sale to the plaintiff then such flaw as the attachment created in the plaintiff's title was already in existence when the sale took place and the cause of action for a suit to recover compensation for the breach of the implied covenant of title arose either on 20th October 1908 or at latest on date (17th December 1908) of the auction purchase by Muni Lal. Whichever of those dates is adopted the suit is beyond time. S. 14, Lim. Act, affords the plaintiff no protection; for his suit against Muni Lal was dismissed as time barred and that suit therefore, did not fail from defective jurisdiction or other cause of a like nature: see *Bishambhur Haldar v. Banomali Haldar* (15). I hold, therefore, that the alternative claim for refund of the plaintiff's purchase money is barred by time, whether Duli Chand's attachment was effected before or after the sale to the plaintiff.

It remains to consider the cross-objection to the effect that the lower appellate Court should not have directed the defendant to bear his own costs in that Court merely because the plaintiff succeeded on the question whether the trial Judge had power to treat the order of remand dated 17th May 1916 as bad for want of jurisdiction. Inasmuch as the raising of this question involved no extra cost to either side and its decision in no way affected the amount of relief allowed which was actually nil, I do not think there was any good reason for departing from the general rule that costs follow the event. The appeal is dismissed and the plaintiff will pay the defendant's costs in all three Courts, including the court-fee on the defendant's cross objection which has been paid solely on the amount of the defendant's costs in the lower appellate Court.

P.N./R.K. *Appeal dismissed.*

15. (1899) 26 Cal. 414.

A. I. R. 1918 Nagpur 268

PRIDEAUX, A. J. C.

Hasanali—Appellant.

v.

Akharli—Respondent.

Second Appeal No. 453 of 1917, Decided on 24th June 1918.

9. (1892) 19 Cal 123=18 I A 153 (P.C.).

10. (1905) 2 N L R 174.

11. (1895) 18 Mad 173.

12. (1913) 37 Bom 538=20 I C 254.

13. (1915) 38 Mad 1171=25 I C 518.

14. (1915) 11 N L R 186=31 I C 277.

(a) Civil P. C. (1908), O. 3, R. 4—Presentation of appeal by pleader through bona fide mistake is not invalid.

Presentation of an appeal through a bona fide mistake by a pleader who should not have presented it, does not make presentation invalid.

[P 269 C 1]

(b) Legal Practitioner — Client — Power of attorney in second appeal.

The term of a petitioner's power of attorney in second appeal expires when that appeal is disposed of.

[P 269 C 1]

V. R. Pandit—for Appellant.

M. K. Padhye—for Respondent.

Judgment.—Mr. Atmaram Bhagwant, pleader, who has filed this appeal for the defendant appeared in second appeal No. 34 of 1915, decided by my brother Mitra on 27th June 1916 for the present plaintiffs respondents. This was a bona fide mistake. The present appellant at the time was in jail; the case was brought to Mr. Atmaram Bhagwant by a friend of the appellant in Nagpur; the power-of-attorney was sent to the Jail and was signed and returned, upon which the appeal was filed. The mistake having been discovered Mr. Atmaram Bhagwant retired and R. B. V. R. Pandit has argued the appeal. I am satisfied that this has been a mistake on the part of Mr. Atmaram Bhagwant but the mistake has led to the contention that this appeal has not been properly filed and it is argued that it is not a duly presented appeal. I am referred to O. 3, R. 4, Civil P. C., in support of this contention. It is contended that the previous power-of-attorney still continues in force as the proceedings in the suit have not yet ended. No authority has been quoted in support of this proposition and it seems to me that the common-sense view is that the term of Mr. Atmaram Bhagwant's power of attorney in second appeal No. 34 of 1915 expired when that appeal was dismissed. Though the appeal was presented by a pleader who should not have presented it yet the presentation cannot be held invalid. (The rest of the judgment is immaterial for this report.)

P.N./R.K.

Order accordingly.

A. I. R. 1918 Nagpur 269

PRIDEAUX, A. J. C.

Bhagwant—Appellant.

v.

Beharilal and others—Respondents.

Second Appeal No. 327-B of 1916, decided on 18th June 1918, from appellate decree of Addl. Dist. Judge, Amraoti.

(a) Transfer of Property Act (1882), S. 92—Doctrine does not apply when person per-

forms obligations undertaken or bound to be performed.

The doctrine of subrogation does not apply when a person simply performs his own obligation or covenant and pays off a charge he has undertaken or is bound to satisfy: 13 Cal. 69, *Relon*.

[P 271 C 1]

(b) Transfer of Property Act (1882), S. 52—Purchaser lis pendens takes subject to result of suit.

Where a person purchases a property lis pendens he takes the property subject to the result of a suit.

[P 270 C 2]

M. B. Bhawanishankar—for Appellant.

C. S. Naidu and M. B. Kinkhede—for Respondents.

Judgment.—The plaintiffs' case is that defendants 3 and 4, Vithu and Raiji, mortgaged the house in suit to defendant Motiram in July 1901 for Rs. 99/. In execution of decree obtained on a money bond the house was attached and sold, the plaintiff buying the same getting possession on 18th July 1909. He discharged the mortgage debt due to Motiram. The house however had been subsequently mortgaged to Bhagwant, defendant, 2 who sued in Suit No. 351 of 1907 and took possession on 12th June 1909. He sold to Maniklal, defendant. After the plaintiff in virtue of his purchase at auction took possession he was sued by Bhagwant and who got back possession. Plaintiff asks for possession of the house after paying the mortgage of defendant 2 or wants defendants to redeem Motiram's mortgage. He fixes the redemption price at Rs. 343-4-9. The purchaser from defendant 2, namely, Maniklal, denied the mortgage in Motiram's favour also the sale in execution of the decree, obtained on the money bond, or the plaintiff's discharge of Motiram's mortgage. He states that plaintiff and Motiram are brothers and colluding. He admits that defendant 2 obtained a decree on a mortgage dated 29th May 1906 by defendant 3 alone and on being dispossessed sued plaintiff for possession in suit No. 972 of 1907. Plaintiff in that suit claimed the right of being redeemed, but it was refused and the question is therefore res judicata. Further as plaintiff's purchase at auction was during the pendency of defendant 2's suit against defendant 3, suit No. 351 of 1907, he is bound by the doctrine of lis pendens. The trial Court found that defendants 3 and 4 did execute the mortgage of 4th July 1904 in favour of Motiram and that the house was sold in execution of the decree in suit

No. 373 of 1906 and sold subject to Motiram's mortgage; but plaintiff had failed to prove that he paid Rs. 146-4-9 towards that decree. No question of notice was held to arise as both Motiram and defendant 2's mortgages were unregistered; defendant 1's sale deed could not have priority over Motiram's mortgage as of the two mortgages Motiram's was the first in date. Plaintiff was found to have purchased *lis pendens* and his suit was dismissed on the ground that as merely the rights of the mortgagor could pass to him and as the time the mortgagor had no rights in the house, it having been foreclosed in favour of defendant 2 nothing really passed. On appeal the learned Additional District Judge, Amraoti, dealing first with the question of *lis pendens* writes:

"The sale was on 29th June 1908 (vide Ex. P-1). The attachment had been on 27th December 1907. But defendant 2 had filed his suit on the mortgage on 17th October 1907 and it resulted in a preliminary decree on 26th March 1908 which was made final for foreclosure on 29th September 1908. Thus we see clearly that both the attachment and sale were during the pendency of the suit which directly concerned the very same property the sale being between the preliminary and the final decrees. The doctrine of *lis pendens* undoubtedly applies. But the sale held during the pendency of the mortgage suit though an involuntary one in execution of a money decree the purchaser got the property subject to the result of the suit. He could not reopen the suit because he was not a party. He acquired the right and title the judgment-debtor had. That included the right to save the foreclosure by paying the amount of the decree. But the right was lost when the final decree was passed. If the plaintiff bought the property he could get no possession as that went to defendant 2 under the final decree. He would simply lose the ten rupees he had paid."

The learned Judge proceeds that if the final decree on defendant 2's mortgage had been for sale that sale would have been subject to the prior mortgage of defendant 5 as that document has priority and when defendant 2 takes by foreclosure he takes subject to defendant 5's mortgage. The Judge thinks that if plaintiff had satisfied Motiram's mortgage he is entitled to this sum. The Judge holds that Rs. 150 were paid by the plaintiff in satisfaction of the mortgage and that he is entitled to get the same from the secured debt. A decree for this amount against Bhagwant was passed. It is here attacked in second appeal.

It is argued for the appellant that the questions involved in this appeal are:
What rights has the auction purchaser acquired

by his payment of the Rs. 150, what kind of decree should have been passed and against whom."

It is contended that inasmuch as the sale took place during the litigation which resulted in the decree of foreclosure the plaintiff is bound by that decree under S. 52, T. P. Act, and can have no rights superior to appellant's. His right of redemption is barred, as he purchased with knowledge of the litigation and took subject to the equities of the decree in favour of the appellant. If he wanted to redeem he should have at once done so, when the other case was pending. It is contended that all plaintiff got by his decree, was the right of the present defendants 3 and 4 to redeem the two mortgages, that is, the mortgages of defendant 2 and defendant 5. The period of redemption of the appellant's mortgage was fixed by his preliminary decree though plaintiff was not bound as to time in discharging defendant 5's mortgage; by paying this off he merely discharged the liability of defendants 3 and 4 which he had undertaken in consideration of the sale in his favour. The position thus being by his inaction in not paying off the decretal debt within the time allowed in suit No. 351 of 1907, plaintiff has lost his right to redeem appellant. These positions, it is contended, were open to the plaintiff. If he acquired the rights of the former mortgagee he could sue appellant for foreclosure under the mortgage of 4th July 1904, in which case he could have got a decree against the property. Secondly, if in position of the mortgagor he by paying off defendant 5's mortgage would have amply fulfilled an obligation. The third case is that taken by the lower appellate Court, namely, that plaintiff has discharged an obligation that lay on the present appellant, in which case a money decree is possible but that is justified only under S. 65, Contract Act. Here it is contended that there was no real obligation but a mere equity, namely, that appellant had the right to redeem. In any case if plaintiff paid for the appellant, the claim for the money is barred by limitation as this money was paid seven years before suit.

In my opinion the appellant's contentions must prevail. The plaintiff bought *lis pendens* and his purchase was subject to the result of the suit then pending. He had an opportunity in the time allow-

ed by the preliminary decree to discharge the present appellant's mortgage. The doctrine of subrogation does not apply when a person simply performs his own obligation or covenant and pays off a charge he has undertaken or is bound to satisfy: see *Harshyam Choudhuri v. Shyamlal Sadhu* (1). Here the plaintiff by his purchase was bound to satisfy his brother's mortgage but that fact does not make his purchase any the less bound by the appellant's decree for foreclosure. It seems to me that it is too late now for the plaintiff to use his discharge of Motiram's mortgage against the appellant and that his claim for the payment made to satisfy the appellant's obligation is barred by time. In this view the appeal succeeds. I allow the appeal, set aside the decree of the lower appellate Court and restore that of the first Court. The plaintiff-respondent will pay the costs here and in the lower appellate Court including those of respondent 2.

P.N./R.K.

Appeal allowed.

1. (1916) 43 Cal 69.

A. I. R. 1918 Nagpur 271 (1)

STANYON, A. J. C.

Nandlal and others—Appellants.

v.

Mirzamal and others—Respondents.

Appeal No. 270 of 1912, Decided on 27th February 1913.

Cosharers—Lambardar letting vacant land without consulting cosharers—Such tenancy is valid—Effect on lambardar indicated.

Where a lambardar required to consult the cosharers before letting vacant land in the village to a tenant, let such land without consulting them, the contract of tenancy is not void or voidable, and whatever remedy apart from partition the cosharers have against their representative, it does not extend to an ejectment of the tenant he has created by virtue of the authority vested in him to lease lands in the ordinary course of village management. Such failure of his duty as to consulting his cosharers should however be debited against the lambardar when partition by metes and bounds come to be made. [P 271 Cl, 2]

S. R. Pandit—for Appellant.

Judgment.—The learned counsel for the appellant has urged everything that could be urged on behalf of his clients in this case. Nevertheless the appeal cannot be sustained. Where a lambardar, required to consult the cosharers before letting vacant land in the village to a tenant, lets such land without consulting them the contract of tenancy is not void or voidable, whatever remedy, apart from

partition the cosharers have against their representative, it does not extend to an ejectment of the tenant he has created by virtue of the authority vested in him to lease lands in the ordinary course of village management. Such failure of his duty as to consulting his cosharers should however be debited against the lambardar when partition by metes and bounds comes to be made. The appeal is dismissed without notice to the other side.

P.N./R.K.

*Appeal dismissed.***A. I. R. 1918 Nagpur 271 (2)**

MITTRA, A. J. C.

Withoba and another—Appellants.

v.

Waman and another—Respondents.

Misc. Civil Appeal No. 14-B of 1917, decided on 23rd August 1917, from decree of Dist. Judge, Amraoti, in Appeal No. 334 of 1915.

(a) Civil P. C. (5 of 1908), O. 41, R. 23—Case not decided on preliminary issues—Retrial can be ordered in exceptional circumstances.

It can no longer be argued under the new Civil Procedure Code that there is no power to order a retrial except in a case where a Court of first instance has decided a suit on a preliminary point. It is permissible to a Court of first appeal to order a retrial in exceptional circumstances. 12 N L R 126, and 41 J. C. 498; *Rel.*

[P 271 Cl 2; P 272 Cl 1]

(b) Civil P. C. (5 of 1908), O. 41, Rr. 23 and 33—Case not decided on preliminary issues—Remand ordered—Order of refund of court-fees is not proper.

An appellate Court remanding a case is not justified in ordering refund of court-fees except where the decision of the Court of first instance has been on a preliminary point only. [P 272 Cl 1]

M. R. Dixit—for Appellants.

M. V. Joshi—for Respondents.

Judgment.—This is an appeal from an order under O. 41, R. 23, and the sole ground upon which the order of the lower Court is questioned is that it is not justified by the Civil Procedure Code. The propriety of the order, however, has not been called in question either in the grounds of appeal or in argument before us. The District Judge finds that the pleadings in this case were imperfect and considers it necessary to have further pleadings taken. He also finds that certain issues which were framed were not tried. In these circumstances he has ordered a retrial. I think it can no longer be argued under the new Code that there is no power to order a retrial except in a

case where a Court of first instance has decided a suit on a preliminary point. S. 564 of the repealed Code has not been re-enacted. In *Jagannath v. Maruti* (1) it has been considered that it is permissible to a Court of first appeal to order a retrial in exceptional circumstances. This view is in accordance with a decision of the Full Bench of the Calcutta High Court in *Abdul Karim Abu Ahmed Khan v. Allahabad Bank, Ltd.* (2) The order of the lower Court, therefore, cannot be questioned before me on the ground mentioned in the memorandum of appeal. I must, however, draw the attention of the learned District Judge to the ruling in *Jagannath v. Maruti* (1) above cited, in which it has been clearly pointed out that a Court is not justified in ordering refund of court-fees, except where the decision of the Court of first instance has been on a preliminary point only. I have no power to set aside the order regarding refund of court-fees, but the District Judge will bear in mind in ordering future orders of remand. The appeal is dismissed with costs.

P.N./R.K. *Appeal dismissed.*

1. (1916) 12 N L R 126=36 I C 241.

2. (1917) 41 I C 598.

* A. I. R. 1918 Nagpur 272

MITTRA, A. J. C.

Trimbak—Appellant.

v.

Madhao—Respondent.

Second Appeal No. 15-B of 1913, Decided on 17th January 1914.

* Evidence Act (1872), S. 92—Oral evidence of discharge of mortgage debt is admissible.

Oral evidence of discharge and satisfaction of debt is always admissible even though the debt is a mortgage debt.

Hence oral evidence of an agreement by which the mortgagee was to cultivate the land for a certain period in full satisfaction and discharge of the mortgage debt is admissible even though the lease is not registered. [P 272 C 2]

G. V. Deshmukh—for Appellant.

Judgment.—The plaintiff-appellant sued on mortgage by conditional sale under the terms of which the entire mortgage money became payable in 1301. The

defence as prevailed in the Courts below was that in 1305, an agreement was come to between the parties under which the plaintiff was to cultivate the field mortgaged for ten years from 1305 to 1314 in full satisfaction of the claim. The Courts below found this agreement proved and also that plaintiff has been in possession for ten years as agreed upon and therefore the claim is satisfied. First argument for the appellant is that S. 92, Evidence Act, prevents the admission of oral evidence of an agreement to modify the terms of a registered instrument. But in this case the agreement itself has been executed and operated as a satisfaction of the mortgage debt. Oral evidence of the discharge and satisfaction of a debt is always admissible. A creditor is always at liberty to accept any mode of satisfaction he likes. There is no question of novation here. The argument that a lease for ten years required a registered instrument in 1305 in Berar overlooks the fact that the Transfer of Property Act was not then in force. Moreover the agreement of lease is not being proved to establish title to immovable property. It is used to prove a payment or discharge of the debt only. In my opinion oral evidence of the satisfaction has been regularly admitted in evidence. An attempt was made to question the findings of fact, but in the lower appellate Court they were not challenged. I see no reason to think that the lower Courts have placed the burden of proof on the plaintiff to show that the mortgage is a subsisting one. The Courts below have rightly approached the evidence with full knowledge but it was for the defendant to prove the satisfaction of a mortgage debt. The argument that there was no consideration for the lease is not quite intelligible. The promise to let the plaintiff cultivate the field for ten years is a sufficient consideration and it is not necessary to ascertain the estimated income and the amount due under the mortgage to determine whether there was adequate consideration or not. The appeal is dismissed without notice to the respondent.

P.N./R.K.

Appeal dismissed.

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TO
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IN GRATEFUL RECOGNITION OF
THEIR WARM APPRECIATION AND SUPPORT

OUDE JUDICIAL COMMISSIONER'S COURT

1918

Judicial Commissioners :

The Hon'ble Mr. Benjamin Lindsay, J. P. I. C. S.

„ „ Louis Stuart, I. C. S. (*Offg.*).

Rao Bahadur Pandit Kanhaiya Lal, M.A., LL. B., (*Offg.*).

Additional Judicial Commissioners :

The Hon'ble Mr. Louis Stuart, I. C. S.

Rao Bahadur Pandit Kanhaiya Lal, M. A., LL. B.

The Hon'ble Mr. Sidney Reginald Daniels, B.A., Bar-at-Law, I. C. S.

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1	1918 O	1	135	1918 O	16	248	1918 O	318	455	1918 O	122	625	1918 O	191
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16	" "	15	141	" "	170	250	" "	311	461	" "	221	639	" "	206
18	" "	85	143	" "	289	265	" "	432	471	" "	343	612	" "	365
31	" "	9	145	" "	153	271	" "	368	475	" "	333	617	" "	215
34	1916 PC	150	149	" "	300	277	" "	348	482	" "	460	655	" "	371
38	1918 O	345	163	" "	163	291	" "	225	486	" "	270	663	" "	348
43	" "	25	159	" "	27	391	" "	214	497	" PC	77	665	" "	303
49	" "	356	165	" "	269	398	" "	374	505	" O	389	667	" "	437
67	" "	98	167	" "	71	401	" PC	25	508	" "	291	670	" "	331
70	" "	295	176	" "	166	414	" O	418	513	" "	18	676	" "	423
73	" "	152	179	" "	105	415	" "	314	519	" "	193	687	" "	328
80	" "	92	187	" "	269	419	" "	321	516	" "	419	691	" "	421
87	" "	138	189	" "	31	422	Not reportable		551	" "	379	695	" "	305
90	" "	102	191	" "	120	426	1918 O	123	572	" "	395	698	" "	364
92	" "	109	193	" "	114	430	" "	430	579	" "	313	701	" "	449
97	" "	207	197	1917 PC	169	433	" PC	45	582	" "	390	741	1919 "	129
106	" "	21	205	1918 O	14	440	" "	10	594	" "	279	745	1918 "	406
109	" "	435	208	" "	5	442	" O	326	597	" "	186	747	1919 "	197
112	" "	162	215	" "	309	445	" "	309	606	" "	341	752	" "	270
114	" "	167	219	" "	145	447	" "	402	611	" "	287	754	" "	278
116	" "	306	223	" "	339	447	" "	402	613	" "	288	754	" "	278
121	" "	176	237	" "	174	450	" "	290	616	" "	376	766	" "	373
133	" "	117	241	" "	240	453	" "	70	622	" "	407	768	" "	379

(Board of Revenue cases are not included).

Table No. II

A. I. R. 1918 Oudh=Other Journals.

AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
1	45 IC 242	22	20 OC 306	71	19 Cr L J 699	105	5 O L J 179
	5 O L J 1	24	46 IC 801	75	44 IC 611	109	45 IC 222
5	46 IC 330		21 OC 138		4 O L J 711		5 O L J 92
	21 OC 97	25	45 IC 300	84	43 IC 342	111	43 IC 481
	5 O L J 208		5 O L J 43		20 OC 392		4 O L J 561
8	48 IC 340	27	45 IC 80	85	43 IC 800	112	44 IC 353
	20 OC 329		5 O L J 159		5 O L J 18		4 O L J 583
9	45 IC 248	29	43 IC 280		20 OC 336	113	44 IC 415
	5 O L J 31		20 OC 295	91	44 IC 621		4 O L J 708
10	43 IC 295	31	46 IC 77		4 O L J 735	114	46 IC 281
	20 OC 318		5 O L J 189	92	45 IC 208		5 O L J 193
14	46 IC 324	32 (1)	43 IC 262		4 O L J 80	116	43 IC 470
	5 O L J 205		20 OC 304	95	43 IC 563		4 O L J 551
15	45 IC 252	32 (2)	44 IC 368	98	45 IC 218	117	45 IC 859
	5 O L J 16		21 OC 1		5 O L J 67		5 O L J 139
16	43 IC 219		4 O L J 648	99	43 IC 473	118	46 IC 650
	20 OC 290	61	43 IC 189		4 O L J 553	119	43 IC 837
	5 O L J 135		20 OC 299	100	44 IC 624		20 OC 327
18	47 IC 764	62	44 IC 645		4 O L J 731		4 O L J 729
	5 O L J 513		4 O L J 744	102	45 IC 219		46 IC 279
21	43 IC 257	70	47 IC 645		5 O L J 90	120	5 O L J 191
	20 OC 300		5 O L J 453	103	43 IC 478		44 IC 78
	5 O L J 106	71	46 IC 145		4 O L J 556	121	20 OC 398
22	48 IC 266		5 O L J 167	105	46 IC 52		

A. I. R. 1918 Oudh=Other Journals—(Concl'd.)

A.I.R.	Other Journals	A.I.R.	Other Journals	A.I.R.	Other Journals	A.I.R.	Other Journals
122	47 IC 930	210	47 IC 194	311	47 IC 137	390	48 IC 20
	5 O L J 455		21 OC 165		5 O L J 259		5 O L J 582
123	47 IC 652	213	48 IC 276	313	48 IC 17	395	48 IC 32
	5 O L J 426		21 OC 254		5 O L J 579		5 O L J 572
125	44 IC 59	214	47 IC 687	314	47 IC 683	398	48 IC 257
	20 OC 360		5 O L J 391		5 O L J 415		21 OC 234
	4 O L J 589	217	48 IC 119	316	48 IC 301	402	47 IC 679
142	45 IC 678		21 OC 220	317	46 IC 860		5 O L J 447
	21 OC 95	221	47 IC 950		21 OC 156	404	47 IC 200
	19 Cr L J 630		5 O L J 464	318	47 IC 115		21 OC 172
143	43 IC 291	224	47 IC 701		5 O L J 243	406	48 IC 1007
	20 OC 311	225	47 IC 225	320	48 IC 753		5 O L J 745
	5 O L J 9		5 O L J 294		21 OC 265	407	48 IC 161
145	46 IC 344	267	43 IC 318	322	45 IC 599		5 O L J 622
	5 O L J 219		20 OC 356		21 OC 74	19	Cr L J 981
152	45 IC 613	269 (1)	46 IC 82	323	47 IC 655	408	47 IC 987
	5 O L J 73		5 O L J 187		5 O L J 419		21 OC 200
155	44 IC 357	269 (2)	46 IC 12	325	48 IC 512		5 O L J 629
	4 O L J 577		5 O L J 165	326	47 IC 649	412 (1)	46 IC 817
158	45 IC 1007	270	47 IC 897		5 O L J 442		21 OC 150
	5 O L J 145		5 O L J 486	328	48 IC 901		19 Cr L J 801
	19 Cr L J 671	275	48 IC 386		5 O L J 687	412 (2)	39 IC 545
160	43 IC 314		5 O L J 647	329	46 IC 804		21 OC 346
	20 OC 350	279	48 IC 151		21 OC 139	418	47 IC 639
162	45 IC 833		5 O L J 594	331	48 IC 550		5 O L J 414
	5 O L J 112	280	46 IC 443		5 O L J 670	419	47 IC 894
	19 Cr L J 641		21 OC 124	333	46 IC 808		5 O L J 546
163 (1)	45 IC 603		5 O L J 241		21 OC 143	421	48 IC 914
	21 OC 66	284	47 IC 934		5 O L J 475		5 O L J 691
163 (2)	46 IC 68		5 O L J 458	336	48 IC 265	423	48 IC 543
	5 O L J 153	286	48 IC 69		21 OC 244		5 O L J 676
166	46 IC 6	287	48 IC 88	339	46 IC 353	428	48 IC 477
	5 O L J 176		21 OC 210		5 O L J 233	429	48 IC 269
167	45 IC 877		5 O L J 611	341	48 IC 177		21 OC 252
	5 O L J 114	288	48 IC 91		5 O L J 606	430	47 IC 676
168	45 IC 281		21 OC 214	343	47 IC 960		5 O L J 430
	5 O L J 87		5 O L J 613		5 O L J 471	431	48 IC 392
170 (1)	45 IC 855	289	46 IC 8	344	48 IC 357	432	47 IC 161
	5 O L J 141		5 O L J 143	345	45 IC 292		5 O L J 263
170 (2)	45 IC 832	290	47 IC 673		5 O L J 38	435	45 IC 236
	5 O L J 139		5 O L J 450	348 (1)	48 IC 535		5 O L J 109
171	46 IC 844	291	47 IC 920		5 O L J 663	437	48 IC 538
	21 OC 134		5 O L J 508	348 (2)	47 IC 214		5 O L J 667
	19 Cr L J 828	293	46 IC 813		5 O L J 277	439 (1)	48 IC 308
173	48 IC 750		21 OC 151	356	45 IC 307		21 OC 251
	21 OC 272	295	45 IC 267		5 O L J 49	439 (2)	47 IC 993
174	46 IC 357		5 O L J 70	364	48 IC 922		21 OC 212
	5 O L J 237		19 Cr L J 507		5 O L J 698	440	48 IC 744
176	45 IC 849	296	45 IC 585	365	48 IC 420		21 OC 269
	5 O L J 121		21 OC 78		21 OC 257	441	48 IC 105
181	46 IC 439	300	46 IC 73		5 O L J 642		21 OC 217
	21 OC 119		5 O L J 149	368	47 IC 106	442	47 IC 558
184	45 IC 606	302	48 IC 722		5 O L J 271		21 OC 188
	21 OC 70		21 OC 261	371	48 IC 400	445	48 IC 329
186	48 IC 153	303 (1)	48 IC 336		21 OC 298		47 IC 125
	5 O L J 597	303 (2)	48 IC 526		5 O L J 655	446	5 O L J 252
190	46 IC 841		5 O L J 665	374	47 IC 634	449	48 IC 767
	21 OC 132	304	45 IC 594		5 O L J 398		21 OC 276
	19 Cr L J 825		21 OC 68	376	48 IC 60	457	47 IC 694
191	48 IC 396	305	48 IC 918		21 OC 194	460	47 IC 177
	21 OC 312		5 O L J 695		5 O L J 616		21 OC 161
	5 O L J 625	306	45 IC 873	378	47 IC 206		5 O L J 482
193	47 IC 963		5 O L J 116		21 OC 176	462	42 IC 794
	5 O L J 519	309 (1)	48 IC 423		48 IC 39		20 OC 265
206	48 IC 417		5 O L J 445	379	5 O L J 551	463	41 IC 903
	5 O L J 639	309 (2)	46 IC 339	389	47 IC 912		20 OC 192
207	45 IC 213		5 O L J 215		5 O L J 505	4	O L J 499
	5 O L J 97						

THE ALL INDIA REPORTER 1918

ODDH J. C's. COURT

* A. I. R. 1918 Oudh 1

LINDSAY, J. C.

Etizad Husain—Defendant — Appellant.

v.

Beni Bahadur—Plaintiff — Respondent.

Second Appeal No. 38 of 1917, Decided on 19th November 1917, from decree of Second Addl. Judge, Lucknow, D. 13th December 1916.

(a) Transfer of Property Act (1882) S. 51—Purchaser knowing that vendor can sell only under certain circumstances failing to make inquiry as to existence of such circumstances—He is not entitled to compensation for improvements.

Where a purchaser knows or is presumed to know that the vendor can sell only under certain circumstances and he either knows that such circumstances do not exist or wilfully abstains from making any inquiry on the subject, the mere fact that he purchased for consideration will not suffice to show good faith and he will not be able to claim compensation under S. 51, for improvements effected by him.

[P 3 C 1]

(b) Transfer of Property Act (1882) S. 51—Owner of limited interest making improvements—True owner standing aside and not asserting rights—Equitable right arises in favour of limited owner apart from S. 51.

Apart from the provisions of S. 51 however an equitable right may arise in favour of the owner of a limited interest who makes improvements on the property in his possession.

[P 3 C 2]

But this right can only come into existence if it can be shown that the true owner stood aside and abstained from asserting his rights. There must be in such cases some equity arising out of the conduct of the true owner and further, apart from the conduct of the owner in this connexion, the right cannot come into existence unless it is found that the person in possession was under a mistaken belief that he had a permanent interest in the property.

[P 3 C 2]

Gokaran Nath Misra and Harkaran Nath Misra—for Appellant.

Bisheshwar Nath Srivastava—for Respondent.

Judgment.—This is a defendant's appeal arising out of a suit for ejectment brought by the plaintiff-respondent Beni Bahadur for the purpose of recovering possession of a house. There was also a claim for mesne profits. The facts of the case are a little complicated and require to be set out at some length. The property in dispute consists of a plot of land situated in the city of Lucknow upon which there is at present standing a pucca house. It is said that this plot belonged originally to one Ram Prasad Kayastha who died some time in the year 1876. It is stated that at the time Ram Prasad died the only buildings standing on this plot of land were a "kacheha dalan" and a "kothri." In fact the ground appears to have been used as a small garden and these buildings were for the residence of the mali. Ram Prasad left a widow Mt. Chhogar Kuar, who survived him for many years. It is admitted that she died in the month of December 1908. On 14th October 1881 Mt. Chhogar Kuar sold the plot of land in dispute to her brother Madho Prasad. The property was sold for Rs. 80 and in the sale deed which was executed the property was described as consisting of "a piece of land used as a garden with a dalan and a kothri." The price paid by Madho Prasad was Rs. 80. It has been found that after Madho Prasad acquired this property he set about building a house which he erected, it is said, at a cost of Rs. 1,500 or Rs. 2,000. In the year 1900 shortly before his death, Madho Prasad made a gift of this property to his Guru, a man named Baba Baram Bilas. Baram Bilas in his turn sold this property to Mir Buziad Husain on 3rd June 1902. Mir

Buniad Husain was the father of the defendant-respondent, Mir Etizad Hussain. The plaintiff in this case, Beni Bahadur, claims to be the reversioner of Ram Prasad. He is, it appears, the son of Ram Prasad's sister and the Courts below have found that he is the only relation of Ram Prasad who can claim as his heir. There is no longer any dispute as to this matter.

A variety of defences was set up in the Court below, but for the purposes of disposing of this appeal it will not be necessary to refer to them all. It is now conceded that the legal title to this property is with the plaintiff and the only question outstanding is whether the defendant-appellant is entitled to any compensation before an order for his dispossession is made. The case as to compensation was dealt with by both the Courts below with reference to the provisions of S. 51, T. P. Act. The Munsif was of opinion that in the circumstances the defendant could not be ejected without compensation being paid to him by the plaintiff. It has been found that the house which now stands upon the land in dispute was constructed by Madho Prasad after his purchase from the widow; and it has also been found that since the date of the purchase by Buniad Husain a sum of about Rs. 500 has been spent on repairing the property. For various reasons the Munsif thought the case was covered by S. 51 and accordingly, while giving the plaintiff a decree for ejectment, he ordered the payment of compensation to the defendant, or, in case the compensation was not paid, he directed the defendant to pay to the plaintiff the value of the land. This decree has been reversed in appeal by the Additional Judge. He was of opinion that the case could not be brought within the purview of S. 51 and that consequently the plaintiff was not liable to pay any compensation as a condition precedent to his obtaining possession of the property.

The first point which has been argued before me is with reference to this question of compensation and the terms of S. 51, T. P. Act. This section lays down that when the transferee of immovable property makes any improvement on the property, believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted therefrom by any

person having a better title, the transferee has a right to require the person causing the eviction either to have the value of the improvement estimated and paid or secured to the transferee, or to sell his interest in the property to the transferee. In dealing with the law as laid down in this section, the learned Judge observed that the question which had to be determined was the position which Madho Prasad occupied with respect to the land in suit. It is to be noted that the present defendant cannot be said to have improved the property, for, as has been mentioned, the pacca house was built on the plot by Madho Prasad. Whether the repairs which were done by the defendant after the date of his purchase could be treated as improvements under this section is a matter of some difficulty. I shall refer to this point later on. The Judge came to the conclusion that Madho Prasad was not a transferee who believed, or who could have believed, in good faith that he was absolutely entitled to the property.

The Judge pointed to the fact that Mt. Chhogar Kuar was a Hindu widow who had therefore only a limited interest in the property. Ordinarily she could not transfer the property except for the period of her life. The Judge found that no legal necessity for the transfer had been proved. Certain evidence was put forward on behalf of the defendant for the purpose of showing that there was a legal necessity, but this evidence has been rejected as unreliable. The learned Judge also referred to the fact that Madho Prasad being the brother of the lady must have been acquainted with the circumstances and must also be taken to know the Hindu law relating to the power of widows to transfer the property which they have acquired from their husbands. He found that Madho Prasad must have been aware that there was no legal necessity for the sale and that in these circumstances he could not claim to be a transferee who believed in good faith that he had an absolute title to the property he had acquired. This finding of the lower appellate Court has been criticized here on a variety of grounds; but it seems to me that I must hold that what the Judge has found amounts to a finding of fact with which I am not competent to interfere.

The expression "good faith" is defined in S. 3, Cl. 20, General Clauses Act, which lays down that a thing is deemed to be done in good faith where it is in fact done honestly, whether it is done negligently or not. Certain facts have been found by the Judge to which I have been referred above, and it appears to me that on those facts it was open to him to find that Madho Prasad could not have had an honest belief that he was the absolute owner of the property. Consequently, as the Judge observes, if Madho Prasad were alive he could not have set up a claim to compensation under S. 51. The conclusion of the learned Judge on this part of the case is supported by a ruling of the Madras High Court as *Nanjappa Goundan v. Peruma Goundan* (1). There it was held that where a purchaser knows, or must be presumed to know, that the vendor could sell only under certain circumstances and he either knows that such circumstances do not exist or wilfully abstains from making any inquiry on the subject, the mere fact that he purchased for consideration will not suffice to show good faith; and he will not be entitled to claim compensation for improvements effected by him. So much for the case set up by the appellant under S. 51, T. P. Act. It follows that if Madho Prasad acquired no right under this section, the defendant-appellant, who has taken a transfer of such title as Madho Prasad had, cannot lay claim to any higher rights than Madho Prasad would have had himself. It may be, as argued, that Buniad Husain gave full value for the property to the person to whom Madho Prasad had made a gift. But that does not not affect the legal question under consideration. If no right had arisen to Madho Prasad under S. 51, then no such right could have passed by purchase to the appellant.

A further question then arises. If S. 51 does not apply to the case, is there any other ground upon which compensation could be awarded to the defendant in this case? Madho Prasad certainly did not come into possession of this property as a trespasser. He was in any case the purchaser of a limited interest which would enure for the life of the widow. I think there can be no doubt that on the authorities, and apart from

the provisions of S. 51, an equitable right may arise in favour of the owner of a limited interest who makes improvements on the property in his possession.

But this right can only come into existence if it can be shown that the true owner stood aside and abstained from asserting his rights. There must be in such cases some equity arising out of the conduct of the true owner; and further, apart from the conduct of the owner in this connexion the right cannot come into existence unless it is found that the person in possession was under a mistaken belief that he had a permanent interest in the property. This doctrine has been appended to by the appellant's learned counsel for the purpose of assisting the case of his client; but it seems to me that the conditions are not satisfied which would justify me in holding that an equitable right had arisen in the appellant's favour. To begin with, we have the finding of the Court below that Madho Prasad could not have been under the belief that he had any permanent interest in this property. Coming now to Buniad Husain, the predecessor-in-interest of the appellant, it is probably the fact that he was under the belief that he had acquired an absolute interest in this land which would have entitled him to hold on to it as long as he chose. But then it cannot be pretended that the improvements erected on the land in dispute were made by Buniad Husain. It is true they were purchased by him, but they were not made by him; and so on this ground it appears to me that the defendant-appellant has not made out a case for equitable relief.

There again there is another point to be considered. In order to entitle the holder of a limited interest in the property to equitable relief in this manner there must, as I have said, be some conduct on the part of the true owner in virtue of which the person in possession was encouraged to make the improvements. The law in this matter has been expounded in a ruling of their Lordships of the Privy Council reported as *Beni Ram v. Kundan Lal* (2). After setting out an extract from a decision of the Allahabad High Court reported as *Gopi*

1. (1909) 32 Mad 530=4 I C 16.

2. (1899) 21 All 496=26 I A 58 (P C).

v. *Bisheshar* (3), their Lordships observe as follows :

"It is to be regretted that the loose and inadequate statement of the rule of equity, which is reported in *Gopi v. Bisheshar* (3), should have been accepted, apparently without much consideration, by the learned Judges of both appellate Courts. The proposition, if it were carefully supplemented, might possibly be made to apply to the case where the owner of land sees another person erecting buildings upon it, and knowing that such other person is under the mistaken belief that the land is his own property purposely abstains from interference with the view of claiming the building when it is erected."

In dealing with this part of the case we have to consider the position of the present plaintiff Beni Bahadur. Up till the time of Mt. Chhogar Kuar's death at the end of 1908 Beni Bahadur was in no sense an owner of the property in dispute. He was the prospective heir of the property, being the nearest relative of Ram Prasad then in existence. But he cannot in any sense be described as the owner of the property ; and it seems to me therefore impossible to apply this equitable doctrine on the footing that Beni Bahadur was the owner of the property in suit and could and should have interfered in order to prevent the appellant or his predecessor from erecting buildings on the land. It is pointed out that Beni Bahadur in the lifetime of Chhogar Kuar brought several declaratory suits relating to certain alienations which Mt. Chhogar Kuar had made and it is claimed to be a significant fact that he never brought any such suit with respect to the property with which we are now concerned. All the same I cannot accept the argument that Beni Bahadur was necessarily under any obligation to bring such a suit, and his omission to bring a suit of this kind cannot, in my opinion, be considered as amounting to any act on the part of the owner by reason of which the person in possession was encouraged to lay out money in improvements. Beni Bahadur in the course of his evidence was asked to explain why he had never brought any suit in the widow's lifetime regarding this property, and his answer was that he did not consider that he had any right to the property so long as Mt. Chhogar Kuar was alive. In short it seems impossible to treat a mere reversioner as an owner for the purpose of

applying this doctrine of equity. A may be a reversionary heir and he may do acts which encourage the person in possession to erect buildings of a permanent character. When the reversion falls in on the death of the life-tenant, B is the nearest heir in existence and not A. Would it be possible for the person in possession to set up an equitable right against B, on the ground that A, who was the previous reversionary heir, had encouraged the holder of a limited interest to suppose that he was in with a permanent title? I think not. It seems to me therefore that neither under S. 51, nor under this doctrine of equity to which I have referred, can the appellant be said to be entitled to compensation in this case.

It has been suggested that at any rate the lower Court ought to allow the defendant to remove the materials of the house before the plaintiff is given possession. Here again I think the argument fails. The reversioner is entitled to the property as it stands at the time of the widow's death. Here we have the fact that the widow died in 1908 and at that time the house had been built. It has further been suggested that the appellant is entitled to the money which he laid out by way of repairs. This argument must fail for the same reason. It seems from the accounts which were put in by the defendant that the money he spent on repairs of the house was spent for the benefit of the tenant of the premises from whom the appellant was receiving rent. It is also made to appear from the accounts that the money was expended in the year 1907, that is before the date of the widow's death. I can see no reason why the plaintiff should not have the benefit of the law which entitled him to possession of the property as it stands at the time when the succession opens. The case may be a hard one, but the defendant-appellant is in no worse position than any other person who has bought property from another holding under a defective title. He cannot set up the hardship to himself as any ground for resisting the claim of the rightful owner; and least of all, when he has not been able to show that the rightful owner has done anything which would give rise to an equitable right in his (appellant's) favour. I am satisfied therefore that

the decision of the lower appellate Court is correct and I dismiss this appeal with costs accordingly.

B.V./R.K.

Appeal dismissed.

A. I. R. 1918 Oudh 5

LINDSAY, J. C.

Kalu Singh—Defendant—Appellant.

v.

Randhir Singh and others—Plaintiffs and Defendants—Respondents.

Second Appeal No. 276 of 1916, Decided on 2nd April 1918, from decree of Dist. Judge, Rae Bareilly, D/- 20th April 1916.

(a) Transfer of Property Act (1882), S. 53—Fictitious.

A sale cannot be said to be a wholly fictitious transaction if any consideration has passed.

[P 6 C 1]

(b) Transfer of Property Act (1882), S. 53—Preference—Transfer is not rendered void—Transfer must be to defeat all creditors.

Section 53, T. P. Act, does not render void transfers which are made merely for the purpose of preferring one creditor to another. In order to constitute a transfer void under that section, it must be shown to be a transfer which was made for the purpose of defeating all the creditors of the transferor.

[P 6 C 1]

(c) Transfer of Property Act (1882), S. 53—Transfer for inadequate consideration—Still bona fide transferee is protected although transferor intended to defeat or delay creditors—Burden of proof is on plaintiff.

In a case under S. 53, T. P. Act, the plaintiff must prove that the transferee is a party to the fraud. Want of good faith cannot be presumed; it must be proved; and even if it be shown that the transfer was made for a grossly inadequate consideration, the transferee who acts in good faith is within the protection of the proviso, although it may be that the transfer was intended by the transferor to defeat and delay his creditors.

[P 7 C 1]

Ali Mohammad—for Appellant.

Samiullah Beg—for Respondents.

Judgment.—The facts of this case are as follows: On 7th February 1905, defendants 3 and 4 to this suit, Rajpat Singh and Mt. Jagannathi Kuar, executed a bond in favour of the plaintiff Randhir Singh. On 3rd September 1912, Randhir Singh got a simple money decree on this bond for Rs. 1,441 odd. On 1st September 1912 (that is, two days before the decree was obtained) these two defendants executed a sale deed of certain property in favour of defendant 2, Indar Singh, who admittedly is a brother of Mt. Jagannathi Kuar. This deed was subsequently registered on 28th November 1912. On 19th September 1912 the plaintiff Randhir Singh in execution of his decree attached the pro-

perty covered by this sale deed, but this attachment seems to have been defeated by the transfer which had been made on 1st September 1912 and the consequence was that on 3rd April 1913, Randhir Singh brought a suit for a declaration that the transfer was void. A written statement was filed on behalf of the defendant, Rajpat Singh, on 5th August 1913, and on 22nd October 1913 Randhir Singh withdrew the suit with leave to bring a fresh action. Then on 28th November 1913 two suits for pre-emption were filed. One of these suits was by the plaintiff Randhir Singh and the other was by Kalu Singh, who is defendant 1 in the present case. Later on Randhir Singh had his suit dismissed on the ground that he did not desire to prosecute it. The result was that on 30th March 1914, a decree for pre-emption was passed in favour of Kalu Singh and on 28th April 1914, Kalu Singh deposited the money directed by the pre-emption decree. On 9th May 1914 a warrant directing delivery of possession to Kalu Singh was issued. This was executed on 30th May 1914, on which date the process server reported that possession had been delivered (Ex. A-11). After this Kalu Singh objected to an attachment of this property made by Randhir Singh, on the ground that it belonged to him and was not liable to be sold in execution of the decree obtained against defendants 3 and 4. This objection was allowed and consequently we have the present suit brought by Randhir Singh with the object of obtaining a declaration that notwithstanding the dealings with the property to which I have referred above, it still continues to be the property of his judgment-debtors and is liable to be sold in execution.

The Courts below do not appear to me to have had any very clear conception as to the nature of the case put forward by Randhir Singh and indeed it may be said that Randhir Singh himself was not quite sure of the grounds upon which he sought relief. There is an allegation in the plaint to the effect that the sale, which purported to have been made on 1st September 1912, was "a wholly fictitious transaction" and there are other allegations in the plaint which would lead to the conclusion that the case which Randhir Singh was putting forward was that there was in fact no sale,

and that the property still remained in the hands of the vendors Rajpat Singh and Mt. Jagannathi Kuar. Obviously if the plaintiff had been able to establish that there was in fact no sale and that the property had never actually been transferred, he was entitled to have a declaration that it still remained the property of his judgment-debtors and was liable to be sold in execution. He has not however been able to establish that case.

The lower Courts have not found as a matter of fact that there was no consideration for the sale. On the contrary they are both agreed in finding that there was consideration, although they describe that consideration as being inadequate. In short, the Courts below have dealt with this case as if it were a case under S. 53, T. P. Act. They have come to the conclusion, so far as I can gather, that there was a sale but that it amounted to a fraudulent transfer, the intention being to defeat the rights of the plaintiff-creditor, Randhir Singh. It is true that both the Courts in their judgments refer to the sale as fictitious. This is altogether inconsistent with the finding that there was consideration (although the consideration was inadequate) for it cannot in any way be said that a sale is a wholly fictitious transaction if any consideration has passed. The Courts then have avoided the sale in favour of the plaintiff on the ground that it was a fraudulent transaction entered into between close relations in circumstances which led inevitably to the conclusion that the intention of the transferors was to defeat the rights of Kalu Singh. If I have understood the effect of the judgment of the Courts below correctly, then all that need be said is that the case even as found by them is not one under S. 53, for this section does not render void transfers which are made merely for the purpose of preferring one creditor to another. In order to constitute a transfer void under S. 53 it must be shown to be a transfer which was made for the purpose of defeating all the creditors of the transferor. I may mention here that the deed of 1st September 1912 refers to a number of debts, which were said to be owing by the transferor at the time of the sale. Under the terms of the deed provision is made for the payment of some of these debts, a por-

tion of the consideration being left with the purchaser for the purpose of discharging various incumbrances which are referred to.

The ground which has been taken by the defendant-appellant Kalu Singh is that S. 53, T. P. Act, did not apply to the case at all, and that even if it did, he is protected by the proviso to that section, which lays down that nothing in the section shall impair the rights of any transferee in good faith and for consideration. Both the Courts below have referred to a variety of circumstances attending the execution of the deed of 1st September 1912, for the purpose of showing that a fraud was intended to be worked. First of all, we have a reference to the fact that the purchaser was a close relation of the vendors. Then it is pointed out that the property was sold for a grossly inadequate price. It is said that the real value of the property is about Rs. 7,000, while it was sold for less than Rs. 2,000. A reference is also made to the secrecy with which the sale deed was executed as also to the great delay in having the sale deed registered. It has also been found that the purchaser Indar Singh was a man of no substance and, lastly, stress is laid upon the fact that the transfer included practically the whole of the property of defendants 3 and 4. The first Court in dealing with the case of Kalu Singh held that the onus lay upon him to prove that he was a bona fide transferee for consideration. The Subordinate Judge was of opinion that he had failed to discharge this burden. He held that he was a relation of the vendors (as he undoubtedly is) and that he had pre-empted a fraudulent and fictitious sale. The Subordinate Judge went further than this and remarked that even if Kalu Singh were innocent of fraud, he would not be in a position to resist the plaintiff's suit. The view taken by the Subordinate Judge is that Kalu Singh by virtue of the pre-emption decree stands in the shoes of the original purchaser, Indar Singh, and that consequently it was for him to show that the sale was bona fide and above board.

These findings have been accepted in their entirety by the learned District Judge, who also refers to another circumstance. He says that it has not been proved that possession of the property sold was ever delivered to the purchaser

Indar Singh. It seems to me that the decision of both the Courts below in this matter is erroneous and that Kalu Singh is entitled to the benefit of the proviso to S. 53, T. P. Act, even if it be supposed that that section can be applied to the case. In the first place there seems to be no doubt that, so far as Kalu Singh is concerned, he has given consideration. That fact indeed is not disputed by the Courts below, for as I have said, they both found that there was consideration, although they say it was inadequate consideration. The proviso to S. 53 however says nothing at all about inadequate consideration and we must take it as an established fact that consideration has been given by Kalu Singh. It is proved that he deposited in Court the money which he was ordered to deposit by the pre-emption decree. He is therefore a transferee for consideration.

The only other question is whether he is a transferee in good faith. The burden of proving want of good faith on the part of Kalu Singh lay upon the plaintiff. It is the plaintiff who is suing to establish his right to attach the property in suit as being that of his judgment-debtors, and it is for him to prove all the facts which are necessary to entitle him to that relief. Further it is to be remembered that Kalu Singh was successful in getting the attachment of this property raised in the executing Court. It is quite wrong therefore to say that Kalu Singh was bound to prove his good faith in order to defeat the claim of the plaintiff. The law on this subject has been expounded at great length in a judgment of the Bombay High Court reported as *Bhagwant Appaji v. Kedari Kashinath* (1). I may also refer to a judgment of the Calcutta High Court in *Ishan Chunder Das Sarkar v. Bishu Sirdar* (2). In a case under S. 53 the plaintiff must prove that the transferee is a party to the fraud. Want of good faith cannot be presumed: it must be proved; and even if it be shown that the transfer was made for a grossly inadequate consideration, the transferee who acts in good faith is within the protection of the proviso, although it may be that the transfer was intended by the transferor to defeat and delay his creditors. A man

cannot be convicted of dishonesty because he has made an extremely good bargain.

What then is the evidence in this case to show that the transfer to Kalu Singh was not made in good faith? The learned counsel has not been able to refer me to any evidence upon this point, except perhaps the solitary fact that Kalu Singh is a nephew of one of the transferors, Rajpat Singh. In para. 8 of the plaint it was said that defendants 2 and 3 set up Kalu Singh to bring a suit for pre-emption and that the decree passed in his favour was a fraudulent decree because the vendors admitted the sale in favour of Indar Singh. There is nothing beyond this bare allegation to show that Kalu Singh was any party to a fraud; and it certainly cannot be assumed merely from the fact that the defendants in the pre-emption suit admitted the sale, that Kalu Singh was acting necessarily in collusion with them. Had matters ended with the transfer made by defendants 3 and 4 in favour of Indar Singh, the result might have been different. I quite admit that there are a great many suspicious incidents attached to the transfer made in Indar Singh's favour, which might perhaps have justified a finding that the sale to him was a fraudulent sale within the meaning of S. 53; but the case has gone a stage beyond this and the transferee now under the orders of the Court which passed the pre-emption decree is not Indar Singh but Kalu Singh, and consequently it lay upon the plaintiff to establish that the present transferee Kalu Singh was guilty of bad faith. There is absolutely nothing to show that Kalu Singh was in any way a party to the negotiations which ended in the sale of 1st September 1912. His own story is that he knew nothing about this transfer till a considerable time afterwards. The result is that all that the Courts below have been able to say with regard to Kalu Singh is that he failed to give proof of his bona fides in bringing a pre-emption suit and obtaining a decree. If this amounts to a finding that Kalu Singh is guilty of bad faith, then it is an erroneous finding based upon a wrong view of the law. It lay upon the plaintiff to establish the want of good faith on the part of Kalu Singh, and if that is not established, the transfer to him cannot be declared void

1. (1901) 25 Bom 202.

2. (1897) 24 Cal 825.

under S. 53. His case falls clearly within the proviso to that section. The appellant therefore is entitled to succeed on this ground.

I allow the appeal, set aside the decree of the Court below and direct that the plaintiff's suit be dismissed with regard to Kalu Singh with costs in all three Courts.

B.V./R.K.

Appeal allowed.

A. I. R. 1918 Oudh 8

LINDSAY, J. C.

Murlidhar — Decree-holder — Applicant.

v.

Baldeo Singh — Judgment-debtor — Opposite Party.

Execution Appln. No. 139 of 1917, Decided on 18th September 1917, against order of Dist. Judge, Sitapur, D/- 17th May 1917.

Civil P. C. (1908), O. 21, Rr. 89 and 90 — Application under R. 90 dismissed for default—Subsequent application under R. 89 is not barred.

A judgment-debtor, who makes an application under O. 21, R. 90, which is dismissed for default, is not thereby disqualified from subsequently applying for getting back his property under R. 89, O. 21 of the Code. [P 9 C 1]

Ishwari Prasad—for Applicant.

Judgment.—This application for revision raises a point of law which I have not seen discussed before, but after listening to the arguments of the learned counsel for the applicant and reading the judgment of the Court below I think the lower Court's order ought to be maintained. The facts may be briefly stated as follows:

The applicant here is the decree-holder. The opposite party is the judgment-debtor. The property of the judgment-debtor was put to sale, and was sold. After the sale had taken place, it seems that the judgment-debtor made an application to the executing Court under the provisions of O. 21, R. 90, that is to say, he asked the Court to set aside the sale on the ground that there had been material irregularity or fraud in publishing or conducting it. It is admitted that this application was dismissed for default. A notice was issued to the decree-holder who attended the Court, but on the day fixed for disposal of the application the judgment-debtor was absent and his application was accordingly dismissed. Therefore, he went

to the executing Court with a petition under O. 21, R. 89, and in the course of this petition he mentioned the fact that he had previously made an application under R. 90, adding that he had withdrawn it. The question is, whether the fact that the judgment-debtor had made this application under R. 90 which was dismissed for non-prosecution is a bar to the entertainment of the application under R. 89. In this connexion the important words are to be found in R. 89, sub-R. 2, in which it is stated that "where a person applies under R. 90 to set aside the sale of his immovable property, he shall not, unless he withdraws this application, be entitled to make or prosecute an application under this rule."

It was contended before the learned Judge of the Court below that the judgment-debtor had not withdrawn his application under R. 90 and that his failure to attend and the allowing of the application to be dismissed for default does not amount to withdrawal. The learned Judge seems to think that it did not matter in what way the withdrawal was made; and he states in his judgment that there is no specified procedure laid down for the purpose of withdrawing an application.

There is a good deal, I think, to be said for this argument; but it appears to me that it is possible to dispose of the case on another ground. R. 89, sub-R. 2, seems to me to contemplate that there shall not be before an executing Court two applications at the same time, one under R. 89 and another under R. 90. The reason for this is obvious. R. 89 gives the judgment-debtor a privilege of getting back his property before a sale is finally confirmed; and it would be absurd to allow him to ask the Court to grant this privilege while he was at the same time in another proceeding denying the validity of the sale by alleging that it had been conducted or published in an irregular or fraudulent manner; and so I take it, the meaning of the rule is that if a judgment-debtor, as in the present case, tries to get the sale set aside by making applications under both rules, he will not be allowed the privilege conceded by R. 89 unless he withdraws the case which he has put forward in R. 90 proceedings and gives up his plea that the sale has been vitiated by fraud or irregularity. Here in the present case we have it that the

application under R. 90 was not prosecuted, and it seems to me that when the application under R. 89 was made to the Court there was no application under R. 90 pending, and in these circumstances I do not see how it was possible for the judgment-debtor to withdraw an application which had already been dismissed for default before the application under R. 89 was made. In the circumstances I fail to see how the judgment-debtor was disqualified from applying under R. 89, and I think the order of the executing Court was correct. The application fails and is dismissed with costs.

B.V./R.K. *Application dismissed.*

A. I. R. 1918 Oudh 9

LINDSAY, J. C.

Hashmat Ali—Defendant—Appellant.

v.

Special Manager, Mahewa Estate—Plaintiff—Respondent.

First Rent Appeal No. 3 of 1917. Decided on 12th April 1917, from decree of Dy. Commr., Sitapur, D/- 10th November 1916.

(a) *Estoppel—Suit by Manager of Court of Wards on behalf of ward as well as on behalf of others—Defendant knowing this cannot resist suit because ward is not sole owner.*

Where a defendant in a suit brought by the Manager of the Court of Wards knows that the Manager is suing on behalf of the ward as well as on behalf of other persons interested in the property in dispute, he cannot resist the suit on the ground that the ward is not the sole owner of the property. [P 10 C 1]

(b) *Civil P. C. (1908). S. 65—Auction-purchaser is entitled to claim profits from date of sale.*

An auction-purchaser of a share in a village is entitled to claim profits from the date of the sale, and not only from the date when mutation is effected in his name in the village papers. [P 10 C 1, 2]

Nabi Ullah—for Appellant.

Nagendra Nath Ghoshal—for Respondent.

Judgment.—The appellant Hashmat Ali was defendant in a suit in the Court below brought under S. 108, Cl. 15, Oudh Rent Act, for the recovery of profits for the years 1320 to 1323 Fasli. The profits were sought in respect of a six annas share in the village and the total sum claimed was Rs. 6,320-7-0. The Court below gave a decree in favour of the plaintiff to the extent of Rs. 3,167-10-0 with costs and future interest at six per cent. The first point which has been

raised in appeal here is with respect to the right of the plaintiff to bring this suit. The plaintiff was the Special Manager of the Court of Wards in charge of the estate of one Jai Indar. The case for the appellant is that Jai Indar was not the sole owner of the six annas share in respect of which the claim was made. In order to understand the matter raised by this argument it is necessary to refer to certain facts. It appears that the defendant Hashmat Ali executed a bond in favour of Raja Balbhaddar Singh of Mahewa. After the death of the Raja a suit was brought by his widow on the bond and a decree was obtained. While execution proceedings were pending, Rani Raghubans Kuar died and was succeeded by one Rajendra Bahadur, who became the Talukdar of the Mahewa Estate. Rajendra Bahadur took steps to execute the decree and the result was that after a number of objections raised by Hashmat Ali had been disposed of, the property was eventually brought to sale by a public auction and was purchased by Rajendra Bahadur on 27th May 1912. Various other objections were afterwards raised by the judgment-debtor but the sale was confirmed on 28th June 1912, and a sale certificate was issued on 21st December 1914. By the time this sale certificate came to be issued, Rajendra Bahadur had died and had been succeeded by his son Jai Indar whose property is under the management of the Court of Wards, and it is on the strength of this sale certificate that the present suit has been brought by the Court of Wards as representing Jai Indar.

It is to be observed that in the sale certificate which was granted on the date above mentioned it was expressly stated by the Subordinate Judge who was dealing with the case that the certificate was being granted to the Special Manager as guardian of Jai Indar for his own benefit and also for the benefit of three other persons who were the legal representatives of the Rani. It is clear on all hands, and in fact it has been admitted by the learned counsel for the Court of Wards, that Jai Indar is not the sole owner of the six annas share in respect of which the profits are claimed. It is admitted that the Court of Wards is managing the property on behalf of

Jai Indar and in a way as trustee for the other three persons who now represent the deceased Rani Raghubans Kuar. It is a pity I think that these facts were not set out in the plaint, for the omission to state them has given Hashmat Ali an opportunity of raising the plea which at first sight appears to be a plausible one. On examination, however, of the facts of the case it is altogether clear that Hashmat Ali's plea has got no substance in it. He has been contesting the claim all along since the time the decree was obtained and execution was sought and he very well knew the facts. It is made to appear that the entry in the revenue papers is in favour of Jai Indar alone, and having regard to the facts which I have already mentioned, it appears to me that Hashmat Ali is not in the present suit in a position to contest the right of the Court of Wards to bring forward this claim, it being of course understood that they are claiming not only on behalf of Jai Indar but on behalf of the three other legal representatives of Rani Raghubans Kuar also. I am satisfied therefore that the plaintiff had the right to bring this suit and that the plea which has been raised to the contrary cannot be sustained.

The next point taken is that the plaintiff was not in a position to sue for profits accruing prior to the date on which mutation was obtained in favour of Jai Indar. Here again I think the plea must be rejected, for, as the lower Court observed, the provisions of S. 65, Civil P. C., apply to the case, and in virtue of those provisions it is clear that the title to the six annas share accrued to the auction-purchaser from the date on which the property was sold. It may or may not be the case that the revenue papers show only Jai Indar as being in possession of the share since 1916, but the entry, whether its value may be as *prima facie* evidence, is contradicted by the other evidence on the record, which shows that Jai Indar is one of four persons who are beneficially interested in the share since the date of the purchase. It is impossible, I think, to say that a good title to this six annas share having accrued to Jai Indar and these other legal representatives on the date of the sale, they are not to have the profits of this property from that date. I see no reason whatever for holding that the

plaintiff and his cosharers would only be entitled to recover profits from the date the mutation was made. It is argued in this connexion that Hashmat Ali, being the lambardar, could not be made responsible to persons who are not recorded cosharers, and it was suggested that he might before the date of this sale have paid away the profits to other persons who were so recorded. There is no virtue in this plea, for the point was never raised in Hashmat Ali's defence. He never pretended that he had paid any money to any other cosharer in the village and so this defence is without merit. The only other point raised is one which must be determined in favour of the appellant. The lower Court decreed the claim only in part. According to the decree which has been prepared the plaintiff has been awarded full costs and the learned Counsel who appears for the respondent admits that this is wrong. The decree will have to be corrected, for in the circumstances the plaintiff was only entitled to proportionate costs in accordance with the amount of his success. A fourth point relating to one of the items of the account between the parties was sought to be argued, but it was brought to the learned counsel's attention that the point was not raised in the memorandum of appeal and the argument was therefore withdrawn. The result is that the appeal is allowed in part; that is to say, the decree of the lower Court will be corrected by insertion of the proper order giving the plaintiff only proportionate costs. In other respects the appeal is dismissed. I make no order as to costs in this Court.

B.V./B.K. *Appeal partly allowed.*

A. I. R. 1918 Oudh 10

LINDSAY, J. C.

Chhanu Lal and others—Plaintiffs—Appellants.

v.

Mt. Raj Kuar—Defendant—Respondent.

First Appeal No. 25 of 1917, Decided on 18th September 1917,

(a) Contract Act (1872), S. 16 — Court's power to interfere with hard and unconscionable bargains is under S. 16.

The only authority given to Courts in India to interfere with what are known as "hard and unconscionable bargains" is conferred by S. 16.

[P 12 C 2]

(b) Contract Act (1872), S. 16—Indebtedness does not justify conclusion of undue influence.

The fact that a borrower is already indebted to the lender does not by itself justify the conclusion that he is subject to undue influence.

[P 13 C 1]

(c) Contract Act (1872), S. 16—Size of debt on date of suit cannot support conclusion of undue influence—Rate of interest, whether excessive, depends upon value of security.

The size of a debt at the date of suit is a matter which cannot be put forward as an argument to support the conclusion that the parties were treating on unequal terms. It is impossible to lay down what constitutes excessive interest. A number of factors contribute to the agreement which regulates the payment of interest and the value of the security is only one of the elements to be considered: 42 Cal 690, *Dias* from.

[P 13 C 1, 2]

A. P. Sen—for Appellants.

Mohammad Wasim—for Respondent.

Judgment.—The main issue raised in this appeal is an issue of law, the question being to what extent the Courts are permitted to interfere with contracts between borrowers and lenders so as to reduce the rate of interest which has been agreed on between the parties. The suit was a suit for sale on a mortgage executed by the defendant, a Hindu widow, in favour of the plaintiffs, a family of money-lenders. The deed was executed on 16th July 1909; the principal sum was Rs. 3,500 and the rate of interest was Rs. 1-12-0 per cent per mensem payable every six months; in default the interest was to be compounded with six-monthly rests. Nothing was paid either on account of interest or principal up till the date of suit and the claim was for Rs. 3,500 principal plus Rs. 9,458 interest, total Rs. 12,958.

The defendant contested the claim on various grounds. While she admitted execution of the deed, she pleaded that she signed the document without a full understanding of its nature and legal effect. In para. 8 of the written statement it was suggested that the plaintiffs had been taking an unusual interest in the defendant's estate even before her husband's death, that a brother of the plaintiffs had at one time managed the estate, and that for these reasons the defendant reposed great confidence in the plaintiffs. It was further suggested that the defendant's agents had colluded with the plaintiffs or had acted under their influence.

Then it was pleaded in para. 10 of the written statement that the terms of the

bond were hard, and that the rate of interest was excessive and the Court was asked to relieve against the conditions of the bond. The Subordinate Judge has found that the plea that the defendant entered into this contract without due appreciation of its obligation and its effect on her interests is untrue. He has examined at length the considerable volume of evidence put forward by the plaintiffs and has commented upon the very significant fact that the lady did not enter the witness-box to contradict the statement of the witnesses who deposed to the circumstances attending the execution and registration of the deed. He was satisfied that the intelligent execution of this document by the defendant, although she is a *pardanashin* lady, was well established. This finding has hardly been questioned here by the learned counsel for the respondent, and in the face of the evidence it would have been impossible to press this Court to disagree with the Subordinate Judge's conclusion.

As is pointed out in the judgment, Mt. Raj Kuar is no novice in dealings with money-lenders. She and her husband before her were parties to a number of money transactions with these very plaintiffs and others and were also parties to the suits which had to be brought to enforce the recovery of previous loans. It appears to be no exaggeration to say that previous debts were only recovered after strenuous litigation, in some instances carried up to this Court. It must be taken as established therefore that Raj Kuar, when she executed the deed now in suit, had plenty of advice and knew perfectly well what she was doing. It was further found by the Court below that full consideration was given for the bond and that the defendant had failed to show that there was any defect in the transaction in this respect. But moved by certain facts and relying upon certain observations contained in a judgment of the Calcutta High Court: *Abdul Majid v. Ksheroode Chandra Pal* (1) dealing with an entirely different set of circumstances, the Subordinate Judge considered that he had before him a harsh and unconscionable bargain and that he was justified in reducing the interest from the compound to the simple

rate. He gave a decree therefore for the principal sum with interest at the simple rate till the date of realization, fixing a period of six months for payment. The plaintiffs' case in appeal is that the Court below was not entitled to interfere with the rate of interest agreed upon.

The defendant has filed cross-objections, but only one of these has been argued, namely, that the Court below should not have awarded more than 6 per cent interest after the date fixed for payment. Before discussing the law which governs the principal matter in issue, it is to be observed that we are not dealing here with any question of relief against a penalty. The stipulation is for payment of compound interest at the same rate in case of default of payment at the simple rate, and there is abundance of authority for the proposition that such a stipulation is not one by way of penalty.

This case of *Abdul Majid v. Ksheroode Chandra Pal* (1) and the Madras case *Avathani Muthukrishnair v. Sankaralingam Pillai* (2), which the Calcutta Court cited with approval, were both cases of penalty to which the law as laid down in S. 74, Contract Act, applied. We have nothing to do here with S. 74, Contract Act.

It is suggested in the plaintiff's memorandum of appeal that the Court below dealt with the case as one under S. 16, Contract Act, and it is argued that the defendant never set up any definite plea of undue influence so as to raise a case under that section. There is a certain amount of force in this criticism, for the allegations of the defendant regarding her relations with the plaintiffs do not amount to the positive assertion of facts constituting undue influence such as a party is bound to make under the rules of pleading (cf. O. 6, R. 4), but it may be taken that it was in the mind of the defendant to raise a defence of this kind and I do not desire to dispose of the case upon a purely technical ground. It may be stated however that the plea of collusion between the plaintiffs and the defendant's agents was not established.

Coming now to the law which is to be applied, we find it very clearly laid down in a judgment of the Privy Council in an appeal, from a decree of this Court. I refer to the case of *Dhanipal Das v.*

Maneshar Bakhsh Singh (3). There the Subordinate Judge who tried the case had applied what he understood to be the "English equitable doctrine" and, being of opinion that the transaction amounted to a "hard bargain," he reduced the rate of interest from 18 per cent compound to the same rate simple. Their Lordships pointed out that the only authority given to Courts in this country to interfere with what are known as "hard and unconscionable bargains" was conferred by S. 16, Contract Act. It was observed that apart from a recent statute (i.e., the Money-Lenders Act) an English Court of equity could not give relief from a transaction or contract merely on the ground that it was a hard bargain, except perhaps where the extortion is so great as to be itself evidence of fraud:

"In other cases there must be some other equity arising from the position of the parties or the peculiar circumstances of the case."

This ruling was considered and interpreted by a Bench of the Madras High Court in *Kesavulu Naidu v. Arithulai Ammal* (4), where it was held that it was not open to the Court to interfere on general equitable grounds with the contract between the parties unless they were satisfied that the contract was brought about by the exercise of undue influence. One of the learned Judges expressed the further opinion that although a stipulation for excessive interest might not per se be a ground for relief, it might be evidence of the fact that the debtor must have been in a helpless condition which allowed the creditor to impose his will. In the particular case before their Lordships, the debt was one of Rs. 1,500 and carried interest at 60 per cent per annum and in the absence of proof of undue influence the contract rate was enforced. What then is the evidence in the present case to show that the plaintiffs were in a position to dominate and did dominate the defendant's will, so as to bring about the execution of a contract to pay interest at 21 per cent per annum to be compounded at the same rate in case of default? According to the findings of the Subordinate Judge above mentioned, the direct evidence relating to the execution and re-

3. (1906) 28 All 570=33 I A 118=9 O C 188 (P C).

4. A I R 1914 Mad 131=22 I C 769=36 Mad 533.

2. (1913) 36 Mad 229=18 I C 417.

gistration of the document shows that the lady was well aware of what she was doing, that she had plenty of advice and that certainly no direct pressure was brought to bear upon her. It is true that she was already indebted to the plaintiffs, but that fact by itself would not justify the conclusion that she was subject to undue influence. She had to provide for the payment of her debts and there is evidence, which the Subordinate Judge has not disbelieved, to show that she had been casting about elsewhere to raise a loan but could only obtain an offer of harder terms than she got eventually from the plaintiffs. So far as we can deal with the matter on the basis of the direct evidence, I find it impossible to say that there is any reliable indication that the plaintiffs were trying to overreach the defendant or to compel her to execute this contract.

The Court however fastened upon certain circumstances which led it to the conclusion that there was a case of unfair dealing. The Judge refers to the rate of interest and the value of the security. It was admitted before him that the value of the mortgaged property is not less than Rs. 26,000, and so he held that the rate of interest was in the circumstances excessive and led to a presumption that the borrower was at the lender's mercy. He seems to have been much influenced by an observation of the Calcutta High Court in the case reported as *Abdul Majid v. Ksherode Chandra Pal* (1), to the effect that :

"where there is ample security an excessive rate of interest has been held to be anything over 10 per cent."

No authority is quoted for this sweeping proposition and I am not prepared to accept it as having any application to the conditions which obtain in this part of India, where a rate of 12 per cent per annum is looked upon as a normal rate of interest even in cases where the security is abundant. It is, in my opinion, impossible to lay down any definition of what constitutes excessive interest. A number of factors contribute to the agreement which regulates the payment of interest and the value of the security is only one of the elements to be considered. Another matter to be taken account of is the state of the borrower's credit, and that in turn depends upon his character for honesty and the re-

putation he has acquired in the matter of readiness to pay his debts. It is unfortunately a fact that a very large proportion of debtors in this part of the country are disposed to repudiate the debts they have incurred and to resort to every conceivable device which dishonesty can suggest for the purpose of defeating perfectly honest claims. A creditor who has to fight his case through three Courts before he can get his decree, and having got so far has to start again and meet constant opposition in the execution of his decree, cannot be expected to ignore the expense he will probably be put to before he recovers his money. The security may be ample, but he can in a great many cases only get at the security after prolonged and expensive litigation, and what the Courts can award him in the shape of costs falls notoriously short of his actual out of pocket expenses.

In the present instance I am not the least impressed with the fact that the lady gave abundant security for the debt. With her previous reputation as a litigant she could not have raised money on anything but the best security. And as for the rate of interest, while it is in excess of the normal 12 per cent per annum, the evidence shows that it is but little higher than the rate she has had to pay for previous loans, and less than the rate which others were willing to lend at when the deed in suit was executed. I disagree therefore with the Court below in holding that the rate to which the parties agreed was in the circumstances excessive. Then the Subordinate Judge appears to have been a good deal influenced by the size of the debt at the time of the suit ; but this again is a matter which cannot be put forward as an argument to support the conclusion that the parties were treating on unequal terms. The defendant in the course of a period of nearly seven years never made the slightest attempt to pay anything on account of principal or interest, and she cannot be heard to make a grievance of the fact that the debt has swollen to its present extent. I cannot accept the reasoning of the Judge when he attributes to the plaintiffs the sinister design of ruining the defendant by waiting till the debt had assumed its present proportions. He says the plaintiffs

"could not, or did not, realize a single shell from the date of the deed till this day."

But how could they if the defendant made no attempt to pay? It appears somewhat unreasonable to construe the forbearance of the plaintiffs to sue into a deep laid design to encompass the defendant's destruction. On a review of all the evidence in the case I am satisfied that the decision of the Subordinate Judge is wrong. In my opinion, there was no ground upon which he was justified under S. 16, Contract Act, in interfering with the terms of the contract. For these reasons the appeal of the plaintiffs must be allowed. As to the objection filed by the respondent there is no substance in it, and it must fail in view of what I have determined in the plaintiffs' favour. I may say that I do not accept the plaintiffs' contention that they are entitled to interest at the contract rate up till the date of realization. On the authorities they can get that rate only up till the date fixed for payment by the Court's decree. On this principle I allow the plaintiffs' claim in full with interest at the full contract rate up till 15th June 1917, the date for payment fixed in the lower Court's decree. Interest thereafter will run at 6 per cent per annum simple. The decree of the Court below is altered to this extent and a fresh decree will be prepared in these terms. The date of payment is extended till six months from the date of this Court's decree. The appellants will get costs of this Court from the respondent. The cross-objections of the respondent are dismissed with costs.

B.V./R.K.

Appeal allowed.

A. I. R. 1918 Oudh 14

LINDSAY, J. C.

Mohan Lal—Plaintiff—Applicant.

v.

Baz Khan and others—Defendants — Opposite Party.

Civil Revn. No. 9 of 1918, Decided on 18th February 1918, against order of Sub-Judge, Hardoi, D/- 20th December 1917.

(a) Civil P. C. (1908), Sch. 2, Para. 3—Court should appoint date within which award is to be made.

When a case is referred to arbitration, it is the duty of the Court to appoint a date within which the arbitrators are to make their award.

[P 14 C 2]

(b) Civil P. C. (1908), Sch. 2, Para. 3 — Award made before date fixed but filed later — Court is competent to receive.

A case was referred to arbitration and the Court fixed a date on which the arbitrators were directed to file their award. This date was extended from time to time and finally the 3rd September was fixed for the filing of the award. The award was actually filed in Court on the 19th September, but it was found that it had been made on the 2nd September.

Held: that the Court was competent to receive the award. [P 15 C 2]

Ram Bharese Lal—for Applicant.

S. M. Haq—for Opposite Parties.

Judgment.—This application in revision is directed against an order of the Subordinate Judge of Hardoi, dated the 20th December last. The order is one upholding an award, upon which the Court passed a decree dismissing the suit of the plaintiff. The plaintiff comes here in revision. One point taken is that the award which the lower Court accepted was void. The argument on this ground is that the award was not made within time. It has unfortunately been the case that the Court below, as so many other Courts in Oudh, did not strictly observe the procedure which is laid down in the Sch. 2, Civil P. C. When a case is referred to arbitration, it is the duty of the Court to appoint a date within which the arbitrators are to make their award. Here a reference to the record shows that no such order was ever made. The only order which was passed was that the award should be filed in Court upon a certain date. This date was extended from time to time and finally an order was passed directing the arbitrators to file their award by the 3rd September. It is an admitted fact that the award was not filed on this date, but was put into Court on 19th September. The award put in on this latter date purported to have been made on the 2nd September, that is, within the period fixed by the Court for the filing of the award. The vacation intervened and on the 31st October notice was given to the counsel of the parties of the award having been filed. Meantime, before the award had been put into Court on the 19th September the Subordinate Judge had passed an order calling the case back from the arbitrators and fixing a date for the disposal of the case. In the course of these proceedings it happened that the 2nd November came to be fixed for the framing of the issues,

this order having been passed after the arbitration proceedings had come to an end. When the case came up on 2nd November 1917, the pleaders for the parties were present and it had then become known that the award had been filed, and one objection raised at that time was that the award was not a good award inasmuch as it had not been made and completed within the time allowed by the Court. This objection was taken by the plaintiff's pleader, the award apparently being in favour of the other party. The Court then passed an order fixing the 13th November for evidence of the parties to show when the award was actually completed. On this date and on later dates evidence was recorded by the Subordinate Judge and he came eventually to the conclusion that the award had been made on the 2nd September.

As regards this finding, it is not liable to be called in question in this application for revision and if the Court has found that the award was made on that date, then it cannot be contended. There only remains the other point which the learned counsel for the applicant has pressed on my attention. After the filing of an award in Court a period of ten days is allowed by law to the parties to put forward objections to the validity of the award (cf. Art. 158 of the Schedule to the Limitation Act). It is quite true that there is nothing on the record to show that any other objection was formally put forward on behalf of the plaintiff regarding the validity of this award other than the one I have just referred to, namely, that the award was not completed within the time limited. It is said however that the parties were misled by the form of the order which was passed by the Subordinate Judge on 2nd November 1917, and it is certainly open to the applicant to argue that from the way in which this order was passed it might have been inferred that the only objection which the Subordinate Judge proposed to investigate in the first instance was the objection that the award had not been completed within time. I have carefully looked through the proceedings and I am inclined to yield to this argument. It seems to me that it would have been better for the Subordinate Judge to have followed the law and not to have ex-

pressed his order in the manner he did. It is possible that the plaintiff may have been misled into thinking that the only objection which they had to support in the first instance was the one regarding the completion of the award within time. I am told that the plaintiff might have challenged the validity of the award on other grounds. In these circumstances I think the proper order to pass is this. I hold that the objection to the validity of the award, based upon the argument that it was not completed within the time, fails and that the award was one which it was competent to the Court to receive. I also am of opinion that the Court below should now give the plaintiff an opportunity of showing cause against the validity of the award on any other grounds which he may have to put forward, and for that purpose it is necessary to set aside the order of the Court below and send the case back to the Subordinate Judge with directions to take up the case again and to give the plaintiff an opportunity of putting forward any other objections he may have to the award. He should call upon the plaintiff to file his objections within ten days from the date of giving his order. I order accordingly and make no order as to costs.

B.V./R.K.

Case remanded.

A. I. R. 1918 Oudh 15

LINDSAY, J. C.

Bhagwati Prasad Singh — Plaintiff—Appellant.

v.

Parmeshwar Dutt and others—Defendants—Respondents.

Second Revn. Appeal No. 21 of 1917, Decided on 11th June 1917, from decree of Dist. Judge, Gonda.

Civil P. C. (1908), S. 11—*Erroneous decision of question of law amounts to res judicata.*

An erroneous decision on a question of law between the parties to a suit may, nevertheless, amount to *res judicata* in a subsequent suit between the same parties.

In a previous suit between the parties it was decided on an issue of law that defendants were liable to pay interest on arrears of rent. In a subsequent suit for arrears of rent and interest the claim for interest was resisted on the ground that the defendants were *thikadars* and were therefore not liable under the provisions of S. 141, Oudh Rent Act, to pay interest on arrears:

Held: that the matter having been in issue in the former suit and having been heard and

finally determined was conclusive in the subsequent suit as to the liability of the defendants to pay interest, even though the earlier decision was a wrong decision in law. [P 16 C 2]

Shahid Hussain—for Appellant.

Ram Chandra—for Respondents.

Judgment.—These two appeals (Nos. 20 and 21 of 1917) can be disposed of by one judgment. They were dealt with in one judgment by the lower appellate Court. The simple question for determination is whether in the circumstances disclosed, the plaintiff-appellant who is the talukdar is entitled to claim interest from the defendant-respondents on arrears of rent. The claim for interest was resisted on the ground that these defendants were thikadars and therefore were not liable under the provisions of S. 141, Oudh Rent Act, to pay interest on arrears. Accordingly the learned Judge held that it was for the plaintiff to show that there was some agreement or contract to pay interest. It was held by the first Court which dealt with the cases that the question of the liability to pay interest was res judicata between the parties. The learned Judge thought that this opinion of the Court of first instance was wrong on the ground that in the present suits the array of parties was not the same. He further thought that the decision of the Assistant Collector in the earlier suits could not be res judicata, because arrears of rent become due every year and any question connected with the payment of interest on such arrears is a recurring question which cannot be settled once and for all by any judgment. This opinion of the learned District Judge is not correct. It is admitted in the first place that the previous litigation to which reference was made by the Assistant Collector was between the same parties. It is also admitted that in the previous litigation it was decided on an issue of law between the parties that the present defendants-respondents were liable to pay interest on arrears of rent. The question must be taken to be res judicata between the parties. In view of the authorities of this Court it cannot be maintained that an erroneous decision on a question of law may not amount to res judicata. I am aware that some of the High Courts in India entertain another opinion; but so far as this Court is concerned, the rule is settled and I need only refer to a

Bench judgment of this Court reported as *Chaudhri Ganga Singh v. Lachmi Narain* (1), in which Mr. Scott quoted with approval a previous decision of a Judge of this Court reported as *Mohammad Bahadur v. Ram Pershad* (2). The matter, having been in issue in the former suit and having been heard and finally determined, is conclusive in the present suits as to the liability of these defendants-respondents to pay interest, although it may be, as argued, that the earlier decision was a wrong decision in law.

The result is that these two appeals must be allowed. I set aside the decree of the Court below and restore the decrees of the Court of first instance. The appellant is entitled to his costs both here and in the lower appellate Court.

B.V./R.K.

Appeal allowed.

1. (1907) 10 O C 145.

2. (1905) 8 O C 37.

A. I. R 1918 Oudh 16

KANHAIYA LAL, A. J. C.

Lalta Bakhsh Singh—Plaintiff—Appellant.

v.

Ganga Bakhsh Singh and others—Defendants—Respondents.

First Appeals Nos. 121 and 124 of 1916, Decided on 19th June 1917, against decree of Sub-Judge, Sitapur, D/- 7th July 1916.

Pre-emption — Decree — Payment of purchase-money is not condition precedent to right to appeal.

The payment of the purchase-money adjudged by the trial Court in a suit for pre-emption is not a condition precedent to the right of a person to file an appeal from the decree by which that payment is directed if he disputes either the amount payable or the method of its payment; 13 All. 376 (F. B.) and 16 All. 126, *Foll.* [P 17 C 2]

Chhail Behari Lal and Gopal Sahai—for Appellant.

Basudeo Lal and Ishri Prasad—for Respondents.

Judgment.—These appeals arise out of rival suits for pre-emption, brought in respect of a sale effected by Himanchal Singh in favour of Ganga Bakhsh Singh on 17th June 1914. The sale comprised a 10 biswas share of the village Bhagwanpur. It purported to have been effected in lieu of Rs. 11,500, out of which Rs. 2,078-11-0 were left for payment to Lalta Bakhsh Singh, a prior mortgagee. The rival pre-emptors were

Durga Bakhsh Singh and Lalta Bakhsh Singh, both of whom are the sons of Sheo Darshan Singh. The defence was that the vendee was also a cosharer in the village and that none of the rival pre-emptors had any preferential right of purchase. The learned Subordinate Judge found that the vendee was not a cosharer in the village, and that the rights of Durga Bakhsh Singh and Lalta Bakhsh Singh were equal. He therefore directed lots to be cast with the result that Durga Bakhsh Singh succeeded and was given the first chance to pre-empt the property and in case of his failure to deposit the pre-emption money, Lalta Bakhsh Singh was given the second chance. The price actually found to be payable to the vendee was Rs. 8,810-11-0 and that was taken by the Court below to represent the existing market value of the property comprised in the sale-deed.

The only point urged on behalf of the rival pre-emptors in these appeals is that the vendee had not paid the money left with him for payment to Lalta Bakhsh Singh on account of his prior mortgage and that that money ought therefore to have been excluded from the amount directed to be paid to the vendee. To these appeals the learned counsel who appears for the defendant-vendee, urges two objections. In the first place he contends that separate appeals ought to have been filed by each of the rival pre-emptors from the decree in the suit in which he was a plaintiff and from the decree in the suit in which he was a defendant. In the second place, he urges that the rival pre-emptors having failed to pay the purchase-money within the time fixed by the decree passed by the Court below, their suits stand dismissed by the force of those decrees and no appeal is therefore maintainable. None of these contentions is however entitled to any force. Each rival pre-emptor was granted a relief in his own suit. In the suit in which he was a defendant no relief was granted to him and the relief which was granted against him was not concerned with the amount of the purchase-money or the method of its payment which forms the subject-matter of these appeals. It was not necessary therefore that he should have filed an appeal from the decree in the suit in which he was a defendant.

This payment of the purchase-money adjudged by the Court below is not a condition precedent to the right of a person to file an appeal from a decree by which that payment is directed if he disputes either the amount payable or the method of its payment. In *Kodai Singh v. Jaisri Singh* (1) it was accordingly held that the plaintiff who had obtained a decree in his favour for pre-emption subject to the payment of a fixed sum within a specified period could appeal from that decree after the period prescribed therein had elapsed without his paying in the pre-emptive price fixed thereby, both as to the correctness of the pre-emptive price and as to the reasonableness of the time allowed for payment. In *Wazir Khan v. Kale Khan* (2), it was similarly held that a person who had obtained a decree conditioned on payment by him of the pre-emptive price within a certain fixed period could after the expiration of that period appeal against such decree on the ground that a condition of the contract out of which his right to pre-empt arose had not been embodied in the decree. The appeals filed by the rival pre-emptors are therefore maintainable.

On the merits, learned counsel for the defendant-vendee has no objection to offer. He has however filed a cross objection in each appeal in which he has re-asserted the right of his client as a cosharer of the village to retain the property. It appears that the village belonged to two brothers, named Tilak Singh and Kirat Singh. Both jointly mortgaged the village with Mt. Akbari Begam sometime in 1871. Mt. Akbari Begam sold her mortgagee's rights to Sheo Darshan Singh, the father of the rival pre-emptors, in 1882. Kirat Singh subsequently sold his 10 biswas share in the village to Himanchal Singh from whom Ganga Bakhsh Singh the defendant-vendee purchased the same, that sale being the subject of the present suits for pre-emption. Tilak Singh the owner of the other half share of the village, mortgaged that share with Sheo Darshan Singh in 1891. The contention of the defendant-vendee is that that mortgage was really a sale, but there is no evidence in support of that state-

(1) [1891] 13 All 376 (F B).

(2) [1894] 16 All 126.

ment. The mortgage was redeemable after eight years but the mortgage-money was only Rs. 1,500 and though Rs. 600 out of it carried interest at 2 per cent per mensem there is nothing to indicate that the mortgage-money would have exceeded the value of the mortgaged property. In 1899 Raghunandan Singh, son of Tilak Singh, sold the said 10 biswas share to Lalta Bakhsh Singh for Rs. 4,000, but, if the property sold had been insufficient to cover the amount of the mortgage-money charged on it, it is hardly likely that Lalta Bakhsh Singh would have agreed to purchase it and to pay something in cash to the vendor into the bargain.

The defendant-vendee next relies on an award of arbitration dated 20th December 1896, to which he and Sheo Darshan Singh, the father of the rival pre-emptors were parties. In that award, he and Sheo Darshan Singh were described as purchasers of an eight anna share in the village and as mortgagors of the remaining eight annas. The former was however obviously a misdescription for neither the defendant-vendee nor Sheo Darshan Singh had purchased any share till then in the village. Sheo Darshan Singh had purchased the mortgagee rights of Mt. Akbari Begam in 1882 and had also taken a mortgage from Tilak Singh in 1891, and it is possible that the misdescription may have been due to a confusion of the facts. The award, which contained the above misdescription, was made on a reference made by Ganga Bakhsh Singh and Sheo Darshan Singh. The present plaintiffs derived their title from the sale effected by Raghunandan Singh in favour of Lalta Bakhsh Singh in which both the plaintiffs were jointly interested. They are not therefore bound by any misdescription contained in the award to which they were no parties. The misdescription was moreover common to the share which was allotted by the award to Ganga Bakhsh Singh as well as to Sheo Darshan Singh so that no plea of estoppel can be founded on it. The other points raised in the cross-objections are not pressed.

The appeals of Durga Bakhsh Singh and Lalta Bakhsh Singh are therefore allowed in so far that out of a sum of Rs. 8,810-11-0 adjudged by the Court below, Rs. 2,078-11-0 will be retained by the successful pre-emptor for pay-

ment to Lalta Bakhsh Singh on account of his prior mortgage. The time for payment will be extended so far as Duaga Bakhsh Singh is concerned up to 19th August 1917 and in case of his failure Lalta Bakhsh Singh will be given one month's further time, expiring on 19th September 1917. In case of default of payment by either, the defendant-vendee shall get his costs from the defaulting plaintiff in all the Courts. In case of payment, the successful pre-emptor who pays the money, will be entitled to get his costs from the defendant-vendee and the other pre-emptor will bear his own costs throughout. The cross-objection in each case is disallowed with costs.

B.V./R.K.

*Appeal allowed.***A. I. R. 1918 Oudh 18**

LINDSAY, J. C.

Ram Rup Singh — Plaintiff — Appellant.

v.

Debi Pershad Singh and others — Defendants — Respondents.

Second Appeals Nos. 361 and 362 of 1917, Decided on 30th April 1918, from decrees of Dist. Judge, Fyzabad, D/- 28th May 1917.

Landlord and Tenant—Underproprietor—Entries in revenue papers are not conclusive when other evidence contradicts.

Where a person is entered in the revenue papers as an under-proprietor, but it appears from other evidence that he does not hold such a status, the entry in the revenue papers is of no avail to him for the purpose of establishing his title as an under-proprietor. [P 21 C 1]

A. P. Sen—for Appellant.*Harkaran Nath Misra* — for Respondents.

Judgment.—These two appeals have arisen out of a suit for declaration brought by the plaintiff appellant, Ram Rup Singh. The suit related to a number of plots of land situated in the village of Mathani, the area of which is 18 bighas odd. The case for the plaintiff, as set out in his plaint, was that he is the owner of the lands in question. The suit was brought in consequence of a case instituted by the defendants against the plaintiff in a revenue Court. In these proceedings the defendants succeeded in getting an order from the revenue Court for resumption of the lands in suit on the ground that they were held as muafi. The revenue Court assessed rent upon

the lands and made it payable to the present defendants.

The defendants denied that the plaintiff was the proprietor of the area in question and a number of technical pleas were raised by way of defence. The first Court held that the plaintiff had failed to show that he had any proprietary title to the lands. The Subordinate Judge however was of opinion that the plaintiff had proved himself to be an under-proprietor and he gave him a declaration accordingly. Both parties appealed to the District Judge, the plaintiff contending that he ought to have been declared the proprietor of the lands in question. On the other hand the defendants maintained that the first Court was wrong in holding that the plaintiff was an under-proprietor. The result was that the District Judge dismissed the appeal of the plaintiff and allowed the appeal of the defendants, so that the plaintiff's suit was dismissed entirely. He now has brought these two appeals against the decrees of the learned District Judge and as they both deal with the same matter, so they may be disposed of together. I may say at once that after hearing counsel in the case, I am satisfied that both appeals must fail. The whole case of the plaintiff rests upon certain proceedings which were taken in a Settlement Court in the year 1873. At the time one Sarnet Singh who was the plaintiff's grandfather was alive. It is admitted that Sarnet Singh had shares in a number of villages including this village of Mathani. Ex. 3 is a copy of the application which was made by the plaintiff Ram Rup Singh to the Settlement Court, in which he stated the nature of his claim. He said in that application or plaint that he was entitled to an area of 22 bighas 11 biswas on the basis of zamindari rights and also on the basis of an occupancy right by which he held the lands free of rent.

He stated that the lands were recorded in his name in the settlement papers and he wanted a declaration of his right from the Settlement Officer. It is proved that the dispute between the plaintiff and his grandfather was disposed of by a compromise. A sulahnama was put in, in which it was stated that Sarnet Singh had given the lands in dispute to the plaintiff: the plaintiff informed the Court that he had received full satisfac-

tion of his claim. As a result of this compromise, the Court passed an order consigning the case to records. No formal decree was drawn up nor was any definite declaration of Ram Rup's right given by the Settlement Officer. In short he seems to have treated the case as if the plaintiff had withdrawn it. It is to be observed that the Subordinate Judge who dealt with the present case had the record of the settlement litigation before him. It is apparent from the notes made by the Subordinate Judge that the Settlement Officer who was dealing with Ram Rup Singh's claim in the year 1873 mentioned in the record that the nature of the claim which Ram Rup Singh was making was not very clear. We find that in the year 1876 the share of Sarnet Singh in this village of Mathani was brought to sale in execution of a decree and was purchased by the predecessors-in-interest of the present defendants. Previous to this sale a statement was drawn up and sent for sanction to the Chief Commissioner. Ex. 4 is a copy of this sale statement, and in it we have particulars of the share of Sarnet Singh which was being offered for sale. It is described as comprising 74 bighas odd of cultivated land. Out of this area 53 bighas odd were said to be in the cultivation of tenants and to yield an annual rent of Rs. 130 odd. It was further stated that the rest of the cultivated area, that is to say 22 bighas odd, was held rent-free by Ram Rup Singh under the decree of the settlement Court.

It may also be mentioned that in the year 1882 this village was divided by partition, and it is proved by Exhibit A-12 that while partition was going on, the plaintiff Ram Rup Singh applied to the Court, saying that he was in possession of 22 bighas odd of *sir* which he held rent-free as "zamindari maurasi." He asked the Court to arrange that his possession over these lands should not be disturbed in the course of the partition proceedings.

From the documentary evidence on record it is established that for a long series of years Ram Rup Singh has been recorded as an under-proprietor of the lands now in dispute, and it further seems that in the revenue Court from time to time Ram Rup Singh has been treated as a person holding a privileged tenure by reason of the order of the settlement

Court which was passed in the year 1873. The learned District Judge was of opinion that the plaintiff could not claim to be proprietor of these lands on the strength of the sulahnama, because this deed was not registered and was not embodied in any decree made by the settlement Court. He further held that as the plaintiff set up the case that he was the full proprietor of these lands the Court of first instance ought not to have given him a declaration that he was an under-proprietor. Further the learned District Judge was of opinion that the Court of first instance was wrong in holding that Ram Rup Singh had acquired an under-proprietary title in these lands by more than 12 years' adverse possession. It is argued here that the District Judge was wrong in saying that the sulahnama did not operate to confer a proprietary title. It is argued that on the terms of this document it should be held that a proprietary right was granted to the plaintiff. It is further argued that although there was no formal order or decree of the settlement Court, nevertheless it should be held that the order passed by the settlement officer amounted to a recognition and declaration of Ram Rup Singh's right as a proprietor. In any case it is urged that the District Judge should have allowed the declaration of the first Court to stand, if it was shown that the plaintiff had made out a case of under-proprietary right.

It is not necessary for me to discuss the technical points which were raised in the judgment of the Court below. The learned counsel for the respondents has argued the case on the merits and his position is that even if full effect be allowed to the language of the sulahnama, no case either of proprietary or under-proprietary right is made out. It seems to me that this contention must be upheld. In the first place, we have the oral evidence of Ram Rup Singh who was examined as a witness on his own behalf. His story is certainly a very confusing one, and it is very difficult to understand in what way he is trying to make out that he is the proprietor of the lands in dispute. He says that he got these lands in a partition effected between himself and his grandfather Sarnet Singh. He was unable to explain how if a partition was made he failed to get any share of the property which was

held in 28 other villages. Again it is not at all easy to understand in what way this partition was made. At one place Ram Rup Singh says that his father was dead at the time the partition was made and that his father had separated from Sarnet Singh before his death. At another place he says that his father died some seven or eight years after the partition took place. He admits that his father's name was never entered in the khewat, and he also says that even after the partition Sarnet Singh used to make all the collections till the time of his death. It is also significant that the plaintiff admits that there was no entry in his favour in the khewat up till the time of Sarnet Singh's death. Altogether this story of the partition is a peculiar one and it is by no means established that the proprietary title which the plaintiff is now asserting regarding these lands was derived by any partition between himself and his grandfather.

One statement made by the plaintiff seems to me to be conclusive against his assertion that he is the proprietor of the lands now in question. He states distinctly that he has never at any time paid Government revenue for these lands or paid any rent to the defendants who now represent Sarnet Singh. It is impossible to suppose that if the plaintiff was the owner of these lands he could have escaped the liability of paying the Government revenue for them. It is equally difficult to conceive how he can be an under-proprietor if he has never paid any under-proprietary rent. Further, the claim for proprietary rights seems to be unmaintainable in view of the admitted fact that when the village was being partitioned in the year 1882, the plaintiff never put forward his proprietary title, so as to have his share in the village divided off. On the contrary after a perusal of all the documents in the case the proper conclusion seems to be that in some way or other the plaintiff in the year 1873 got a grant of a rent-free tenure from his grandfather Sarnet Singh. More than this is not established and I am satisfied that the evidence falls far short of showing that the plaintiff has acquired any under-proprietary title.

On the contrary all the entries seem to me to be consistent with the view that the plaintiff was merely the holder of a rent-free tenure. He certainly was

treated on no other footing when the share of Sarnet Singh was sold by public auction in the year 1876; and in spite of the entries in the revenue papers which are in his favour, I think it has been properly contended that his status is not that of an under-proprietor. In the year 1884, when the predecessor-in-interest of the defendants tried to recover arrears of rent from Ram Rup Singh, the claim was dismissed in appeal by the Deputy Commissioner on the ground that Ram Rup Singh was the holder of a rent-free tenure (compare Ex. 31) and the status of the plaintiff has, I think, been correctly described in the order of the Deputy Commissioner of Fyzabad, dated 17th June 1914. This order, I may state, was restored in appeal by order of the Board of Revenue. The Deputy Commissioner points out in his order that there is no judicial decision according to which the land now in question could be deemed to be held in the under-proprietary right. In my opinion the Deputy Commissioner was right in holding that Ram Rup Singh could show at most that he was the holder of a rent-free tenure. In these circumstances I am satisfied that on the merits of his case, apart from all technicalities, the plaintiff was not entitled to a declaration that he is either the proprietor or the under-proprietor of the disputed land. The result is that both appeals fail and are dismissed with costs.

D.V./R.K.

*Appeals dismissed.***A. I. R. 1918 Oudh 21**

LINDSAY, J. C.

Brij Mohan Dayal and others—Plaintiffs—Applicants.

v.

Sarup Narain and others—Defendants—Opposite Party.

Section 115, Appln. No. 128 of 1917
Decided on 13th August 1927, against order of Sub.Judge, Sitapur, D/- 31st January 1917.

Civil P. C. (1908), O. 32, R. 14—Death of next friend of minor—Order making next friend liable for costs is without jurisdiction.

A Court has no jurisdiction to pass an order making the estate of the next friend of a minor plaintiff liable for costs where at the date of the order the next friend by his death has ceased to be a party to the suit. [P 22 C 2]

*Zahur Ahmad and Mahesh Prasad—*for Applicants.

*Haider Husain and Syed Shahanshah Husain—*for Opposite Party.

Judgment.—This is an application for revision of an order passed by the Subordinate Judge of Sitapur, in a suit which was brought by a minor plaintiff against the defendants, opposite party, Sarup Narain and others. It appears that the suit was brought for the minor by his next friend, Rai Din Dayal, and was instituted in August 1915. The case came up for hearing in the month of November last, the first date being the 22nd of that month. Some evidence was taken on that date and the case was adjourned to the following day for the taking of further evidence. On 23rd November a petition was put in before the Subordinate Judge representing that the infant's next friend, Rai Din Dayal, had been attacked with paralysis and was unable to attend the Court. An application was therefore made to the Court to adjourn the hearing for at least a month. The Subordinate Judge appears to have been unwilling to allow an adjournment; it is stated in his proceedings that as there was a large number of counsel engaged, he did not think that the application for adjournment was well founded. One of these gentlemen on being pressed to continue the case informed the Court that he had no instructions and could get no instructions, as the next friend was not in a condition to speak. He therefore withdrew from the case. The result of this was that taking action under O. 32, R. 9, Civil P. C., the Court directed the removal of Rai Din Dayal as the infant's next friend and made an order for costs of the day to be paid by the plaintiff. It may be noted here that the Subordinate Judge made no order regarding the costs of the case such as is contemplated by O. 32, R. 9, sub-R. (1).

The case came up again on 18th December and on that date one of the defendants made an application to the Court calling upon the Court to appoint a next friend for the infant. The next friend suggested was Babu Brij Mohan Dayal, who is the son of Rai Din Dayal. This gentleman was himself engaged as a pleader in the case. It was represented on behalf of the other defendants that they would have no objection to

Babu Brij Mohan Dayal being appointed as the minor's next friend. The learned Judge accordingly made an order which purports to have been made under O. 32, R. 10. Later on it appears that Babu Brij Mohan Dayal made certain representations to the Court, indicating that he was not willing to undertake at that time the duties of a next friend inasmuch as he was busily engaged in work connected with the administration of his deceased father's estate. An adjournment was given on a representation made by Babu Brij Mohan Dayal and for the purpose of seeing whether he could induce some other of his relatives to act as the infant's next friend. Finally the case came up on 31st January 1917. It appears from the Subordinate Judge's order that no steps had been taken to procure a next friend who could be substituted for Babu Brij Mohan Dayal. The Subordinate Judge then expressed the opinion that the plaintiff's relatives were not eager to prosecute the case and were in fact throwing obstacles in the way of its prosecution. The result was that he passed an order dismissing the plaintiff's suit and awarded the defendant's costs, which from the decree appear to amount to over Rs. 900. With regard to these costs the order which the Subordinate Judge passed was that they should be realized out of the estate of the deceased Rai Din Dayal. Rai Din Dayal, I may mention here, died on 5th December 1916.

It is this portion of the order of the Subordinate Judge which is attacked here in revision and, shortly put, the ground taken is that the Subordinate Judge had no jurisdiction to pass any order directing that these costs should be realized out of Rai Din Dayal's estate. A good deal of argument has been addressed to me by both sides, but I think it is sufficient for me to dispose of the case on one short ground. At the time when this order was passed Rai Din Dayal had died and cannot therefore in any sense be deemed to have been a party to the suit as it stood on 31st January 1917. On that date the next friend of the plaintiff was not Rai Din Dayal, but Babu Brij Mohan Dayal. It may be, as has been argued by the learned counsel for the opposite party, that in a suit which is brought by a minor and in which the proceedings are

carried on for him by a next friend, the Court has jurisdiction in awarding costs to direct that the costs shall be paid either by the minor or by the next friend. It is I think quite correct to say that in certain special cases the Courts do order the next friend to pay costs where the suit is dismissed but this argument does not, I think, help the case of the opposite party, for from the facts that I have just stated it will be apparent that the next friend on the date when the suit was dismissed was Babu Brij Mohan Dayal and there is no order on the record directing him to pay the costs of this suit. It seems to me clear in every way that the order of the Subordinate Judge directing the costs to be recovered out of Rai Din Dayal's estate is an order without jurisdiction. Rai Din Dayal was no party as I have said, nor was his estate in any way before the Court so as to justify the passing of an order directing the costs to be realized out of it. Obviously there are a number of persons who are interested in the estate of Rai Din Dayal. This fact is admitted, and it certainly cannot be considered a proper order to direct the estate to furnish the costs of this litigation when the various parties who are now interested in the estate and who were interested in it on the date in question were not represented before the Court. The application therefore must be allowed and my order is that the order of the Court below directing the costs to be realized out of the estate of Rai Din Dayal be set aside. The applicants are entitled to their costs in this Court.

B.V./R.K.

Appeal allowed.

A. I. R. 1918 Oudh 22

LINDSAY, J. C. AND KANHAIYA
LAL, A. J. C.

Ganga Prasad and others—Defendants
—Appellants.

v.

Ram Samujh and others—Plaintiffs
and Defendants—Respondents.

Second Appeal No. 175 of 1917, Decided on 29th August 1917, against decree of Dist. Judge, Gonda, D/- 4th April 1917.

Transfer of Property Act (1882), S. 59—Mortgage discovered void and unenforceable

under S. 59—Money decree can be passed—Contract Act (1872), S. 65.

Where in a mortgage suit it is discovered that the mortgage deed is void and unenforceable for want of due attestation in the manner required by S. 59, T. P. Act, the provisions of S. 65, Contract Act, apply and the mortgagee is entitled to a money decree for the amount advanced by him. [P 24 C 2]

Gokaran Nath Misra—for Appellants.

Ram Chandra—for Respondents.

Lindsay, J. C.—This appeal was referred by me to a Bench for decision by my order dated 13th July 1917, and the facts which it is necessary to consider are set out in my order. The reference was made by reason of the learned Judge of the Court below having relied upon a judgment of their Lordships of the Privy Council reported as *Ram Narayan Singh v. Adhinda Nath* (1). It was because I had some difficulty in understanding the purport of this judgment that I caused this reference to be made. I may briefly re-state the facts here. On 22nd April 1889 one Mahabir Misra mortgaged certain property to Sheoratan Dubey to secure a loan of Rs. 1,000. The mortgage was with possession. The suit out of which this appeal has arisen was brought by Gokaran, the brother of the mortgagor, who died some years before the suit was brought. According to the case set out in the plaint the mortgagee, and after him his brother, the present plaintiff, had remained in possession of the mortgaged property up to the month of May 1916, when the defendants wrongfully took possession. These defendants are the heirs and legal representatives of the mortgagor Mahabir. One plea which was taken by the defendants was to the effect that neither the plaintiff nor his brother before him had been in possession of this property. On this part of the case the learned Judge has found as a matter of fact that the plaintiff Gokaran was unlawfully dispossessed in or about the month of June 1916. It is further to be observed that according to the terms of the document of mortgage which was put in suit, the mortgagor undertook to keep the mortgagee in possession up till the end of the year 1326 P. The stipulation in the deed was that the mortgagor was not to be entitled to redeem the property before the end of that year.

This period of the mortgage had not expired at the time when the plaintiff was put out of possession. The whole difficulty in the case arises out of the fact that the document of mortgage upon which the plaintiffs rely was not proved to have been attested in the manner required by law (S. 59, T. P. Act). Consequently in accordance with the ruling of their Lordships of the Privy Council laid down in *Shama Patter v. Abdul Kadir Rowshan* (2) the transaction between the parties cannot be treated as a valid mortgage transaction. The learned Judge of the Court below was not unmindful of this point, but relying upon another judgment of their Lordships reported as *Ram Narayan Singh v. Adhinda Nath* (1), he came to the conclusion that he was justified in awarding the plaintiff the mortgage money, namely, Rs. 1,000, under the provisions of S. 68, T. P. Act. As I have said in my order referring this case to the Bench, it is not easy to understand how the provisions of S. 68 can be applied in a case where the relation of mortgagor and mortgagee is not proved to exist, and yet it must be admitted that there are passages in the judgment of their Lordships just referred to which would go to show that S. 68 can be resorted to in a case like this for the purpose of decreeing the mortgage money. It may be observed however that the point was not finally decided by their Lordships, for the case which was before them was sent back to the Subordinate Judge for further trial.

The plaintiffs in the case before their Lordships had set out certain allegations in paras. 6 and 7 of their plaint upon the strength of which it was contended that relief could be awarded to them under S. 68, T. P. Act, and it was for the purpose of giving the plaintiffs an opportunity of establishing those allegations that the suit was remanded for trial to the Subordinate Judge. Apart however from the language of S. 68, I have come to the conclusion after long consideration that the decree of the Court below ought not to be disturbed. I think it was competent to the learned District Judge to give the plaintiff a decree for the money which was proved to have been advanced at the time this con-

1. A I R 1916 P C 119=44 Cal 338=38 I C 932=44 I A 87 (P C).

2. (1912) 35 Mad 607=16 I C 250=39 I A 218 (P C).

tract was entered into. S. 65, Contract Act, lays down that when an agreement is discovered to be void, or when a contract becomes void any person who has received any advantage under such agreement or contract is bound to restore it or to make compensation for it to the person from whom he received it. Here we have a document purporting to be a mortgage-deed, which on the face of it appears to be regular. According to the law as it was understood in these provinces at the time when this agreement was entered into, the document, now before us, would have been treated as a valid document. It is owing to the exposition of the law set out in the judgment of their Lordships reported as *Shamu Patter v. Abdul Kadir Rowethan* (2), that it is now discovered that the document is void and that it cannot be enforced as a mortgage.

In these circumstances it seems to me that we ought to hold that the terms of S. 65 apply, and although the discovery that the agreement is a void agreement has only been made during the course of the trial in the first Court, that fact ought not, in my opinion, to lead us to withhold any relief to which we think the plaintiff entitled. It would I think be quite improper to lay down that the discovery of the invalidity of the document not having been made till after the suit had been filed, the only course was to refer the plaintiff to another suit. We can I think, give the plaintiff relief to which he is entitled in this suit, and for that reason I consider that the money-decree which the Judge of the lower appellate Court has awarded ought to be sustained. My interpretation of the meaning and scope of S. 65, Contract Act, is supported by a judgment of the Madras High Court to be found in *Krishnan v. Sankara* (3). In that case referring to the grant of a lease of certain rights, which it was pleaded was illegal, their Lordships observed at p. 444 of the report as follows:

"The agreement in regard to the transfer of urayama right on a lease of 96 years prescribed only a special mode of satisfying that obligation (i. e. obligation to repay the money), and if that agreement could not take effect because of its being tainted with illegality, their obligation to repay cannot on that ground be taken to be satisfied. According to the rule laid down by Lord Cairns in *Elkington's case* (4) and in *Brid-*

ger's case (5), an agreement that an obligation which is contracted shall be discharged in some particular mode is collateral to the primary contract which created the obligation, though the two agreements may be mixed up in one contract. Assuming that S. 65, Contract Act, is not intended to vary the rule that a mistake of law is no ground on which a party can be relieved from his own contract, we are still of opinion that the respondent is entitled to recover back the amount advanced, on the ground that the collateral agreement which provided for its repayment failed."

Similarly here if the collateral agreement by which the creditor in this case was to hold possession of the property by way of security for the repayment of the loan has failed by reason of the defect in the attestation of the deed, the plaintiff is nevertheless entitled under the terms of S. 65, Contract Act, to recover the sum which was advanced to the predecessors-in-interest of the present defendants. On this ground therefore it appears to me that the decree of the learned District Judge can be sustained and I would dismiss this appeal accordingly with costs. It is to be noted that execution of this money decree can only be had against the assets left by the deceased mortgagor.

Kanhaiya Lal, A. J. C.—I agree.

B.V./R.K. *Appeal dismissed.*

5. (1870) 9 Eq. 75.

A. I. R. 1918 Oudh 24

LINDSAY, J. C.

Jagdat—Defendant—Applicant.

v.

Jagmohan—Plaintiff—Opposite Party.

Civil Revn. Appln. No. 51 of 1918, Decided on 2nd May 1918, from decree of Addl. Munsif, Fyzabad, D/- 31st January 1918.

Provl. Small Cause Court Act (1887), Sch. 2, Art. 35 (i)—Claim for damages to wall by diversion of water course by defendant is not within Cl. 35 (i).

A claim for damages caused to the wall of the plaintiff by the defendant's diversion of his own water course is not a suit falling within the scope of Art. 35, Cl. (i). [P 25 C 1]

P. N. Rozdon—for Applicant.

Judgment.—I have heard counsel in support of this application and I have also examined the record. In the first place, the record does not show that the Court declined to examine any witnesses of the defendants who were present in the Court. On the contrary, the note on the record is that after examining one witness the defendant closed his case. As for the argument that the

3. (1886) 9 Mad 441.

4. (1867) 2 Ch. 511=36 L J Ch 593.

suit was not triable in a Court of Small Causes, I accept the ruling which was followed in the Court below and which is reported as *In re Hausambhai Abdula-bhai* (1). I agree that a claim for damages caused to the wall of the plaintiff by defendant's diversion of his own watercourse is not a suit falling within Art. 35, Cl. (i) of the Schedule to the Small Cause Courts Act (9 of 1887). The application for revision is dismissed.

B.V./R.K. Application dismissed.

1. (1906) 20 Bom 233.

A. I. R. 1918 Oudh 25

LINDSAY, J. C.

Bhairon Bakhsh Singh and another—
Plaintiffs—Appellants.

v.

Mt. Raghubansa Kunwar and others—
Defendants—Respondents.

Second Appeal No 131 of 1917, Decided on 8th November 1917, from decree of Dist. Judge, Rae Bareilly, D/-12th January 1917.

(a) Civil P. C. (1908), S. 11—Redemption—Suit for, by one co-mortgagors—Others impleaded as defendants—Decree directing payment by plaintiff but not providing for redemption by defendant co-mortgagors—Plaintiff failing to redeem—Suit by other co-mortgagors for redemption is not barred.

A decree was passed in a suit for redemption by one of several co-mortgagors, in which the other co-mortgagors were impleaded as defendants. The decree directed that if the plaintiff failed to pay the money within a period of six months the decree would become a nullity. It did not provide for redemption by the defendants co-mortgagors in case the plaintiff made default. The plaintiff failed to comply with the order of the Court, and subsequently some of the other co-mortgagors brought a suit for redemption.

Held: that the suit was not barred by the rule of res judicata inasmuch as the plaintiffs in the subsequent suit were not claiming under the plaintiff in the previous suit. [P 27 C 2]

(b) Court-fees Act (1870), S. 7 (9)—Redemption of share—Co-mortgagor entitled to redeem share—Court-fee is calculated on amount of mortgage debt chargeable on share.

Where a co-mortgagor who is entitled to redeem a share of the mortgaged property sues for redemption, the court-fee payable is to be calculated on the amount of the mortgage debt which is chargeable on the share which the plaintiff is entitled to redeem. [P 27 C 2]

*Bisheshwar Nath Srivastava and Rajeshwari Prasad—*for Appellant.

*Gokaran Nath Misra and Shahabuddin Ahmad—*for Respondents.

Judgment.—The principal question for decision in this second appeal is

whether the suit for redemption brought by the plaintiffs-appellants was barred by the rule of res judicata. A minor question relates to the court-fee which was payable on the plaint. As regards the first point both the Courts below have held that the suit was barred. After hearing the arguments in the case I have come to the conclusion that this decision is erroneous and that the suit is maintainable. In order to understand the matter in dispute it is necessary to set out the following facts. In the village of Pindaria there are three pattis called respectively Patti Sheo Ghulam Singh, Patti Gur Bakhsh Singh and Patti Kali Din. Each of these pattis represents a 5 annas 4 pies share in the whole mauza. In the year 1866 two of these pattis, namely, Sheo Ghulam Singh and Gur Bakhsh Singh, were mortgaged with possession to one Kali Din Shukal to secure a debt of Rs. 2,066. Later on, that is to say, in the year 1868, a deed of further charge was executed by the owners of a one-half share in Patti Gur Bakhsh. On 7th December 1896 a suit for redemption was filed by one Sitla Bakhsh, the son of Sheo Din Singh, who was one of the owners of Patti Sheo Ghulam Singh. In this suit the representatives of the co-mortgagors who had executed the deed of 1866 were impleaded as defendants. The case was tried out and a decree was given declaring that Sitla Bakhsh, the plaintiff, could have redemption of the entire property mortgaged under the deed of 1866 on payment of a certain sum. The Court gave a direction that if the money were not paid within a period of six months the decree was to become a nullity. It appears that Sitla Bakhsh never complied with the order of the Court. He made several applications for extension of time and eventually the last application for this purpose was refused. It is an admitted fact that at some time subsequent to this last order of the Subordinate Judge the mortgagee allowed redemption of a 2 annas 8 pies share out of the 5 annas 4 pies share in Patti Gur Bakhsh. This redemption was allowed on payment of a proportionate amount of the mortgage debt. The consequence is that at the time the present suit was brought a 2 annas 8 pies share of Patti Gur Bakhsh and the whole 5 annas 4 pies share of Patti Sheo

Ghulam were still unredeemed. In this suit the plaintiffs together with defendants 8 and 17 represent this 2 annas 8 pies share of Patti Gur Bakhsh. Defendants 18 and 19 are the proprietors of the 5 annas 4 pies share of Patti Sheo Ghulam. Defendants 1 and 7 represent the original mortgagee. The suit as brought was for redemption of the whole 8 annas share, that is to say, 2 annas 8 pies of Patti Gur Bakhsh and 5 annas 4 pies share of Patti Sheo Ghulam.

The mortgagees resisted the claim on various grounds, the most important plea taken being that the suit was barred by the rule of *res judicata*. This plea was founded upon the facts which I have stated already in connexion with the suit brought by Sitla Bakhsh Singh in the year 1896. The case for the mortgagee defendants was that as Sitla Bakhsh had been given a decree for redemption and that as he had failed to avail himself of it, no second suit for redemption could be maintained.

Another plea taken was that even if the plaintiffs were entitled to sue, they could only ask for redemption of a 2 annas 8 pies share in Patti Gur Bakhsh Singh. As I have mentioned, both the Courts below held that as the result of the suit which was brought in the year 1896 the present suit for redemption was barred. In coming to this decision both the Courts relied upon a decision of a single Judge of the Allahabad High Court reported as *Nathe v. Khachera* (1). It seems to me that notwithstanding this ruling upon which the Courts below have relied, the plaintiffs were entitled to maintain the suit. The rule of *res judicata* can only be applied as between the parties to the previous suit or their representatives in interest; and from what is disclosed in the present case it appears to me to be impossible to hold that the present plaintiffs (together with defendants 8 and 17), who are the owners of a 2 annas 8 pies share in Patti Gur Bakhsh Singh are the representatives of Sitla Bakhsh Singh who brought the previous suit for redemption in the year 1896. To begin with Sitla Bakhsh Singh in that suit was the representative of only one of the co-mortgagors. The present plaintiffs with defendants 8 to 17 are the representatives of other co-mortgagors of the

Patti of Gur Bakhsh Singh; and it cannot therefore be said that these plaintiffs and defendants are in any way claiming title under Sitla Bakhsh Singh or his predecessor-in-interest. On the other hand, it is quite clear to me that they are claiming under an independent title. It has been argued that there is certain evidence on the record to indicate that in this earlier suit Sitla Bakhsh was really representing the other co-mortgagors as well; but I do not think this point has been established. There are no doubt statements of certain witnesses who say that the mortgagor defendants in the suit which was brought by Sitla Bakhsh were helping Sitla Bakhsh with funds in the prosecution of the suit. This is possibly true, but I should not be able to infer therefrom that Sitla Bakhsh was the representative of the other co-mortgagors in the sense in which the expression is used in connexion with the rule of *res judicata*. It is further to be observed that in this suit of 1896 the co-mortgagors put forward in their written statement of defence certain objections to the right of Sitla Bakhsh to bring this suit for redemption. It was only by way of alternative that they pleaded that if their objections were overruled, then they would not oppose a decree for redemption being given in favour of Sitla Bakhsh in respect of the entire ten annas eight pies. I may further observe in this connexion that these co-mortgagors who were impleaded as defendants in the suit in 1896 applied to the Court to be made plaintiffs.

The Subordinate Judge who was dealing with the case refused this application, stating in his order that there was no need to make these persons plaintiffs, for if a decree were passed in favour of that plaintiff, Sitla Bakhsh, then the defendants co-mortgagors would be in a position to obtain redemption from him. I may also mention in connexion with this earlier litigation that there was no decision of the Court regarding the right of the co-mortgagors to redeem. In the decree which was passed upon the judgment no provision was made for allowing the co-mortgagors to redeem in case the plaintiff Sitla Bakhsh should make default. The judgment and decree are altogether silent regarding any right of redemption on the part of the co-mort-

gagors who were joined as defendants; and this being so, it is impossible to hold that there was any decision by the Subordinate Judge regarding the rights of these co-mortgagors to redeem. If no decision on this question was given in the earlier suit and if no opportunity was afforded to the co-mortgagors to the decree to redeem in case of Sitla Bakhsh's failure to deposit the mortgage money, then it seems to me that the principle of res judicata cannot in any way operate in order to bar the present suit. Of course it is well-settled law in this Court that no second suit for redemption will lie, that is to say, where a plaintiff has obtained a decree for redemption and has failed to take advantage of it he will not be allowed to bring a fresh suit. But that decision cannot be applied to the facts of the present case where the plaintiffs are not claiming in any way under the person who was the plaintiff in the earlier suit and who were not represented by him in that suit. I have omitted to state that in the record of the earlier suit of 1896 there is nothing to show that Sitla Bakhsh was allowed in any way to maintain the suit on behalf of the other co-mortgagors. With regard to the decision in *Nathe v. Khachera* (1), upon which the defendants relied, that was a case in which the equity of redemption had been bought jointly by three purchasers. A suit had been brought by one purchaser and a decree obtained, and it was held that this decree was a bar to another suit by the other joint purchasers for the purpose of obtaining redemption.

It may be that on the facts of that case it was possible to hold that the plaintiff in the first suit was acting as the representative of all the joint purchasers; but as I have said, there is no evidence upon which in this case it could be held that Sitla Bakhsh, when bringing his suit in 1896, was acting as the representative of the present plaintiffs and defendants 8-17. According to the view taken by the Courts below the final refusal of the Subordinate Judge in the earlier suit to extend the period fixed for payment of the mortgage debt shows that it was his intention to debar the plaintiff from all right to redeem. That remark is quite correct, but it is not to be inferred that because

it was the intention of the Court to debar Sitla Bakhsh from exercising his right of redemption it was meant that the co-mortgagors, each of whom had a separate right to redeem, were also to be debarred. If any such intention was in the mind of the Court, it ought to have been expressed in the judgment and decree. I am satisfied therefore that the principle of res judicata does not apply so as to bar the present suit. It is to be noted here that the first Court took the view that if the suit for redemption were maintainable then the plaintiffs together with defendants 8-17 would be entitled only to ask for redemption of a two annas eight pies share in Patti Gor Bakhsh. That position has been accepted by the learned counsel for the plaintiffs appellants. He states that his clients are not eager to redeem anything more than this share.

As regards the question of court-fee I may say that in my opinion the court-fee paid is sufficient. If the right of the plaintiffs is to redeem only a share of the mortgaged property, then the court-fee payable is to be calculated on the amount of the mortgage-debt which is chargeable on the share of which the plaintiffs are entitled to ask for redemption. This view of the law has been accepted in the following cases, namely *Vasudera v. Madhava* (2), *Amanat Begam v. Bhajan Lal* (3) and *Balkrishna Dhondo v. Nagvekar* (4). As the appeal has been disposed of on a preliminary point it is necessary now to send the case back to the District Judge for disposal on the merits. I allow the appeal accordingly and direct the learned District Judge to dispose of the case in accordance with the above observations. Costs here and hitherto will abide the result.

B.V./R.K.

Case remanded.

2. (1893) 16 Mad 325.
3. (1886) 8 All 438.
4. (1881-82) 6 Bom 321.

A. I. R. 1918 Oudh 27

STUART, A. J. C.

Jang Bahadur and others—Defendants—
Appellants.

v.

Matadin and another—Plaintiffs—
Respondents.

Second Appeal No. 137 of 1917, Decided on 8th August 1917.

(a) Transfer of Property Act (1882), S. 60—Mortgagor subsequently executing simple deed agreeing not to redeem mortgage before satisfying simple debt is not binding on transferee, but subsequent mortgage embodying this condition would be enforceable.

Where the executant of a deed of mortgage executes a subsequent simple deed, by which he creates a personal covenant not to redeem the mortgage until he satisfies the amount due on the subsequent deed, such a covenant cannot be enforced against a subsequent transferee of the mortgaged property. But, where the subsequent deed pledges as security the property already mortgaged, the effect is a consolidation of the two mortgages and a subsequent transferee must satisfy the amount due on both as a condition precedent to redemption: *A I R 1914 Oudh 304, Expl.* [P 28 C 2]

(b) Mortgage—Construction—Mortgage stipulating payment of rent before redemption—Condition applies to rent legally recoverable.

Where a mortgage-deed provided that at the time of redemption all arrears due from the tenants must be paid to the holder of the deed:

Held: that the provision meant that the arrears at that time legally due from the tenants, in other words, arrears the recovery of which was not barred by limitation, must be paid in as a condition precedent to redemption.

[P 29 C 1]

Gokaran Nath Misra and Sarju Prasad Misra—for Appellants.

Bisheshwar Nath Srivastava—for Respondents.

Judgment.—The defendants-appellants in this appeal are holders of two deeds, a deed of mortgage dated 7th November 1881 and a deed dated 15th June 1883. The plaintiffs-respondents are the holders of a deed dated 27th May 1915. This is the situation. The plaintiffs-respondents have a right under their deed to redeem any prior deed or deeds and thus to secure possession of the mortgaged property. They admit the existence of the deed of 7th November 1881, and their suit was to redeem it. When they brought that suit, the mortgagees under that deed asserted that their mortgagors had executed in their favour a subsequent deed of mortgage dated 15th June 1883 and that the plaintiffs-respondents could not redeem and obtain possession of the mortgaged property until they had satisfied that deed also. The learned Subordinate Judge found that it was not proved that the deed of 15th June 1883 had been executed. The learned District Judge in appeal found that that deed had been executed for good consideration. His finding on this point is final. But he considered that the plaintiffs-respondents were under no

obligation to satisfy the amount due on the subsequent deed as a condition prior to the redemption of the deed of 7th November 1881.

The first point that I have to decide is whether this decision is correct. He has quoted in support of it a decision of my own in *Ram Adhin Misra v. Sitla Bakhsh Singh* (1). I did not in that decision discuss the whole law applicable to the facts of this case as there was no necessity to do so. The principle in that decision was that where the executant of a deed of mortgage executes a subsequent deed, by which he creates a personal covenant not to redeem the mortgage until he satisfies the amount due on the subsequent deed, such a covenant cannot be enforced against a subsequent transferee of the mortgaged property. But my decision was based upon the finding that the subsequent deed was a simple deed and not a deed of mortgage. Before that decision can be held to be applicable, it must be found that the deed of 15th June 1883 is a simple deed.

I do not find this to be the case. The executants stated therein that as there was no further prospect of realizing interest from the property mortgaged by the deed of 7th November 1881 and whereas they were in want of money, they borrowed Rs. 1,000 at a certain rate of interest and agreed that they would pay off the amount at the time of the redemption of the deed of 7th November 1881 and they pledged as security the property mortgaged by the deed of 7th November 1881 and other immovable property. In the deed which formed the portion of the subject-matter in the case reported as *Ramadhan Misra v. Sitla Bakhsh Singh* (1), there was nothing to show that any interest in immovable property was transferred. Here the case is altogether different. An interest in immovable property was transferred on the terms of the deed of 15th June 1883, which was more than a deed of charge. It was a deed of mortgage. On those facts the law is very clear. It has been laid down in repeated rulings to which I need not refer. The effect is a consolidation of the two mortgages and a subsequent transferee must satisfy the amount due on both as condition precedent to redemption. The

1. *A I R 1914 Oudh 304*=17 O C 303=25 I C 905.

amount due on the deed of 15th June 1883 at the time of the filing of the written statement before the learned Subordinate Judge was Rs. 1,000 principal and Rs. 1,959-6-0 interest. The defendants-appellants were further due interest at the contractual rate up to the date of payment in event of redemption.

I now come to the second point raised in the appeal. In the deed of 7th November 1881 there is a condition that at the time of redemption all arrears due from the tenants must be paid to the holder of the deed. Both the Courts below have held that this condition means that the arrears at that time legally due from the tenants, in other words, arrears, the recovery of which is not barred by limitation, must be paid in as a condition precedent to redemption. I accept this interpretation. In any circumstances the appellants could not have succeeded on this point because the learned District Judge found as a fact that the defendants-appellants had not proved the amount of arrears due, with the exception of the amount of arrears legally recoverable. But the defendants-appellants will succeed with respect to the amount of arrears, the recovery of which was not barred by limitation at the time the suit was instituted. The lower Courts have by an oversight omitted to include this amount. I need not send the case back for rehearing on this point, as on the evidence of the patwari the amount is Rs. 235-4-0. The Courts below appear to have accepted the patwari's evidence as true. I was first inclined to exclude the arrears the recovery of which, although not time barred at the time of the institution of the suit, is time barred now. But I do not consider that I should be justified in excluding such arrears under the terms of the deed of 7th November 1881.

The result is that the appeal succeeds for the most part. The plaintiffs-respondents will have to pay an additional amount of Rs. 235-4-0, and Rs. 1,000 principal on the deed of 15th June 1883, and interest amounting to Rs. 1,959-6-0 due on that deed till the time of the filing of the written statement, and interest at the contractual rate on that deed from the date of filing the written statement up to the time of payment as a condition precedent to redemption.

They will be allowed to redeem up to 8th February 1918. The defendants-appellants have succeeded with regard to three-fifths of their appeal. The plaintiffs-respondents will pay three-fifths of their own costs and three-fifths of the costs of the defendants-appellants in all Courts. The defendants-appellants will pay two-fifths of their own costs and two-fifths of the costs of the plaintiffs-respondents in all Courts. The decree for costs shall be separated from the decree for redemption. The learned Subordinate Judge had ordered that, in event of the plaintiffs-respondents failing to redeem, the property should be sold. I can find no justification for this order in the terms of the deed. The defendants-appellants are in possession and have no right to have the property sold. The deed of 7th November 1881 is called in one place a deed of sale, but it is clearly a deed of usufructuary mortgage and in those circumstances the property cannot be brought to sale.

B.V./R.K. *Appeal mostly allowed.*

A. I. R. 1918 Oudh 29

STUART, A. J. C.

Mt. Nasimunnissa—Defendant—Appellant.

v.

Abdul Kadir and another—Plaintiffs—Respondents.

Second Appeal No. 99 of 1917, Decided on 19th July 1917, against decree of Dist. Judge, Lucknow, D. 8th February 1917.

Provincial Insolvency Act (1907), Ss. 36 and 38—Transfer in favour of Mahomedan wife, in lieu of dower is not fraudulent—Transfer of Property Act (1882), S. 53.

There is nothing fraudulent in the action of a Mahomedan wife who, having a claim of dower against her husband and knowing that he is heavily in debt, and calculating that if she waits he might have nothing left from which to pay her, obtains a transfer of some of his property in her favour, and thus forestalls his other creditors. [P 30 C 1]

Wazir Hasan—for Appellant.

Mumtaz Husain—for Respondents.

Judgment.—The facts of this case are as follows: A certain Ashraf Ali executed a deed of sale on 24th August 1914 in favour of his wife, by which he transferred to her certain houses in lieu of Rs. 500 due to her as dower. He registered the deed on 22nd December 1914. On 26th March 1915 Ashraf Ali applied to the Court of the District Judge to be

declared an insolvent. On 14th May 1915 he was declared an insolvent. The insolvency proceedings are now in progress. A certain Abdul Kadir was appointed receiver. The question arose whether the transfer of the houses by the insolvent to his wife was a good transfer, whether the houses should not be considered a portion of the assets of the insolvent and whether they should not be sold and the sale proceeds divided amongst the creditors. The provisions of the Provincial Insolvency Act (3 of 1907) apparently afforded the receiver an opportunity of applying under S. 36 for an annulment of the sale of 24th August 1914. The receiver did not take that course, however. He filed a suit for a declaration that the sale in question was a nullity and that the houses were first in the possession of the insolvent and then of himself as receiver. He obtained this declaration in the Court of the trial Judge and that decision is confirmed by the learned District Judge. The wife has presented the present appeal.

The view of the learned District Judge is that the transaction was fraudulent, collusive and fictitious. I find that his conclusion as to its being fraudulent cannot be sustained. The case is perfectly simple. The woman was owed money on account of dower. In the Courts below it appears that it was agreed that the dower was prompt dower and I am not disposed to allow the point to be opened now as to whether it was prompt or deferred. But, whether it was prompt or deferred, a Mahomedan wife can hardly be stated to be guilty of fraud if she asks her husband to pay her dower, even if that dower be deferred. Of course it may be said, that ordinarily a Mahomedan wife does not claim her dower during her husband's lifetime, and frequently never claims it at all. But that circumstance is immaterial. A Mahomedan wife has a right to claim dower, and she can enforce that right as she wishes, and how she wishes. The appellant had a right to some dower at any rate, and even if she knew that her husband was heavily in debt and calculated that, if she waited, he might have nothing left from which to pay her and wished to forestall other creditors and obtain what was due to her first, there is nothing fraudulent in her action. This

is the view which is taken in *Musahar Sahu v. Hakim Lal* (1) by their Lordships of the Privy Council. The point of collusion is hardly distinguishable from that of fraud, and I do not find that the transaction is vitiated on account of collusion.

There remains the question as to whether the transaction was fictitious, in other words, whether there was a transfer at all. The learned Munsif found that there had been no transfer. He found that, although a deed of sale had been executed for a consideration of Rs. 500 in lieu of the amount due to the vendee as her dower, her husband had continued to live on the premises and had paid for the repairs and made additions to the houses out of his own pocket. If the learned District Judge had upheld this finding of the learned Munsif there would have been an end of the matter. But the finding of the learned Judge on this point is inconclusive. This is what he says :

"Certain additions have been made to the residential houses since the date of sale, and it is alleged on behalf of defendant 2 that these additions have been made by her. The lower Court has found that this is not so."

The learned Judge then proceeds, not to decide whether it is so or not, but to argue that it is immaterial whether defendant 2, that is to say, the present appellant, did or did not pay for those additions out of her own pocket. He says :

"But even if it is so, I do not find that this circumstance proves anything material in regard to the question of fraudulent intent on behalf of defendant 2."

It does not prove anything with regard to fraudulent intent, but a decision on this point is material to the question as to whether there was or was not any transfer. He continues :

"Her father is well to do and so is her brother, and they may well have helped her and her husband to make the houses more comfortable."

It is true that he adds later :

"The lower Court has held, and I consider rightly, that as a matter of fact defendant 1 is still in possession of the houses as before and that the transfer was a mere paper transaction, which was not meant to transfer anything in reality."

But he has not arrived at such a clear finding of fact as to justify me in concluding that he has found that there was no transfer. This is how the case stands.

The mere circumstance that the appellant's husband has continued to reside in the house since the execution of the deed of sale proves nothing one way or another. In many cases in which a husband genuinely transfers his house to his wife he continues to reside in the house afterwards. It is not necessary for him to separate from his wife's society to establish that such a transfer is genuine. But it is very important to know who has made the additions and the repairs. If the appellant has made the repairs out of her own pocket, whether the money with which she has made the repairs has been advanced by her family or she has obtained it in some other manner, this circumstance will go to show that there was a genuine transfer. But if her husband has made the repairs with money which he may have obtained from any source—either from his wife's family or anybody else—that circumstance will go to show that there has been no transfer, and such being the case, a clear finding is necessary one way or the other.

I accordingly remit the case to the learned District Judge for the decision of the following point: Have the houses in question passed from the possession of the appellant's husband to the appellants? Was the transfer of 24th August 1914 a genuine transfer or a paper transaction? He will decide this issue upon the evidence on the record after hearing arguments, without taking any fresh evidence, and send me his finding on or before 31st August 1917. Ten days will then be allowed for objections. The learned counsel for the respondents has objected to this appeal being heard, on the ground that the appellant has since the institution of the appeal preferred a claim as a creditor in insolvency proceedings in respect of her dower-debt due. As he very rightly points out, she cannot set up that her dower-debt has been satisfied by a genuine transfer of the houses, and at the same time claim to have her dower-debt satisfied out of the insolvent's assets. Her counsel after taking instructions has stated that the appellant only wishes to claim alternate reliefs. If this Court finds that the houses were transferred to her by a legal and valid deed of transfer, she will withdraw her claim from the insolvency proceedings, but, if the point is decided

against her, she wishes to take her rights as a creditor. The point raised by the learned counsel for the respondents is noted. It may or may not require decision.

B.V./R.K.

*Case sent back.***A. I. R. 1918 Oudh 31**

STUART, A. J. C.

Dadhij Singh and others—Plaintiffs—Appellants.

v.

Mt. Basti and others—Defendants—Respondents.

Second Appeal No. 222 of 1917, Decided on 9th November 1917, from decree of Dist. Judge, Sitapur, D/- 27th February 1917.

Custom—Succession—Eunuch—Presumption that personal heirs succeed eunuch—Strong evidence is required to rebut this presumption.

Ordinarily when a male becomes a eunuch, his heirs are his natural heirs under the personal law to which he is subjected, and, to set aside the presumption that the rule of succession would be his personal law, it is necessary to prove a great deal more than that in certain instances, even if numerous, the relatives did not take the trouble to claim the property of the eunuch, but permitted it to go to another eunuch. [F 31 C 2]

Bisheshwar Nath Srivastava—for Appellants.

Mohammad Wasim—for Respondents.

Judgment.—The sole point for decision in this case is whether an equity of redemption of a mortgage possessed by two eunuchs called Badni and Madar Bakhsh passed legally after their death to two other eunuchs called Muradan and Khiyali. The assertion on behalf of the appellants is that eunuchs form an association and that the custom of succession amongst them is that one eunuch succeeds another. In support of this alleged custom certain instances were quoted. These instances prove nothing at all. Ordinarily when a male becomes a eunuch, his heirs are his natural heirs under the personal law to which he is subjected, and, to set aside the presumption that the rule of succession would be his personal law, it is necessary to prove a great deal more than that in certain instances, even if numerous, the relatives did not take the trouble to claim the property of the eunuch, but permitted it to go another eunuch. I should have to be satisfied that the question had been raised between the

relatives of a eunuch on the one side and eunuchs on the other and decided in favour of the eunuchs. In not a single instance is this the case. There is nothing, as the learned District Judge observes, amongst eunuchs from which it can be inferred that they ever formed anything of the nature of an association. I find that the custom is not established in any way and in these circumstances the appeal fails and is dismissed. The appellants will pay their own costs and those of the respondents.

B.V. R.K. *Appeal dismissed.*

A. I. R. 1918 Oudh 32 (1)

LINDSAY, J. C.

Mohammad Yaqub — Defendant—Applicant.

v.

Bijai Lal—Plaintiff—Opposite Party.
Section 115 Appln. No. 135 of 1917,
Decided on 13th September 1917, against
order of Munsif, Partabgarh, D/- 31st
July 1917.

**Provincial Insolvency Act (1907), S. 16—
Suit against undischarged bankrupt, with-
out leave of Court, is not maintainable.**

Insolvency proceedings always remain pending until the insolvent obtains his order of discharge. Therefore an undischarged bankrupt cannot, without the leave of the insolvency Court, be sued in respect of a debt which he mentioned in the list attached to his application and of which notice was duly served on the creditor, but which the latter failed to prove before the insolvency Court. [P 32 C 2]

Ali Mohammad—for Applicant.

H. N. Misra—for Opposite Party.

Judgment.—This application must be accepted. The order of the Court below is clearly wrong and in my opinion the Munsif had no authority to entertain this suit. The suit was brought by one Bijai Lal against a man named Mohammad Yaqub in respect of a bond executed on 3rd January 1914. It has been admitted before me that Mohammad Yaqub was declared insolvent in the year 1914. It is further admitted that at the time he filed an application to be declared an insolvent he exhibited the debt, the recovery of which is now sought, in the list attached to his application. It is also established that notice was issued to the creditors named in this application to come and prove their debts, and it is further established that the present plaintiff Bijai Lal in spite of having received the notice failed to attend before the insolvency Court and

give proof of his debt. He has brought this suit on 9th June 1917, the defendant Mohammad Yaqub being still an undischarged bankrupt. This fact is admitted. It has not been contended that any order of discharge has been passed with respect to Mohammad Yaqub. In these circumstances the jurisdiction of the Court below to deal with this suit is entirely ousted by the provisions of S. 16, Provincial Insolvency Act. The Munsif seems to have thought that the provisions of S. 16, sub-S. 2 of the Act refer only to suits to be brought during the insolvency proceedings, and that is quite correct. But unfortunately the Munsif has fallen into error in thinking that the insolvency proceedings are not still pending. Insolvency proceedings always remain pending until the insolvent has obtained his order of discharge. In this view the insolvency proceedings against Mohammad Yaqub are still running their course and this being so, the suit against him was barred unless the plaintiff obtained the leave of the Court below beforehand. I therefore allow this application and set aside the order of the Court below. The claim of Bijai Lal will be dismissed with costs. No order as to costs of this application.

B.V./R.K. *Application allowed.*

A. I. R. 1918 Oudh 32 (2)

LINDSAY, J. C. AND STUART, A. J. C.

Bisheshar Baksh Singh—Plaintiff—Appellant.

v.

Rameshar Bakhsh Singh—Defendant—Respondent.

First Appeal No. 60 of 1915, Decided on 6th July 1917, from decree of Sub-Judge, Mohanlalganj, D/- 31st March 1915.

Oudh Estates Act (1 of 1869), S. 22—First Summary Settlement of Taluk — Talukdar dying issueless leaving widow — Widow in possession at Lord Canning's Proclamation of 1858—Second Summary Settlement with widow—Permanent, heritable and transferable proprietary rights under sanads conferred upon widow — Settlement on ground of widow's full title to taluka — Widow's death—Collateral relative of husband taking possession of entire taluka—Suit by widow's brother's grandson against collateral relative for possession decreed—Collateral relative setting up under-proprietary title—Succession to taluka held governed by terms of S. 22 and widow's brother's guardian was the right heir — Widow being in possession of full estate, Art. 144 and not Art. 141 ap-

plied — Limitation Act (9 of 1908), Sch. 1, Arts. 141 and 144—That as limitation was to be determined on case set up in plaint, suit was barred under Art. 141 — Collateral relative was not estopped from setting up under-proprietary title by adverse possession—Suit was barred by *res judicata* in respect of part of taluka — Civil P. C. (Act 5 of 1908), S. 11, Explan. 4 — Limitation Act, Arts. 141 and 144 — Evidence Act (1872), S. 116.

At the time of the annexation of Oudh a taluka was in the possession of a Bais Thakur B. S. After the annexation the First Summary Settlement of the taluka was made with him. He died issueless in 1857 and was succeeded in possession by his widow D. K., belonging to the clan of Amethia Thakurs. She was in possession when Lord Canning's Proclamation of confiscation was issued in 1858.

The Second Summary Settlement of the taluka was made with her and in the various proceedings relating to this settlement she was described as the wife or widow of B. S. She never in any way acknowledged that any third person had a right in the taluka, although she made subsequent declarations to the effect that she had no intention of giving it to Amethia Thakurs. She was still in possession when the letter of the Governor-General, dated 10th October 1859, was published, by which it was declared that every talukdar with whom a Summary Settlement had been made subsequent to the date of the re-occupation of Oudh had thereby acquired permanent, heritable and transferable proprietary rights in the taluka for which the engagement had been taken.

As provided by this letter, a sanad in the original form was granted to D. K. in her own name in 1860. In 1861 a sanad in the revised form, i. e., the primogeniture sanad, was similarly granted to her. Her name was subsequently entered in Lists I and II of the Oudh Estates Act.

After her husband's death she took steps to provide for the devolution of the taluka upon a collateral relative of her deceased husband B. S., but later on cancelled the provision in 1866 and 1873. In the proceedings held at the time of the First Regular Settlement she described herself as the wife or widow of B. S. and gave the history of the taluka as having come down in the family of B. S. This Regular Settlement was made with her not on the basis of these representations but on the ground that she had acquired the full title to the taluka under the sanads.

She continued in possession of the taluka till her death intestate in 1893, after which the above-mentioned collateral relative of B. S. took possession of the entire taluka.

Then R. B. S., as the right heir of D. K., being her brother's grandson, sued the collateral relative of B. S. for possession of the taluka and succeeded in obtaining a decree in 1900. In 1911 R. B. S., setting out his title to the entire taluka under this decree, brought a suit in ejectment against B. B. S. as a trespasser, who was at that time in possession of one of the villages comprised in the taluka. B. B. S. was at that time aware of the facts upon which he relied in the present suit, mentioned below, for the purpose of showing that he was the rightful owner of the whole taluka, but he set up an under-pro-

prietary title in respect of the village, his case being that he and his predecessors had been in adverse possession as under-proprietors for many years upon payment of the revenue and cesses due in respect of the village. The suit of R. B. S. was however decreed in 1911 on the finding that B. B. S. was not an under-proprietor of the village.

In 1913 D. H. S. instituted the present suit against R. B. S. He claimed to be the nearest male heir of B. S. and as such to be entitled to possession of the taluka in preference to R. B. S., who was a stranger to the family. R. B. S. relied upon his title arising from the provisions of S. 22, Cl. 6, Oudh Estates Act, and pleaded limitation as well as *res judicata* as a bar to the suit.

Held: (1) that Lord Canning's Proclamation of 1858 having resulted in divesting all landed property from proprietors in Oudh and transferring and vesting the same in the British Government, the Second Summary Settlement did not of itself vest the absolute proprietary and heritable rights in taluka but amounted to a permission to the persons with whom the settlements were made to engage for the payment of the Government revenue, the effect of the declaration contained in the Governor-General's letter, dated 10th October 1859, being to invest the talukdars in possession under the Summary Settlements with permanent, hereditary and transferable proprietary rights in their talukas, including the perpetual privilege of engaging with the Government for the revenue of those talukas; the two sanads addressed to D. K. having purported to confer upon her and her heirs for ever the full proprietary right, title and possession of the taluka, and the intention of the Government in the matter being deducible from the acts of the Government itself and not from the conduct and declarations of D. K.; D. K. took the taluka in her own right as full owner, and not in the right of her husband B. S. as a Hindu widow, nor as such widow with special powers of alienation superadded, so that if she failed to exercise the special powers of transfer conferred upon her the taluka would revert after her death to the nearest male heir of her deceased husband according to the rule of primogeniture, nor even as a trustee for the reversioners of her deceased husband B. S., for there was no evidence to show that she had, by any express or implied acknowledgment, declaration or conduct, constituted herself such a trustee; and that therefore succession to the taluka was governed by the terms of S. 22, Oudh Estates Act, under which R. B. S. was the right heir of D. K. [P 88 C 2; P 39 C 2; P 40 1, 2; P 41 C 1; P 47 C 1 and P 50 C 1]

(2) that D. K. having been found to be in possession of a full estate, the case was governed by Art. 144 and not by Art. 141, Sch. 1, Lim. Act; but that, as the point of limitation was to be determined in view of the plaintiff's allegations, which were to the effect that the plaintiff was entitled to succeed on the death of D. K. not as her heir but as an heir of her husband B. S., Art. 141 applied and the suit was barred. [P 53 C 2; P 54 C 2]

(3) that R. B. S. not being debarred under S. 116, Evidence Act, from raising in the previous suit the proprietary title in respect of the village then in dispute, inasmuch as he asserted at that time an adverse subordinate title and

not a title derived from the superior proprietor, or from setting up both proprietary and under-proprietary titles at one and the same time on the ground of inconsistency, the present suit was barred by *res judicata* under S. 11, Expl. 4, Civil P. C., so far as the said village was concerned, and not in respect of the entire taluka, inasmuch as title to the entire taluka was not a point which properly belonged to the subject of the previous litigation.

[P 56 C 1; P 57 C 1 & 2; P 59 C 1 & 2]

Rash Behari Ghose, Mirza Samiullah Beg, Wazir Hasan and Shahbuddin—for Appellant.

Sundar Lal, Mohammad Nasim, Gokaran Nath Misra and Harkaran Nath Misra—for Respondent.

Judgment.—This appeal has arisen out of a suit for possession brought by the plaintiff-appellant, Thakur Bisheshar Bakhsh Singh, against the defendant-respondent, Raja Rameshar Bakhsh Singh. The property in dispute is the Samarpaha taluka which is situated in the Rae Bareli District, and before proceeding to discuss the points which are in issue before us we think it will be expedient to set out as far as possible certain facts relating to the history of this estate. At the time of the annexation of Oudh the property was in possession of Basant Singh who was a Thakur belonging to the Bais clan. After the annexation the first Summary Settlement of this taluka was made with Basant Singh, who died thereafter on 12th November 1857, during the Mutiny. Thakur Basant Singh left no issue and was succeeded in possession by his widow, Thakurain Dariao Kuar, whose age at that time appears to have been about 18 or 19 years. At the time when the proclamation of confiscation was issued by Lord Canning in the month of March 1858, Dariao Kuar was in possession of the estate which had belonged to her husband. On 8th May 1858 an application was made to have the second Summary Settlement of this taluka made with her. This application was presented on her behalf by an agent of hers named Ram Sahai. The application was accepted and two days afterwards, that is to say, on 10th May 1858, an order was issued by Major Barrow, Special Commissioner sitting at Lucknow, directing that the settlement should be made with Dariao Kuar. Dariao Kuar was still in possession when the letter of the Governor-General, dated 10th October 1859, was published by which it was

declared that every talukdar with whom a Summary Settlement had been made subsequent to the date of the re-occupation of Oudh had thereby acquired permanent, hereditary and transferable proprietary rights in the taluka for which the engagement had been taken. This letter is incorporated, in the Oudh Estates Act (1 of 1869), and in para. 4, it was directed by the Governor-General that sanads should be issued in his name by the Chief Commissioner of Oudh.

We find from certain official correspondence which is on the record that a sanad was granted to Dariao Kuar in the month of December 1860: cf. Ex. A-5, a letter addressed by the Deputy Commissioner of Rae Bareli to the Commissioner of the Baiswara Division. This must have been a sanad in the original form set out in Sykes' Compendium of Talukdari Law at p. 385. Later on we find that a sanad in the revised form, namely, the primogeniture sanad, was granted to Dariao Kuar. A copy of this sanad is on the record (plaintiff's Ex. 9). It was signed by the Chief Commissioner on 8th May 1861. The evidence on record shows that this sanad was delivered to Dariao Kuar on 25th October 1861.

Subsequently, when the Oudh Estates Act (1 of 1869) came into force Dariao Kuar was treated as the talukdar and her name was entered in Lists 1 and 2 prepared under S. 8 of the Act. It is admitted that Dariao Kuar continued in possession of the Samarpaha Taluka till the date of her death, namely, 13th November 1893. She died intestate. In order to explain the course of the litigation regarding this estate which took place after the lady's death, it is necessary to travel back to the period immediately succeeding the re-occupation of Oudh in March 1858 and to refer to certain events which took place about that time. Basant Singh, as we have said was a Bais Thakur and his estate was one of the numerous large estates in the Rae Bareli District held by the members of that clan. His wife belonged to the Amethia clan of Thakurs and it may be taken as an established fact that the Thakurs, of the Bais clan viewed with some apprehension the prospect of the estate passing away from their clan into the clan of the Amethias. We have already mentioned the fact that Basant Singh left no male issue.

It is proved that after her husband's death Dariao Kuar took steps to provide for the devolution of the estate upon a collateral relative of her deceased husband. Acting no doubt in consultation with the members of her husband's family in the year 1860 she took a boy named Sher Bahadur, whose age at that time was 11 or 12 years, to live with her with the intention that he should be brought up in the family house and should succeed to the estate upon her death. It was alleged in subsequent litigation that Dariao Kuar had adopted Sher Bahadur as a son to her husband, but it was decided that no valid adoption had ever taken place.

On 1st September 1861, in obedience to a letter addressed to her by the district authorities, Dariao Kuar prepared a formal deed (plaintiff's Ex. 8) by which she declared Sher Bahadur Singh to be the person who would succeed to the Samarpaha taluka after her death; the document was styled a will. This arrangement which Dariao Kuar had made failed to prove satisfactory. Sher Bahadur Singh, as he grew older seems to have given great offence to the lady; and instigated most probably by certain members of the Bais clan, he began to press for an immediate transfer of the whole estate to himself. The lady refused to entertain any such proposition and turned Sher Bahadur Singh out. The relations between her and Sher Bahadur Singh formed the subject of various petitions and counter-petitions addressed by the parties to the district authorities. Eventually in the year 1866 Sher Bahadur Singh addressed an application to the Chief Commissioner (Ex. A-3), dated 10th September 1866, in which he asked that a sanad for the Samarpaha taluka should be granted to him on the ground that he had been adopted in the year 1265 Fasli, corresponding to 1858-59. He asserted that the sanad had been granted by mistake to Dariao Kuar and that in fact he was the proper person to receive it. He made certain allegations that the widow was wasting the property and giving it away to her own relatives, and represented that if the sanad were left in the name of Dariao Kuar the result would be that the entire taluka would pass away from the family to which it belonged. On receipt of this petition the

Chief Commissioner called for reports from the local authorities and the matter was finally dealt with by the Chief Commissioner in his order (Ex. A-7), dated 29th March 1867. He declined to take any action on Sher Bahadur Singh's petition, saying that no alteration could now be made in the sanad, that Dariao Kuar was the proper person to receive it and that he refused to interfere in any way with the rights which the British Government had conferred upon the Thakurnia.

After this order had been issued, Sher Bahadur Singh made an attempt to have it reviewed by presenting a petition (Ex. A-9) dated 24th April 1867. This petition was rejected by the Chief Commissioner by his order (Ex. A-10), dated 6th May 1867. Meantime Dariao Kuar led in consequence of the conduct of Sher Bahadur Singh presented a petition to the Deputy Commissioner, dated 27th December 1866, in which she represented that her formal appointment of Sher Bahadur Singh by the document dated 1st September 1861 was to be considered as revoked. Sher Bahadur Singh having been worsted in his attempt to secure possession of the taluka had recourse to a suit for recovery of possession of the estate, which he filed in the Court of the Deputy Commissioner of Ilaz Bareilly on 1st September 1873. A copy of the plaint in this suit is on record and is marked Ex. A-64. As soon as the suit had been filed Dariao Kuar by way of answer to it executed a formal document (Ex. A-63), which was duly registered and by which she formally set aside the document of 1st September 1861 by which she had appointed Sher Bahadur Singh as the person to succeed to the estate. In the suit which he brought Sher Bahadur Singh claimed to be the adopted son of Basant Singh and to be entitled to possession of the estate on the ground that Dariao Kuar was holding the property in trust for him. He relied upon certain letters said to have been written by Dariao Kuar for the purpose of showing that she had acknowledged her position as trustee.

The Deputy Commissioner dismissed this suit on 15th November 1873, on the ground that Dariao Kuar had the full title to the estate under the terms of the sanad (vide Ex. A-66, a certified copy of Deputy Commissioner's judgment). This

decision was upheld in appeal by the Commissioner. cf. Ex. A-68, dated 22nd April 1874. An appeal was then taken to the Privy Council. Their Lordships on 10th November 1877 (cf. Ex. A-69) passed an order remanding the suit for disposal on certain points which had been left undetermined. In this order their Lordships expressed their agreement with the opinion given by the Commissioner to the effect that Dariao Kuar had under the sanad a title which could not be assailed. They pointed out however that, although the title which Government had conferred upon Dariao Kuar was absolute and overruled all other titles, a talukdar to whom such a title had been granted might nevertheless by express declaration constitute himself a trustee. Their Lordships directed that the claim should be further investigated and that the plaintiff Sher Bahadur Singh should be given an opportunity to show, if he could, by means of the letters and any other evidence of surrounding circumstances that Dariao Kuar had declared herself or agreed to be a trustee for him (Sher Bahadur Singh). The case was dealt with by the Commissioner of Rae Bareilly in his judgment of 29th October 1878 (Ex. A-70). He was of opinion that the letters upon which Sher Bahadur Singh relied for the purpose of proving that a trust had been declared in his favour were not proved. He held in addition that there was no satisfactory proof that Sher Bahadur Singh had been validly adopted as the son of Basant Singh. This decision became final, for although Sher Bahadur Singh applied for leave to appeal to Her Majesty in Council the application was eventually dismissed by reason of his failure to deposit the necessary security for costs: see the order of the Commissioner, dated 29th July 1879, Ex. A-72.

The next event to which we have to refer is the taking of possession of the entire estate by Sher Bahadur Singh after the death of Thakursain Dariao Kuar in the month of November 1893. This led to the next litigation, which began in the year 1899. On 27th May in that year Raja Rameshar Bakhsh Singh, who is the defendant in the present proceedings, filed a suit claiming possession of the entire taluka on the ground that he, as the right heir of

Dariao Kuar, was entitled to the property. This suit was decided in favour of Raja Rameshar Bakhsh Singh on 12th October 1900. The decree of the Subordinate Judge was maintained on appeal to this Court and was upheld by their Lordships of the Privy Council in their judgment dated 27th July 1906: cf. *Thakur Tribhuwan Bahadur Singh v. Raja Rameshar Bakhsh Singh* (1). It may be explained here that Sher Bahadur Singh died while the appeal was pending in the Privy Council and he was represented before their Lordships by his son Tirbhuwan Bahadur Singh. Their Lordships held that Sher Bahadur Singh had failed to prove any title by adoption, that succession to the estate was governed by the provisions of S. 22, Act 1 of 1869, and that Raja Rameshar Bakhsh Singh, as the right heir of Dariao Kuar, was entitled to the property under Cl. 6 of the section in question.

We have now to refer to further litigation which began in the year 1911. Raja Rameshar Bakhsh Singh having executed the decree obtained in his favour, got possession of the entire estate with the exception of a single village called Shayestabad or Bharkaspur. It seems that at the time when the judgment of their Lordships was delivered this village was in the possession of Mt. Gajraj Kuar, the mother of Sher Bahadur Singh. She appears to have continued in possession asserting that she had a right to remain in possession as kham thekadar, being entitled to collect the rents subject to the payment of a yearly sum of Rs. 1,126 to the talukdar. Gajraj Kuar died on 15th December 1906 and according to what was set out in the plaint, filed by Raja Rameshar Bakhsh Singh in this litigation, Bisheshar Bakhsh Singh (who is the plaintiff in the present suit) took wrongful possession after the lady's death. Raja Rameshar Bakhsh Singh brought a suit in ejectment against Bisheshar Bakhsh: cf. Ex. A-79 of the plaint, dated 4/6th June 1910. In that plaint Raja Rameshar Bakhsh Singh set out his title to the entire taluka by virtue of the decree which had been passed in his favour. He asked for the ejectment of Bisheshar Bakhsh, saying that he was a trespasser.

In the alternative he prayed for a declaration that the defendant, Bisheshar Bakhsh, had no right or interest in this village except that of a kham thekadar. Bisheshar Bakhsh defended the suit. He admitted that Rameshar Bakhsh had obtained a decree for possession of the whole taluka and that this village of Bharkaspur was one of the villages belonging to the estate, but he pleaded that Rameshar Bakhsh Singh had no cause of action for the suit. Bisheshar Bakhsh set up an under-proprietory title, saying that he and his ancestors had held the village as owners in subordination to the talukdar since before the time of the British rule and that the village had been held by himself and his predecessors on payment of the revenue only. It was asserted that Dariao Kuar had always recognized the under-proprietory status of the defendant and his predecessors. A further plea of title as under-proprietor by adverse possession was set up. Another defence was to the effect that Rameshar Bakhsh Singh was estopped from denying Bisheshar Bakhsh's title as under-proprietor, on the ground that he had accepted payment of the Government revenue from Mt. Gajraj Kuar and afterward from the defendant himself. He pleaded that he was not bound by the decree which Rameshar Bakhsh Singh had obtained against Sher Bahadur Singh inasmuch as he was no party to the proceedings, and he claimed that the decree in question could not in any way affect his under-proprietory right. The suit was decided in favour of Rameshar Bakhsh Singh. It was held that the defence set up by Bisheshar Bakhsh Singh to the effect that he was an under-proprietor was a false defence. The Subordinate Judge also was of opinion that Rameshar Bakhsh Singh was in no way estopped from denying the under-proprietory title put forward by Bisheshar Bakhsh Singh.

This is a brief history of the events relating to this estate, which took place prior to the institution of the present suit which was brought into Court on 7th April 1913. The plaintiff Bisheshar Bakhsh Singh, according to the pedigree which is exhibited with his plaint, claims to be the nearest male heir of Thakur Basant Singh and, as such, to be entitled to possession of the estate in preference to the defendant, who is a stranger to

the family. It was admitted in para. 3 of the plaint that after the death of Basant Singh in the month of November 1857 his widow Dariao Kuar succeeded him in possession of the estate, and in para. 4 of the plaint it is admitted that the second summary settlement was made with this lady. It is stated in this paragraph that Dariao Kuar applied for the settlement "in her character of widow of Basant Singh." In para. 5 of the plaint it is admitted that a sanad was granted by the British Government to Dariao Kuar in the year 1861, but it is asserted that the grant was made to her as widow of Basant Singh. Para. 7 of the plaint after amendment alleges that the purpose of the second summary settlement and the objection of the grant of the estate to Dariao Kuar and the terms of the sanad granted to this lady indicate that the estate was to descend after the death of Dariao Kuar to the nearest male heir of Thakur Basant Singh. In para. 9 of the plaint reference was made to a will alleged to have been executed by Dariao Kuar on 24th June 1878. We are no longer concerned with this document. The learned Subordinate Judge has declared it to be a forgery and it has not been relied on in any way for the purpose of supporting the plaintiff's case here in appeal. The plaint was further amended by introducing an allegation in para. 9 (a), to the effect that the estate which had been granted by the British Government to Dariao Kuar constituted her stridhan. In para. 10 the custom relating to succession to estate held by the Bais Talukdars is set out, the case being that the person who succeeds is the eldest amongst the nearest of the deceased's relations. It was also asserted by way of amendment in this paragraph that the custom applied also to the case of property held as stridhan. After reciting the fact of Dariao Kuar's death on 13th November 1893, it was alleged in para. 12 of the plaint that at the time the lady died the plaintiff's father Sheodat Singh was still alive and was, according to the pedigree exhibited with the plaint, the heir to the estate. Reference is then made to the taking of possession of the estate by Sher Bahadur Singh after the death of Dariao Kuar and to his subsequent ejectment in consequence of the decree which was passed

against him in favour of the defendant Rameshar Bakhsh Singh. In para. 14 of the plaint it is stated that the defendant, who is the grandson of Dariao Kuar's brother, has no right whatever to the property now in dispute and is a trespasser. The defendant relies upon the title which was affirmed by the decree of their Lordships of the Privy Council. Shortly put, his case is that the full estate was granted by the British Government to Dariao Kuar and her heirs. He claims that succession to the estate is governed by Act 1 of 1869 and that he being the next heir of the lady, has the title to the estate in accordance with the provisions of Cl. 6, S. 22, Oudh Estates Act (1 of 1869). The defendant also put forward two other pleas by way of defence with which we shall have to deal in disposing of the appeal, namely, pleas of limitation and *res judicata*.

The lower Court found in favour of the defendant upon all the material issues. It was decided that the title to the estate lay with the defendant, that the plaintiff's claim was barred by limitation and that the suit was not maintainable on the ground of *res judicata*. The three questions which have been argued before us are: (1) the plea of *res judicata*, (2) the question of limitation and (3) the question of title. They were argued in this order, but we think it expedient to deal in the first place with the question of title. The decision of the issue of limitation is involved in this, for the point of limitation has to be determined in accordance with the view we may take as to the nature of the interest which was acquired by Dariao Kuar in the Taluka of Samarpaha.

Title

To proceed then to a consideration of the question of title, we start with the facts that the second summary settlement was made with Dariao Kaur; that thereafter in the year 1861 a sanad in the primogeniture form was granted to her; that on the passing of the Oudh Estates Act 1 of 1869, the name of Thakurain Dariao Kuar was recorded in lists 1 and 2 prepared under S. 8 of the Act; that she was therefore a talukdar, and lastly that she died on 13th November 1893 intestate. It has already been mentioned that the first summary settlement of the estate was made while Thakur Basant Singh was still alive,

and that Dariao Kuar came into possession of the taluka on the death of her husband in November 1857. Lord Canning's proclamation of confiscation was issued on 15th March 1851 and the result of that was to destroy any interest which the lady or any of the reversionary heirs of her husband had in this property. A great deal of discussion seems to have been permitted in the Court below regarding the legal operation of the proclamation and the Subordinate Judge has referred at great length to a large number of State papers and other documents for the purpose, apparently, of ascertaining the meaning and effect of the proclamation. At the hearing of the appeal we have ruled out all this evidence as being irrelevant. It is too late at the present day to argue that the proclamation of Lord Canning resulted in anything but the complete destruction of proprietary rights in Oudh. The language of the proclamation has been interpreted repeatedly by the highest judicial authority and it would have been quite sufficient for the learned Subordinate Judge to refer to one or other of the decisions of their Lordships of the Privy Council in which the effect of the proclamation has been expounded. It is enough for us to say that it has been laid down that the effect of the proclamation was to divest all landed property from proprietors in Oudh and to transfer it to and vest it in British Government. The proprietary right in land in Oudh was confiscated to the British Government and was liable to be disposed of in such manner as the Government might think fit. We might also refer to a decision which we shall have further occasion to mention in the course of this judgment, namely, the case of *Brij Indar Bahadur Singh v. Ranee Janki Koer* (2) in which speaking of a case like the present in which a widow was in possession at the time of the proclamation, their Lordships observed as follows:

"Her interest as widow and that of the reversionary heirs were absolutely destroyed and put an end to by the confiscation under Lord Canning's proclamation."

The next matter we have to notice is that the summary settlement of this taluka was made with Dariao Kuar on 10th May 1858. The documentary evidence on record shows that on 8th May

1858 an application (Ex. A-1) was presented to the authorities by one Ram Sahai, who described himself as the agent of the wife of Basant Singh the talukdar of the villages in the Samarpaha taluka. It was stated by Ram Sahai in the application that the taluka consisting of 72 villages had long been in the possession of his client. It was mentioned that in the year 1264 Fasli, immediately after the annexation, 17 villages were detached from the estate and settled with other persons. It was alleged that during the Mutiny possession had been resumed over these 17 villages. It was declared that the lady had no co-sharer in the estate and that she was ready to pay Government all the arrears of Government revenue. On the 10th May an order was passed that settlement of the entire estate be made with Basant Singh's wife as Talukdar, that an instalment of the Government revenue should be taken from her and that she should be directed to send her authorized agent to Mr. Tucker, the Commissioner. From other documents on the record it is proved that this order for summary settlement was made by Major Barrow, Special Commissioner of Lucknow (cf. Ex. 11). Pausing here we may consider what was the effect of this summary settlement being made with Dariao Kuar. It is clear from the authorities that the making of this settlement did not amount per se to a grant of proprietary rights to the lady. The arrangement was a temporary measure and meant no more than that the person with whom it was made was permitted to engage for the payment of revenue for a period of three years. It did not amount in any way to the acknowledgment of the existence of any proprietary title; nor could it, bearing in mind the fact that the proclamation which had been issued less than two months before had swept away all rights in landed property in Oudh and had vested them in the British Government. Up to the date on which the summary settlement was made no grant of those rights had been made to any one by the Government. The legal effect of the making of the second summary settlement has been declared in the judgment of their Lordships of the Privy Council in the well-known case of the *Ranee of Chillaree v. Government of India* (3).

3. (1876-77) 4 I.A. 205 (note) (P.C.).

where it is stated that this temporary revenue settlement did not of itself vest the absolute proprietary and heritable right in the taluka, but amounted only to a permission to the person with whom the settlement was made to engage for the payment of the Government revenue.

We now come to a consideration of the letter of 10th October 1859 from the Secretary to the Government of India, Foreign Department, to the Chief Commissioner of Oudh, which is incorporated to Sch. 1, Act 1 of 1869. In para. 2 of this letter the Governor-General in Council, after expressing his agreement with the Chief Commissioner regarding the expediency of removing all doubts as to the intention of the Government to maintain the talukdars in possession of the talukas for which they had been permitted to engage, was pleased to declare that every talukdar with whom a summary settlement had been made since the re-occupation of the Province had thereby acquired a permanent, hereditary and transferable proprietary right, namely, in the taluka for which he had engaged, including the perpetual privilege of engaging with the Government for the revenue of the taluka. By para. 4 of the letter the Chief Commissioner was directed to prepare a list of the talukdars upon whom a permanent proprietary right had now been conferred and that sanads should be prepared to be issued to the talukdars at the time of His Excellency's arrival in Lucknow. The effect of the declaration contained in this letter has been the subject of decision of their Lordships in the *Chillaree's* case (3) which has been mentioned above. According to that judgment the object of the Government in issuing this declaration was

"to maintain in possession those talukdars who then were in possession under summary settlements entered into with them after the re-occupation of the Province."

The talukdars who were declared to have acquired the right conferred by the letter were those who had been permitted to engage. Dariao Kuar, being one of the talukdars who had been admitted to engage for the revenue settlement and who was still in possession at the time when this letter of the Governor-General in Council issued, must therefore be treated as a person who had acquired a permanent, hereditary and transferable pro-

proprietary right in the Taluka of Samarpaha, including the perpetual privilege of engaging with the Government for the revenue of that estate. Following upon this letter we know that a sanad in the earlier form was granted to Dariao Kuar, a sanad in the form which is set out in Sykes' Compendium at p. 385. According to the language of this document the Chief Commissioner, acting under the authority of the Governor-General in Council, conferred upon Dariao Kuar the full proprietary right, title and possession of the estate of Samarpaha. It is recited that the sanad was granted to Dariao Kuar in order that it might be known to all whom it might concern that the estate of Samarpaha had been conferred upon her and her heirs for ever subject to the payment of such annual revenue as might from time to time be imposed and subject to certain other conditions which are specified in the document. The sanad winds up with a declaration that as long as the obligations specified were observed by Dariao Kuar and her heirs in good faith, so long would the British Government maintain her and her heirs as proprietors of the Samarpaha estate. A copy of the second sanad which was given to the lady in substitution for the earlier one is to be found on the record (Ex. 9). This document like the earlier one is addressed to "Mt. Dariao Kuar, talukdar," and it purports to confer upon her the full proprietary right, title and possession of the estate of Samarpaha. It declares that this estate has been conferred upon her and her heirs for ever. It lays down a rule of succession to be observed in the devolution of the estate, the descent being to the nearest male heir according to the rule of primogeniture. It is further declared that Dariao Kuar and all her successors are to have full power to alienate the estate or any portion of it to whomsoever they please, and, as in the former document, there is a further declaration that subject to the performance of the obligations which are recited the British Government would maintain Dariao Kuar and her heirs as proprietors of the taluka. There is nothing therefore in the language either of the letter of 10th October 1859, which is a letter in general terms, or in the language of the two sanads which were addressed by name to Dariao Kuar to indicate that

the interest which was being conferred upon her by the British Government was anything less than that of an absolute estate in the property specified. It has however been argued here, as it was in the Court below, that by reason of certain facts established by evidence it should be held notwithstanding the language of the documents we have just mentioned, that (to quote the language of para. 7 of the plaint)

"the purpose of the second summary settlement, the object of the grant of the estate to Thakurain Dariao Kuar and the contents of the sanad"

indicate that the intention of Government was that the property should be held by Dariao Kuar for her life and should descend thereafter to the nearest heir of her deceased husband who might be alive at the time the succession opened. This proposition has been condensed in argument by saying that Dariao Kuar took the estate not in her own right but in the right of her husband, Basant Singh, and it has been contended that as she took in that capacity the interpretation, which must necessarily be placed upon the acts and declarations of the British Government between the time of the making of the second summary settlement and the grant of the sanad, is that the intention was, so to speak, to restore the taluka to the family to which Basant Singh belonged by providing that it should devolve upon Basant Singh's heir as soon as the lady died. It was pointed out that in the litigation between Sher Bahadur Singh and the present defendant, which was concluded by the judgment of their Lordships of the Privy Council reported as *Thakur Tribhuwan Bahadur Singh v. Raja Rameshar Bakhsh Singh* (1), it had been admitted that Dariao Kuar took the estate in her own right. The words used by Lord Macnaghten in this connexion are to be found at p. 162 of the report and are as follows:

"It is not disputed that the Thakurain became talukdar not in right of her husband Basant Singh but in her own right."

Assuming that this language conveys the meaning now sought to be attached to it, namely, that the words "became talukdar" are equivalent to "took the estate," it is stated now that in the present suit there is no such admission as was made in the suit between Sher Ba-

hadur Singh and the present defendant. The case for the plaintiff here is that Dariao Kuar took the estate in right of her husband and not in her own right, and of course it cannot be suggested that any admission made in the Court of the previous litigation is binding upon the plaintiff who was not a party to it.

The real question which has to be determined is, what was the interest which the Government intended to confer upon Dariao Kuar by the various proceedings which took place from the time of the Second Summary Settlement up till the date of the delivery to her of the sanad. What Dariao Kuar took can only be what the Government intended to confer upon her. The entire proprietary rights in the taluka were vested in the British Government and we have to decide to what extent the Government parted with those rights in favour of Dariao Kuar. The intentions of the Government in this matter can only, we think, be deduced from the acts of the Government itself. The conduct and declarations of Dariao Kuar cannot be appealed to for the purpose of ascertaining the intentions of Government, except in so far as it can be shown that any conduct on her part affected the purpose of the Government in its dealings with her. We pass on now to consider the various acts and declarations of the lady which have been referred to by the learned counsel for the appellant in this connexion. We have already adverted to the fact that when an application was made by Dariao Kuar on 8th May 1858 for the purpose of having the Summary Settlement made with her, she was described in the petition as the wife of Basant Singh. Ex. A-1 is an official document described as "Settlement Statement A." In col. 4 of this statement the heading of which is "name of talukdar or zamindar," the entry is "wife of Basant Singh." The agent who signed the application on behalf of the lady described her as being the wife of Basant Singh. Similarly in Ex. 2, described as "Statement B," we find in col. 5, which is meant to show the name of the person paying the revenue, the entry "wife of Basant Singh." Basant Singh's own name is shown in col. 2, of the statement which is designed to indicate the name of the talukdar. (It may be observed here that the entry in

col. 2 is an obvious mistake, for it is common ground that Basant Singh had died in the month of November 1857). Similar entries are to be found in other documents relating to this settlement (cf. Ex. 3 and Ex. 1). We have also had our attention called to Exs. A-84 and A-85 which show that, in response to an order of the authorities calling for certain information regarding the family, Dariao Kuar sent in a family pedigree which is admittedly the pedigree not of her own family but of her husband's family.

Again Ex. A-2 is a copy of an order or rubkar in which it is stated that the settlement of the whole taluka comprising 72 villages was made for a lump sum of Government revenue with the wife of Basant Singh. This document bears date 20th September 1859. These are the only documents which are anterior in date to the letter which was issued by the Governor-General-in-Council on 10th October 1859 (cf. Sch. 1, Act 1 of 1869). Certain other documents subsequent to that date have also been pressed upon our attention. Ex. A-207 is an extract from a list of talukdars which was prepared in consequence of certain directions issued under the authority of the Chief Commissioner. In the column of remarks contained in this list there are exhibited certain replies purporting to have been received from various talukdars and showing the rule of succession which obtains in the family. Opposite the entry relating to the wife of Basant Singh there is a statement which appears to have been made by Dariao Kuar, in which is described the rule of succession as it obtained in the family of her deceased husband. Ex. 146 may be read in connexion with the above exhibit. It is a certified copy of the letter which led to the preparation of Ex. A-207. It shows that inquiries were being made as to the extent to which the rule of primogeniture obtained amongst the talukdars. Another document is Ex. 4 which is dated 8th February 1860. This is a copy of a petition or application put in by the "widow of Basant Singh deceased." In this petition the lady, after reciting the fact that the British Government had conferred upon her the proprietary right in the ilaqa of Samarpaha, etc., for generation after generation, expressed

her desire that after her death the estate should continue in the name of Sher Bahadur Singh, her adopted heir, entire and undivided according to the custom of raj-gaddi. Ex. 145 is another list of talukdars which was prepared with a view to ascertaining the extent to which the rule of primogeniture prevailed. Here again there is an entry relating to the estate held by the widow of Basant Singh. In the column of remarks attached to this statement there is a note which appears to have emanated from the Deputy Commissioner, Mr. Capper. According to this note Dariao Kuar survived her husband and succeeded to the estate. It was added that her husband's next of kin would succeed unless she adopted a younger member of the family. A good deal of stress appears to have been laid upon this particular entry in the Court below.

We are however doubtful whether the entry was at all admissible in evidence; but on the assumption that it can be admitted under the provisions of S. 35, Evidence Act, as being an entry in a public register made by a public servant in the discharge of his official duty, we are of opinion, that as evidence it is of no value. It seems to us to express nothing more than the opinion of the gentleman who was responsible for it and we certainly cannot assume in the absence of any evidence that it is a record of any statement made by Dariao Kuar herself. Ex. A-95 has also been referred to. This is a copy of a deposition made by two Qanungos before the Assistant Settlement Officer of Rae Bareilly on 19th March 1863. The statements seem to have been taken with a view of preparing a history of the estate and we find the deponents saying that Basant Singh's estate was given to his widow who now managed it. It was further said in the course of the deposition that the heir apparent to the estate was Sher Bahadur Singh, an adopted son. Ex. 9 is another document relied upon by the appellant. This, as we have mentioned before, is a copy of the primogeniture sanad. Exs. 6 and 7 also purport to be certain statements made by the lady with reference to the history of the estate and the pedigree of the family. It is clear from these that in response to the invitation of the authorities she sent in a history of her hus-

band's family. Ex. 8, dated 1st September 1861, is a document to which we have already called attention. It is the deed by which Dariao Kuar designated Sher Bahadur Singh as the person who would succeed to the estate on her death "for the purpose of perpetuating the name of the family." The other documents to which our attention has been called relate to the period during which the First Regular Settlement was going on, that is, from the year 1863 onwards. It seems to us that for the purposes of ascertaining the extent of the interest which Government intended to confer upon Dariao Kuar these documents are of no value at all. By the time the Regular Settlement began, the titles of the talukdars as proprietors of their estates had already been settled and the First Regular Settlement was made with them on the basis of the title conferred in virtue of the Summary Settlement, the letter of 10th October 1859 and the sanads which were subsequently granted. Nothing was done by the Government in the course of these Regular Settlement proceedings which could add to or detract from the interest already conferred upon the talukdars, except so far as steps were taken to define and secure the rights of the inferior zamindars and village occupants to which a reference is made in para 3 of the letter of 10th October 1859 and also in para 4 of the letter of 19th October 1859, which is to be found as No. 2 in Sch. 1, Oudh Estates Act.

After a perusal of these documents it cannot be doubted that in various proceedings relating to the Second Summary Settlement Dariao Kuar was described as the wife or widow of Basant Singh. The question is whether this fact is to be treated as being of any importance or weight in connexion with the matter under inquiry, namely, the intention of the Government in making a grant of the proprietary rights. Is there anything to show that the declaration of Dariao Kuar that she was the wife of Basant Singh in any way affected the intentions of the Government at the time when the letter of 10th October 1859 was issued or, still later, when the two sanads were granted in succession to Dariao Kuar? We have already expressed our opinion that no proprietary rights can be deemed to have

been conferred upon Dariao Kuar prior to the letter of 10th October 1859.

It is, of course, possible to argue that the decision to allow Dariao Kuar to engage for the payment of the Government revenue for a period of three years subsequent to May 1858 was influenced by the fact that she was Basant Singh's widow, and it may perhaps be conceded that the order for making the settlement with her (which, as we have mentioned, was passed on the third day after she had made the application) would not have been made had it not been that she was Basant Singh's widow and in possession of his property. But while these facts may be taken to have constituted the motive which determined the selection of Dariao Kuar as being the person who should be permitted to engage for the period of the Summary Settlement, we are unable to see how they could affect the nature of the interest which was afterwards conferred upon her. It need not be supposed that in the interval between the making of the Summary Settlement with the various talukdars and the issue of the letter of 10th October 1859 Government was not aware of the fact that this taluka Samarpaha and other talukas were in possession of widows. There is plenty of evidence on the record to show that information regarding the various estates and their histories had been sought for and obtained before the Governor-General issued his letter of 10th October 1859 in response to the urgent solicitations of the Chief Commissioner of Oudh.

Had it been the intention either of the Chief Commissioner or of the Governor-General to lay down any particular terms regarding the estates which were in possession of widows, we think that some clear expression of the intention would have been sound in the letter of 10th October 1859. But as has been pointed out, the declaration contained in para. 2 of this letter is a perfectly general one. It is made in favour of "every talukdar" with whom a Summary Settlement had been made and must be deemed therefore to include the case in which the person admitted to engage for the revenue was a woman. We can find nothing in this letter of the Governor-General to indicate that it was his intention to bestow in any case anything less than the full estate described

in the letter; and the language of the sanads which were subsequently addressed to the individual talukdars confirms this opinion; and while it may be true that, in the various proceedings relating to the second Summary Settlement, Dariao Kuar was described as the wife or widow of Basant Singh, it is important to notice that in Ex. 9, which is the copy of the primogeniture sanad the lady is described by her own name and not as Basant Singh's widow: the sanad addresses her as "Mt. Dariao Kuar, talukdar." We are unable therefore to yield to the argument that the description of Dariao Kuar as the wife or widow of Basant Singh in these various documents is a fact which can be treated as having weighed with Government when it came to make the grant of the proprietary rights in the taluka of Samarpaha.

We have now to notice an argument which was very strongly pressed upon us by the learned Counsel for the appellant. It is said that although the confiscation of 15th March 1858 may have made a clean sweep of all existing rights, the effect of the "restoration" of talukas to their former owners was to re-instate them in their old position, subject only to such modifications as were made by the Government either by way of curtailing or enlarging the rights formerly possessed by them; and it is claimed that the documents to which we have referred show conclusively that the grant made by the Government to Dariao Kuar operated as a restitution and so it is argued that in accordance with well established principles of law in such cases any rights which could have been enforced against talukdars before the confiscation would be revived. In other words, the argument is that the effect of the grant made by the British Government was to restore the status *qua ante* and to put Dariao Kuar in the position of a person holding the estate of a Hindu widow with special powers of alienation superadded, the result being that if she failed to exercise the special powers of transfer conferred upon her, the estate would revert after her death to the nearest male heir of her deceased husband.

It would, we think, be difficult to discover, either in the language of the letter of 10th October 1859, or in the

language of the sanads which were granted subsequently, anything which might lead us to conclude that the intention of the British Government was merely to restore the position as it existed before the date of the confiscation. Here again we may say that had this been the policy of the Government, we might reasonably expect to find words clearly expressing this intention. An examination of the letter of 10th October 1859 appears to us to negative any hypothesis of this kind. The policy of the Government seems to have been to perpetuate the fiscal arrangement which had been carried out by means of the second Summary Settlement, to maintain the existing possession of the persons with whom that Summary Settlement had been made, and for this purpose it was thought proper to declare that every person, with whom such a settlement had been made and who in the month of October 1859 was still in possession of the estate for the revenue of which he had contracted, was to be deemed to have acquired thereby a permanent, hereditary and transferable right in the taluka. Para. 4 of the letter refers in the plainest language to the permanent proprietary right "which has now been conferred." It seems to us that this letter does not in any way purport merely to restore a former title or to proclaim that the talukdars were to be deemed to be in again as of their old estates.

On the contrary there was the grant of a fresh title altogether and not merely the acknowledgment and restoration of a title which had existed prior to the confiscation and had been destroyed thereby. With regard to the argument that in cases where a grant operates merely by way of restitution there is a revival of all rights which might have been enforced against the grantee prior to the confiscation; it may be pointed out that there is positive evidence, in the history of the legislation which took place subsequent to the grant of the sanads, to show that the rights of mortgagors to redeem mortgages on property which had become included in the estates covered by the sanads had, as a matter of law, been confiscated by the proclamation, although it seems that the result was not intended. In the year 1866 an Act was passed (13 of 1866) to exempt certain suits in Oudh from

the operation of the rules of limitation in force in that Province. The suits so exempted included suits for the redemption of mortgages with possession executed on or after 13th February 1844. This Act was passed with the consent of the talukdars, who agreed to waive the objections they might legally be entitled to make to the redemption of mortgages. It was afterwards discovered, however, that the language of this Act 13 of 1866 was ambiguous and that it was very doubtful whether a suit to redeem a mortgage of property comprised in a taluka was not legally barred. In fact it was brought to the notice of the Government that in spite of the provisions of Act 13 of 1866 to which the talukdars had assented, one of them had actually pleaded in Court that the redemption of a mortgage of property comprised in his estate was barred by the terms of the sanad. It was to remove all doubts regarding the right to redeem these mortgages that S. 6, Act 1 of 1869 was passed.

We may take it, therefore, that it was not understood by the Government that the effect of the letter of 10th October 1859 and of the sanads which followed upon it was to revive all rights which might have been enforced against the talukdars prior to the time of the confiscation; otherwise there would have been no necessity for the subsequent legislation intended to protect the rights of persons who had made mortgages at a date prior to the annexation of Oudh. We may also observe here that the terms of the letter of 10th October 1859 disclose to what extent the Government then contemplated the revival of rights which could be enforced against the talukdars. Para. 3 of this letter declared the intention of Government to take steps for the protection of inferior zamindars and village occupants and for upholding their rights in the soil in subordination to the talukdars; and in this connection we may also refer to the letter of 19th October 1859, which is included in Sch. 1, Oudh Estate Act, and in which the intentions of the Government, as expressed in para. 3, of the former letter are more fully declared. It was notified that when a Regular Settlement of the Province should be made, means would be taken to secure the rights of the zamindars or other persons who held an interest in

the soil intermediate between the raiyat and the talukdar. It seems clear therefore that it was at this time the intention of the Government, in spite of the grant of full proprietary rights to the talukdars, to revive as against them the rights of certain subordinate zamindars and tenure-holders; but beyond this there is nothing in the language of this letter of 10th October 1859 to indicate that Government had any intention of restoring or reviving other rights such for example as the rights of the reversionary heirs of a deceased Hindu expectant on the death of the Hindu widow in possession of the estate. We are led to hold, for the reasons just given, that Government had no intention whatever of reviving any such reversionary rights.

On this part of the case the learned counsel for the appellant pressed us with the decision of their Lordships of the Privy Council in the *Hunsapoor* case [*Baboo Beer Pertab Sahoe v. Maharajah Rajender Pertab Sahoe* (4)]. That was a case in which a Raj had been confiscated by Government, who kept possession of it for upwards of 20 years and ultimately granted it to a younger member of the family to which the estate had previously belonged. It was held there that although the zamindari was to be treated as the self-acquired property of the grantee, yet the grant, being from the ruling power, in the absence of evidence of the intention of the Government as grantor to the contrary, carried the incident of the family tenure as a Raj. It was held in the circumstances that the Government's intention must be taken to have been to restore the estate as it existed before confiscation with no change other than such as affected the former owner and his descendants. Consequently, the grant was held not to take effect as the creation of a new tenure but to operate simply as a change of tenant by the exercise of a vis major. It is to be observed with reference to this decision that in this case there was no issue of a fresh sanad. The only evidence of the intention of the grantor which was before their Lordships of the Privy Council was to be found in certain proceedings and correspondence which afforded no means of ascertaining the precise grounds upon which the

Government determined to confer the property upon the new grantee. As their Lordships observed, there was no clear expression of intention on the part of the Government to alter the nature of the tenure. The facts relating to the confiscation and the granting of estates in Oudh are altogether different. We do not treat the decision of their Lordships in the *Hunsapoor* case (4) as laying down any general rule defining the incidents of estates which are re-granted after confiscation. We take it that what is laid down in the judgment is that in each case the question is purely one of the intention of the Government as grantor and every case must be decided on its own facts.

We have in the present case clear and precise evidence, to be found in the formal declaration of the Government contained in the letter of 10th October 1859 and in the language of the sanads which followed, to show that the intention was not merely to restore the estates with all the incidents which attached to them before the confiscation took place. We think in the case of estates in Oudh the situation was not merely that of a change of tenant by the exercise of vis major. There was a fresh grant conferring a fresh title and a new estate with incidents which were unknown prior to the time when confiscation took place. It has been said in the course of argument that if the Government chose to confer upon a Hindu widow powers of alienation not possessed by her under the ordinary Hindu law, the reversionary heir would be precluded from questioning the validity of any transfer made by her, but his right to succeed to the undisposed estate would not be affected in any way. This is an echo of the argument which was raised before their Lordships of the Privy Council in *Janki Koer's* case (2), where it was urged that what had been granted to the widow was a widow's estate with a general power of appointment, failing the exercise of which the estate would descend to the husband's heirs. Their Lordships dealt with this argument in the following language to be found at p. 11 of the report:

"They consider that the sanad conferred and was intended to confer a full proprietary and transferable right in the estate upon Kabla and her male heirs according to the law of primogeniture, and not merely to confer upon her an

estate for life with full power of alienation and with remainder to the male heirs of her husband in the event of her dying intestate without having alienated it in her lifetime."

If this is the interpretation which their Lordships put upon the sanad granted to Kablas Kuar, we certainly should not consider ourselves at liberty to construe the very same language which is to be found in the sanad given to Dariao Kuar in a different sense. The sanads are identical in terms and we take it that their Lordships intended to rule that the nature of the estate conferred was to be deduced from the language of the document which constitutes the evidence of the grant. While it may be true that a peculiar estate of the kind mentioned in the learned counsel's argument, namely, a life-estate in a Hindu female with a general power to appoint, is not unknown to the Hindu law, we think we may safely say that such an estate is rarely to be met with. There is an instance of an estate of this kind to be found in the reports [cf. *Bai Motivahu v. Bai Mamubai* (5)]. This was a case in which their Lordships of the Judicial Committee had to deal with the interpretation of the will of a Hindu testator who devised his immovable property upon trust for the income to be appropriated to the maintenance of his widow and daughter, and of the children that might be born of the daughter, the property to be divided among the heirs of such children. It was further provided by the will that if there should be no children born of the daughter, the property covered by the will was to devolve upon those to whom the daughter might direct it to be delivered by making her will. It was held that :

"The daughter having no children there was not an absolute gift to the daughter and that the persons to whom the property was given, though to be designated by her, did not take the gift from her but from the testator."

This therefore was a case of a bequest to a daughter of a life-estate with a general power to appoint by will and the estate so created was declared by their Lordships to be a valid estate under the Hindu law, on the ground that the testator himself might have designated the person to take in the event of the daughter's having no child. The gift would then have been valid as an executory bequest, supported by pre-

ceding life-interests, but the taker so designated must have been, either actually or in contemplation of law, in existence at the death of the testator. Here the language in the will which gave rise to this estate was clear. The testator had provided that if his daughter Mamubai should have no children, then after her death and the death of the widow Motivahu the trust was to become void and the property was to be delivered to such persons as the daughter might appoint by will. We think we are correct in saying that any intention to create a peculiar estate of this kind would have to be expressed in the clearest possible language.

We take it that this argument, which contends for the grant of a life estate to Dariao Kuar with a general power of appointment superadded, is based upon the language of the penultimate clause of the primogeniture sanad, which declares that the grantee and her successors are to have full power to alienate the estate, either in whole or in part, by sale, mortgage, gift, bequest, or adoption, to whomsoever they might please. By the terms of the preceding clauses there is a grant to Dariao Kuar, and the suggestion appears to be that the special mention of the power of alienation to be found in Cl. 3 of the sanad indicates that the intention was to give a limited estate, but to confer upon the grantee full powers of alienation. But it is to be observed that what is granted by the earlier clauses of the sanad is the full proprietary right, title and possession of the estate of Samarpaha, and it appears to us that no such significance as is contended for can be attributed to the language contained in Cl. 3 which relates to the power of alienation. It seems clear enough that the special mention of the power of alienation contained in this third Clause was made merely to prevent the raising of any doubts as to the meaning of the previous words which settled the rule of descent by the law of primogeniture. In other words, Cl. 3 lays down that the estate is to descend by primogeniture in the event of the grantee, or of any of her successors, dying intestate, but it is to be understood that the operation of this rule can be prevented by the exercise of the full power of alienation which has been conferred upon the grantee and indeed it seems to

us impossible to put any other construction upon the language of the sanad when it is remembered that the grant, of which this sanad is merely evidence, had been made by the letter of 10th October 1859.

We have already expressed our opinion that the effect of this letter was to confer upon all talukdars, with whom a summary settlement had been made, the full proprietary title in the estates for which they had engaged and there is certainly nothing in the language of that letter to indicate in any way that in the case of the talukdars who were Hindu widows it was Government's intention to confer merely a life interest with a general power of transfer superadded. Again it has been argued that in the dealings between herself and the British Government after confiscation Dariao Kuar was acting in a representative character. It is said that she was representing the complete estate, namely, her own limited interest together with the interest of the reversionary heirs. That may have been the situation in the eye of the law up till the time when the proclamation of 15th March 1858 was issued but any such legal character borne by her was put an end to by the confiscation and after the proclamation, Dariao Kuar like all other proprietors in Oudh, was in the situation of a person stripped of all immovable property. She then represented nothing in the way of estate, for there was nothing to represent. We have already said that there is no evidence to satisfy us that in the dealings which took place between the lady and the British Government subsequent to the date of the confiscation she was regarded by the Government in the light of a representative. On the contrary, it seems to us that at the time when the declaration contained in the letter of 10th October 1859 was made Dariao Kuar was treated by Government as being merely one of a number of individuals with whom a summary settlement had been made and who was by reason of that fact considered to be a fit object of the bounty of Government. It was this fact, namely, the making of the summary Settlement with her, which constituted the reason for the grant and it was in that character and in that character only that the estate appears to have been bestowed upon her. In

short this argument is merely the restitution argument put in another form and we have already disposed of that by what we have just said above.

We now come to another part of the plaintiff appellant's case as argued before us. It has been contended that for certain reasons Dariao Kuar, although the sanad was granted to her, should be considered to have held the position of a trustee for the reversioners of her deceased husband Basant Singh. The case in this respect seems to have developed considerably after the filing of the plaint, for an examination of this document would indicate that the only grounds suggested for the plea that Dariao Kuar was a trustee are to be found in para. 7 of the plaint in which we have already referred and it may perhaps be taken that the allegations contained in paras. 4 and 5 of the plaint that Dariao Kuar engaged for the second summary settlement and obtained the sanad in her character of the widow of Basant Singh were intended to suggest that Dariao Kuar occupied this position. In the course of the preliminary arguments before the lower Court before the issues were struck the plaintiff's counsel informed the Court that he did not raise the case that Dariao Kuar acquired the taluka in trust for herself and others in the technical sense of the term but only that the grant to her was subject to certain equities which flowed first, from her position as a Hindu widow and secondly, from the circumstances under which the grant was made. These latter circumstances it was said would be disclosed by evidence contained in Dariao Kuar's own applications to the Settlement Courts and in other official papers. A reference was made by the plaintiff's counsel to certain decisions of their Lordships of the Privy Council, in which it had been held that the talukdar to whom the sanad had been granted took the property in trust and it was pleaded that in the present case there were circumstances which would give rise to equities similar to those which were recognized in the decisions of their Lordships of the Privy Council.

A reference to the judgment of the learned Subordinate Judge goes to show that other points were also argued before him for the purpose of showing that Dariao Kuar was nothing but a trustee.

One argument was that her situation in the eye of the law was similar to that of a life-tenant who renews a lease or acquires the reversion of the leasehold property and who would be treated in equity as a trustee for the remainderman. Then again an appeal seems to have been made to what we may call the doctrine of graft, in other words, it was argued that Dariao Kuar had the precarious estate of a Hindu widow upon which there had been grafted a general power of appointment. And lastly, stress was laid upon certain acts and declarations of Dariao Kuar by reason of which it was argued that she had made herself a trustee for Basant Singh's reversionary heirs. All these arguments have been repeated before us in appeal and we now proceed to deal with them. There can be no doubt that in a number of cases which have come up for disposal before the Judicial Committee it has been decided that the person to whom the sanad has been granted is a trustee in spite of the terms of the grant. We might in this connexion refer to the remarks of their Lordships in their judgment of 1877 given in the suit which Sher Bahadur Singh brought against Dariao Kuar in respect of this very estate. A copy of this judgment is on the record and is marked Ex. A-69 [cf. *Thakur Shere Bahadur Singh v. Thakurain Dariao Kuar* (6)]. They refer to

"the tenor of some recent decisions whereby, although undoubtedly the doctrine is affirmed that the title conferred by the Government is absolute and overrides all other titles, nevertheless it has been held that the grantee under the Government may by an express declaration of trust constitute himself a trustee."

In another case of this kind their Lordships observe that the legal owner might either by express agreement or by his conduct constitute himself trustee for others as to the whole or part of the beneficial interest. We have been referred to all the cases in which this point was considered beginning with the case of *Mt. Thukrain Sookraj Koowar v. Government and Baboo Ajeet Singh* (7) down to the case reported as *Maharaj Kedar Nath v. Thakur Ratan Singh* (8). An examination of these cases goes to show that in all instances in which it was held that a trust had been raised

there was before their Lordships definite evidence of acts upon which they came to the conclusion that in spite of the terms of the sanad the grantee held the property either in whole or in part, for the benefit of third persons.

In the *Bhinga* case [*Mt. Thukrain Sookraj Koowar v. Government and Baboo Ajeet Singh* (7)] there were definite acknowledgments in writing made by the grantee by which he admitted the title of the lady, and it was proved that these admissions of title had induced the lady who was suing to stand aside and forbear from pressing her claims to a grant of the estate. In the *Sessendee* case [*Widow of Shunker Sahai v. Rajah Kashi Pershad* (9)] there was evidence to show that the widow's proprietary title to a portion of the property covered by the sanad had been acknowledged by the talukdar when he made his application for the Second Summary Settlement. Similarly in the *Mourawan* case [*Hurpur shad v. Sheo Dyal* (10)] the evidence was sufficient to show that the grant, although expressed to be made to one member of a joint family, was in reality made to the entire family.

In the case of *Thakoor Hardeo Bux v. Thakoor Jawahir Singh* (11) there was proof on the Settlement Record of an admission of title made by the talukdar and this was treated by their Lordships as having the same force as an express writing so as to constitute between the parties the relation of trustee and beneficiary. In other cases such as those reported as *Seth Jaidial v. Seth Sita Ram* (12) and *Maharaj Kedar Nath v. Thakur Ratan Singh* (8), effect was given by their Lordships to family arrangements come to between the parties previous to the grant of the sanad.

A similar case of family arrangement is that reported as *Thakurain Ramnund Koer v. Thakurain Raghunath Koer* (13), a case in which several widows were in possession after the husband's death and had executed an agreement between themselves relating to the manner of the enjoyment of the estate. In this case the defendant Thakurain Raghunath Kuwar who received the sanad was found

6. (1877-78) 3 Cal 645=3 Sar 769 (P C).

7. (1870-72) 14 M I A 112 (P C).

8. (1910) 32 All 415=7 I C 648=37 I A 161=13 O C 332 (P C).

9. (1876-77) 4 I A 198 (P C).

10. (1875-76) 3 I A 250=26 W R 55 (P C).

11. (1877-78) 3 Cal 522=4 I A 178 (P C).

12. (1880-81) 8 I A 215 (P C).

13. (1882) 3 Cal 769=9 I A 41 (P C).

to have held herself out all along, and certainly from April 1856 up till the time she got the sanad, as claiming the estate under her husband's will which made provision for the successive enjoyment of the estate by the widows. The only other case we think it necessary to notice is one reported as *Hasan Jafar v. Muhammad Askari* (14). Here the talukdar had at the time of applying for Second Summary Settlement expressly stated that he was only one of several cosharers in the estate. It was proved that the settlement was directed to be made with him on this basis and definite orders were passed to provide for the rights of the absent cosharer if he returned. It was further proved that this arrangement was agreed to by the talukdar.

In every one of these reported cases therefore there was some definite evidence of acknowledgment of the title of a third party, either by express admission or by execution of a deed of family arrangement or by a solemn declaration made at the time of the granting of the Second Summary Settlement. They are all cases in which the conduct of the talukdar was held to amount either to an express or constructive declaration of trust. Is there any evidence of this kind in the case now before us? We are of opinion that there is not. We have already touched upon some of the evidence which is relied upon in this connexion, namely, various declarations made by Dariao Kuar up till the time the sanad was granted. It is true she described herself as the widow of Basant Singh, that in answer to inquiries relating to the history of the property she gave the history of her husband's family, but so far as we are able to see she never in any way acknowledged that any third person had a present right in the taluka. It is true that in the year 1861 she made a declaration that Sher Bahadur Singh would succeed to the property after her death; but this obviously cannot be treated as a declaration of trust in favour of Sher Bahadur. The document was one in the nature of a will which Dariao Kuar could revoke, and did subsequently revoke, and in the litigation between Sher Bahadur Singh and Dariao Kuar this document was never treated as amounting to a declaration of trust.

14. (1899) 25 Cal 879=26 I A 229 (P O).

A good deal of reliance has been placed upon Ex. 12 which is a copy of a letter, dated 27th December 1866 which Dariao Kuar addressed to the Deputy Commissioner of Rae Bareilly in connexion with a dispute then pending between herself and Sher Bahadur Singh. This was the time when Sher Bahadur was moving the Chief Commissioner and the Government of India to recall the sanad from Dariao Kuar and grant it to him. In this letter the lady refuted the suggestion that had been made against her, namely, that she was alienating the estate to her brothers, men of the Amethia clan. She went on to say that when the time came when she should think it right to make over the estate to someone else, she would make an application to the Deputy Commissioner to entrust the estate to a member of her family (apne khandan) of approved good character. We do not look upon this document as containing any declaration of trust or any admission by the lady that she was holding the property for the benefit of her husband's relatives. The statement that she would not give the estate to the Amethias in her life tied her down to nothing. She might have exercised her power of alienation at any time before her death in favour of anyone she pleased, and although she may have protested that she had no intention of handing over the property to Amethias, that statement would not raise any trust in favour of any particular person belonging to the Bais clan to which her husband belonged.

As for what she says regarding her intention at the proper time to hand over the estate to a well-behaved member of the family, in view of what she had already said, she probably did mean a member of her husband's family. However, all that need be said regarding this is that she never took any such action and by dying intestate left the estate to go where the law directed it should go. Ex. 141 is another letter, dated 24th January 1867, which Dariao Kuar addressed to the Deputy Commissioner. This too relates to the dispute then going on between herself and Sher Bahadur.

The lady repudiates the charges brought against her and justifies her conduct and she refers to the previous declaration she had made, namely, that she

had no intention of giving the estate to the Amethias.

Next it is said that certain proceedings in the Courts of the Settlement Officers during the First Regular Settlement afford evidence of acknowledgment of a trust. We have already observed that no acts or declarations of Dariao Kuar at this period could be taken into account for the purpose of ascertaining the intention of Government in conferring the estate and for the purpose of determining the extent of the estate so conferred, for all that had been settled long before the proceedings of the First Regular Settlement were commenced. We proceed to notice the various documents which are relied upon by the plaintiff in this connexion. Exs. 16 to 21 and 21 to 38, which are all of the period between 1861 and 1865, are copies of petitions which were made by Dariao Kuar for regular settlement of the various villages comprised in the taluka.

In a great many of these documents she styles herself as the widow of Basant Singh and the property is described as "ancestral" or "inherited" property or property which had for generations past been "in the possession of her ancestors" or herself. Then Exs. A-16 to A-58 are copies of orders, decrees or judgments passed by the Settlement Officers who dealt with the applications for the regular settlement. In some of these orders the claim of Dariao Kuar is described as being a claim by inheritance, as well as a claim under a right conferred by the sanad. The claim is allowed in all cases and in some instances it is stated that the settlement is made with her because she has acquired a full proprietary right. Exs. A-59 to A-62 are copies of certain kabuliyats or engagements executed by the lady in which she is described as the wife or widow of Basant Singh. Then we have a number of village administration papers (Exs. 39 to 123) containing the history of various villages comprised in the Samarpaha taluka and in which mention is made of the fact that the property had descended in the family of Basant Singh.

The result then is, that in a variety of documents relating to the regular settlement of the taluka we have repeated declarations of Dariao Kuar that the property was ancestral property, that it was inherited and that it had been in

possession of her and her ancestors for generations. We have no doubt that in using this language the lady was describing the history of property which had come down in her husband's family, for it could hardly be suggested that she was making a declaration notoriously untrue, namely, that the property had belonged to her own family before the time of the annexation. But what do these declarations amount to? There can surely be no ground for saying that in making these statements of fact Dariao Kuar had any notion of holding herself out as a trustee for the heirs of her husband. It is perfectly clear that the regular settlement was not made with her on the basis of these representations that she was Basant Singh's widow and that the property had been in her husband's family for many years, but on the ground set out in the decrees and orders of the Settlement Courts, namely, that she had acquired the full title to the property under the sanad. All these declarations are naturally explained on the assumption that they are nothing but mere statements of history; not statements of any intention to create a trust or acknowledgments of title made with the intention of admitting the existence of any beneficial interest in the property in third parties. We are unable to hold that on this evidence it is proved that Dariao Kuar either expressly or by implication constituted herself a trustee for the reversionary heirs of her husband. The only ground then left for any argument that Dariao Kuar was a trustee is the fact that she was the widow of Basant Singh, and it was admitted by the learned counsel for the appellant when he came to sum up his arguments that the whole question of title in this case is narrowed down to this, namely whether Dariao Kuar acquired the taluka "in right of her husband." If she did, it is argued the succession must be to her husband's reversioners. We have already discussed this question, holding that the matter for decision is really what the intention of the Government was in making the grant. We have expressed the opinion that the Government in conferring the estate by the letter of 10th October 1859 and by the sanad which followed had no regard to her position as a Hindu widow, but gave her the full proprie-

tary right solely on the ground that she was a person who had been permitted to engage for the Second Summary Settlement. We may finally dispose of this part of the case by referring to an authority which in our opinion is conclusive of the matter in debate. We refer to the ruling reported as *Brij Indar Bahadur Singh v. Ranee Janki Koor* (2). A great deal of time and ingenuity has been expended in an attempt to distinguish that case from the present one, but, in our opinion, without success. The facts of the two cases are for all practical purposes identical. Any differences which have been discovered appear to us to be altogether negligible and cannot possibly affect the principles upon which the case was decided. The main question which their Lordships were called upon to determine in *Janki Koor's* case (2) was the nature of the estate conferred upon Thakorein Kablas Kuar to whom, as in the present case, a primogeniture sanad had been granted. The taluka had belonged to one Mahpal Singh, who died in the years 1852-3 prior to annexation leaving two widows, one of whom was Kablas Kuar. At the time of the annexation Kablas Kuar was in possession of the estate which had descended to her as the surviving widow of Mahpal Singh. As in the present case Kablas Kuar was in possession of the estate at the time of confiscation and after confiscation the Second Summary Settlement was made with her. In the *kabuliyat* which she executed Kablas Kuar was described as Mahpal Singh's widow; and in a *wajib-ul-arz* which was in evidence before their Lordships it appeared that she had made an admission that the regular settlement had been made with her in virtue of the ancestral right of her husband. A primogeniture sanad was granted to the lady and it was proved that before this sanad was given Kablas Kuar had presented a petition asking for the grant to her of a sanad for life. This petition, and the letter of the Deputy Commissioner to which it was an answer, were strongly relied upon for the purpose of showing that the grant to Kablas Kuar was intended to be a grant to her and the heirs of her husband. In spite of the prayer contained in Kablas's petition the Government issued a primogeniture

sanad to her without even mentioning her status as a widow either in the operative part or by way of describing her. Their Lordships were of opinion that if the Deputy Commissioner's letter and Kablas's petition for a sanad for her life could properly be taken into consideration for the purpose of ascertaining what the Government intended to grant by the sanad, they would operate more against than in favour of the claims of the parties who were setting up the case that the grant was one to Kablas Kuar and the heirs of her husband. Dealing with the nature of the estate which Kablas Kuar took under the sanad their Lordships said they entertained no doubt. They held that the sanad conferred and was intended to confer a full proprietary and transferable right in the estate upon Kablas Kuar and her male heirs according to the law of primogeniture, and not merely to confer upon her an estate for life with full power of alienation and with remainder to the male heirs of her husband in the event of her dying intestate without having alienated it in her lifetime.

They were further of opinion that Lord Canning's proclamation had the effect of absolutely destroying both the interests of the widow and that of the reversionary heirs and that the Government, having by the confiscation acquired the right of disposing of the property in such manner as it thought fit, granted to Kablas Kuar and her heirs male according to the law of primogeniture the full proprietary right and title to the estate. After this interpretation of the terms of the sanad their Lordships went on to observe that the lady's title did not depend entirely upon the sanad but was also established by the provisions of Act 1 of 1869. When this Act was passed, the name of Kablas Kuar was entered in the first of the lists prepared under S. 8. By reason of the provisions of S. 10 the entry of her name in that list was conclusive evidence of the fact that she was a talukdar within the meaning of the Act, and consequently by virtue of S. 3 of the Act Kablas Kuar was to be deemed to have acquired by the sanad a permanent, heritable and transferable right in the estate in dispute. It was argued before their Lordships that a trust had been created and that Kablas Kuar took the estate upon

trust for those who would have been entitled to it if it had not been confiscated.

Dealing with this argument their Lordships observed that to hold that such a trust arose would reduce to a nullity the confiscation and the disposal by the Government of the property confiscated. The power of alienation by sale, mortgage, gift or bequest was wholly inconsistent with an intention on the part of Government to create a trust for the benefit of the reversionary heirs of her husband. Their Lordships were of opinion that no trust was created by the sanad or by the Act of 1869 and there was no evidence before them to prove that a trust was created in any other manner. These are material portions of the judgment of their Lordships to which it is necessary for us to refer, and it seems to us after a careful perusal of the report that there is not a single argument raised here for the plaintiff-appellant which was not advanced before their Lordships. We find there, as here, the argument as to the interpretation of the sanad to the effect that it conferred upon Kablas Kuar the ordinary estate of a Hindu widow with a power of alienation, failing the exercise of which the estate would go to the husband's heirs. Their Lordships held that the sanad was not susceptible of this construction. Then again it was argued there that the sanad was intended to operate as a grant of property to the widow in trust for the reversionary heirs of her husband. As to this, their Lordships observed that no trust had been created either by the sanad or by Act 1 of 1869 and there was no evidence before them to show that a trust had been created in any other manner. Here, of course, we have been referred to certain evidence outside the sanad for the purpose of establishing the position of Dariao Kuar as a trustee.

But that evidence, as we have said, has failed to convince us that Dariao Kuar in any way made herself a trustee for her husband's heirs. The argument that the widow took the estate "in the right of her husband" was, we think, also put before their Lordships in the case reported, although it has been seriously contended here that the point was not taken, or that, at any rate, if it was, the argument was not repelled on the

ground that it was a matter of indifference whether she took the estate in her husband's right or her own. The learned counsel has referred to what was said by Lord Macnaghten in the case of *Thakur Tirbhuwan Bahadur Singh v. Raja Rameshar Bukhsh Singh* (1), where his Lordship remarked that it was admitted that Dariao Kuar became talukdar "in her own right" implying, it is argued, that if she had become talukdar in right of her husband the result of the case would have been different. There is no doubt in our minds that it was argued in *Janki Koer's* case (2) that Thakurain Kablas Kuar, when the estate was conferred upon her, took it in her quality of widow and it was in support of this argument that reliance was placed in particular upon the letter which Kablas Kuar wrote in reply to Col. MacAndrew and in which she prayed that a sanad for life might be granted to her. It was this request of Kablas Kuar which was strongly relied upon before their Lordships for the purpose of showing that what Kablas Kuar took under the grant was only the life-estate of a Hindu widow. But it seems to us that their Lordships treated that fact as being of no avail, when it was evident that in spite of the request so made the Government by the sanad conferred the estate upon her and her heirs male

"without even mentioning her status as a widow either in the operative words or in describing her."

The case was in this respect a stronger one than the case now before us, for it cannot be pretended that Dariao Kuar, although she generally described herself as Basant Singh's widow and referred to the property as having descended in her husband's family, ever asked for the grant of a sanad for her life only. If it was possible to hold, as it was held in *Kablas Kuar's* case, that the widow received a full estate notwithstanding her prayer for the grant of a limited estate only, it seems to follow a fortiori that it should be so held when, as here, there never was any such request on the part of Dariao Kuar. As we have already said, the question is not what the lady took but what the Government conferred and intended to confer by the declaration contained in the letter of 10th October 1859. The grant made by that letter was, as their Lordships ob-

served in the *Chillaree* case (3), "an act of grace," and the nature of the interest which came to Dariao Kuar by the exercise of this act must be determined by ascertaining, not what Dariao Kuar wished or did not wish to receive, but what the Government thought fit to bestow upon her. This question is to be answered by interpreting the language of the letter of 10th October 1859 and of the sanad which followed it; and, as observed by their Lordships in *Janki Koer's* case (2), there is nothing in either document to suggest that Government was in any way influenced by the fact that Dariao Kuar was a Hindu widow to whom her husband's estate had descended under the ordinary Hindu law before the date of confiscation. As in the case of *Kablas Kuar* so here the sanad neither in its operative part nor by way of description refers to Dariao Kuar's status as a widow, and we think we are right in holding that this particular fact was treated by their Lordships of the Privy Council in the reported case as being decisive of the matter.

To sum up, the decision in *Janki Koer's* case (2) appears to us to be conclusive as regards the nature of the interest acquired by Dariao Kuar. The only ground upon which it is possible to suggest that there is any distinction between the cases is that certain evidence has been put forward here for the purpose of showing that Dariao Kuar acquired the property in circumstances which made her a trustee for the heirs of her husband. The evidence, as we have said, fails to establish this position and we find accordingly that by reason both of the letter of 10th October 1859 and of the sanads which followed thereupon, and by reason of the provisions of the Oudh Estates Act, Dariao Kuar was the full owner of the Samarpaha taluka. This being so, succession to the estate was governed by the terms of S. 22 of Act 1 of 1869, and the defendant Rameshar Bakhsh Singh took as her heir. The plaintiff has no claim whatever to this property. To say that the property was the lady's stridhan does not in our opinion advance the plaintiff's case in any way, for whether it is stridhan or not it is clear from the decision in *Janki Koer's* case (2) that succession to it is governed by the rules laid down in S. 22, Oudh Estates Act, and Rameshar

Bakhsh Singh is the lady's heir under the provisions of Cl. 6 of that section.

Limitation

The next matter for determination is the question of limitation. The decision of the Court below is that the claim was barred by Art. 141, Sch. 1, Lim. Act. This article, which is to be read along with Art. 140, lays down a period of limitation governing a suit brought by a Hindu or Mahomedan entitled to the possession of immovable property on the death of a Hindu or Mahomedan female. Art. 140 relates to suits brought by a remainderman, a reversioner (other than a landlord), or a devisee, for possession of immovable property. Art. 141 lays down that the suits to which it relates must be "like suits" to those provided for by Art. 140. We have had occasion in a case decided some time ago to discuss the meaning and scope of Art. 141 and our judgment in this case is reported as *Ghose Singh v. Gopraj Singh* (15). In that case it was held on a review of the history of the article in question that it did not apply to cases in which the Hindu or Mahomedan female had been in possession of a full estate, but only to cases where the title of the person bringing the suit is independent of the title of the female who was in possession of the intermediate estate. In other words, Art. 141 lays down a rule of limitation for those suits in which it is sought to recover estates which, having once been estates in expectancy, have become vested in the heir of the last male owner on the determination of a limited estate held by a Hindu or Mahomedan female. It was held in the case just referred to that where the Hindu or Mahomedan female had a full estate and where the title of the plaintiff is derived through the female, the proper article to be applied is Art. 144.

We adhere to this view of law, the correctness of which has been admitted by the learned counsel for the appellant, who relied upon this decision. We may add that its correctness has not been seriously challenged by the learned counsel for the respondent. The plaintiff has found himself in difficulties with regard to this question of limitation, for it appears to us that if he contends that the estate which was held by Thakurain Dariao Kuar was a full estate which was

vested absolutely in her he is out of Court on the question of title; for, as we have pointed out, if Dariao Kuar was the full owner the defendant is her heir and has the right to the property. The plaintiff has no standing whatever as an heir of Dariao Kuar. On the other hand, if it is the plaintiff's case that Dariao Kuar held only an intermediate estate, which was to revert after her death to the heirs of her deceased husband, the case is clearly governed by the provisions of Art. 141. In para. 3 of the plaint the allegation was that after the death of Basant Singh in November 1857 Dariao Kuar as his widow came into possession and enjoyment of the taluka. That *prima facie* amounts to an allegation that Dariao Kuar was in possession with the limited estate of a Hindu widow. Then again in para. 7 of the plaint it was alleged that for various reasons therein specified the grant to Dariao Kuar was the grant of an estate which was to descend after her death to the nearest reversioner of Thakur Basant Singh. So far therefore it appears that the case set out in the plaint was that Dariao Kuar was in possession of a limited estate only; and if the question of limitation is to be decided by the statements put forward in the plaint, the opinion of the Subordinate Judge to the effect that the suit is barred by Art. 141 appears to us to be perfectly correct.

In the argument which took place in the Court below before the issues were settled the plaintiff's counsel admitted that Dariao Kuar, by reason of the Summary Settlement and the sanad, had acquired a permanent, heritable and transferable right in the estate in suit; but this statement was qualified by a plea to the effect that her right in the property was subject to all the conditions attached to her status as a Hindu widow under the Hindu law, although she had full proprietary rights in the property. It is somewhat difficult to ascertain what the meaning of these statements is, but we take it that they amount to a plea that in spite of the language of the sanad Dariao Kuar was in reality in possession not of a full but of a limited estate only. On this statement of the plaintiff's case therefore it appears to us that the appellant is not in a position to contend that the law of

limitation has been misapplied by the Court below. It has indeed been argued here, as it was before the Subordinate Judge, that Dariao Kuar did not occupy the position of a tenant for life inasmuch as she had an absolute power of disposal, and it has further been argued that Art. 141 could not apply by reason of the fact that Dariao Kuar was in possession of the property till the time of her death. But if the intention of this argument is that Dariao Kuar in spite of having an absolute power of disposal was in possession of anything short of the full estate, we hold that Art. 141 would apply so as to bar the claim. Nor do we think that the article would cease to apply in a case where the Hindu or Mahomedan female was in possession till the time of her death. The language of the article itself does not suggest any such distinction. Limitation under this article begins to run from the time when the female dies, because it is from the date of her death that the right to sue accrues and it seems to us that the right accrues, only on her death and irrespective of the question whether she is in possession or not. On the merits, of course, we are bound by what we have just decided to hold that Art. 141 would not apply to the facts as proved, for we have expressed our opinion, that Dariao Kuar was the absolute owner of the property. However that was not the case with which the plaintiff came to Court, and dealing with the matter on the footing of the allegations contained in the plaint, we agree with the Court below that the suit was barred by Art. 141, Sch. I, Lim. Act.

Res judicata

We have now to deal with the question of *res judicata* which was raised in the lower Court and which was decided adversely to the plaintiff. The learned Subordinate Judge was of opinion that the present suit was barred under the provisions of S. 11, Civil P. C., by reason of what was decided in a previous suit between the same parties. In order to elucidate the argument on this point we have to refer to the pleadings and the judgment in the previous suit. This previous suit was brought on 30th May 1911 by Raja Rameshar Bakhsh Singh against the present plaintiff Bisheshar Bakhsh Singh. The purpose of the suit was to recover actual proprietary posses-

sion of a village called Shayastabad alias Bharkaspur which, at the time the suit was brought, was in the possession of the defendant. The case for Rameshar Bakhsh was that the title to this village was with him and the title which he pleaded was the title which had been recognized in the litigation between himself and Sher Bahadur Singh, which terminated in the year 1906 with a decree in his favour given by their Lordships of the Privy Council. We have in an earlier part of this judgment referred to those proceedings. Rameshar Bakhsh Singh asserted that at the time he took out execution of the decree the village was in possession of Mt. Gajraj Kuar, who was the mother of Sher Bahadur Singh. He alleged that this lady was in possession as kham thekadar, her right being the right merely of collecting the rents and of reserving for her own use whatever she could collect in excess of a sum of Rs. 1,120.3.6 which was payable annually to the plaintiff. It was said that when Gajraj Kuar died in the month of December 1906 the defendant wrongfully took possession of the village.

The defence which Bisheshar Bakhsh Singh set up is described in his written statement, a certified copy of which is Ex. No. 80. In the first paragraph of the written statement Bisheshar Bakhsh Singh admitted that Rameshar Bakhsh Singh had obtained a decree for the whole taluka of Samarpaha. He put forward the case however that he had a title to this village of Bharkaspur as an under-proprietor. In para. 13 of his written statement it was set out that he and his ancestors had all along been in possession of this particular village in subordination to the taluka of Samarpaha and that this tenure had been in existence ever since before the time of the British occupation of Oudh. The allegation was that the defendant and his predecessors had only been liable to pay the land revenue assessed upon this village. In para. 14 of the written statement it was asserted that Dariao Kuar had never denied the under-proprietary rights of Bisheshar Bakhsh Singh and his predecessors, and in para. 15 it was distinctly stated that an under-proprietary right in the village had in any case been acquired by adverse possession. In para. 18 Bisheshar Bakhsh Singh raised a plea of estoppel against

the plaintiff, saying that as he had been realizing revenue from him (Bisheshar Bakhsh Singh) he could not be permitted to deny that the defendant Bisheshar Bakhsh Singh was in possession as an under-proprietor. In his replication to this written statement Rameshar Bakhsh Singh denied altogether that the defendant, or any of his predecessors, had any under-proprietary right in this village. He denied that either Gajraj Kuar or Bisheshar Bakhsh Singh had ever paid him the revenue of the village. On the contrary he said that both of them had been in the habit of sending the Government revenue direct to the tahsil and that the money had been refunded to him from the tahsil as superior proprietor. The result of this litigation was that Rameshar Bakhsh Singh's claim for possession of Bharkaspur was decreed with costs. The issue raising the question of the defendant's title was issue 2 and was framed in the following language:

"Whether the defendant is an under-proprietor of Shayastabad and did he remain in possession as such for more than twelve years?"

The Subordinate Judge came to the conclusion that the defence set up by Bisheshar Bakhsh Singh was a false defence and his decision was that there was no satisfactory evidence to show that Bisheshar Bakhsh Singh, or any of his predecessors, had ever held this village in under-proprietary right. In fact the Subordinate Judge decided that this village had been given by Dariao Kuar to Sher Bahadur Singh by way of maintenance and that the interest so created in Sher Bahadur Singh's favour had come to an end with the latter's death. It will be observed, and it has been freely admitted, that in the litigation just described Bisheshar Bakhsh Singh did not set up the title which he is asserting as plaintiff in the present suit. He did not claim to be the true owner by right of inheritance of the Samarpaha taluka, which includes this village of Bharkaspur. The point therefore is whether by reason of his omission to set up this title by way of defence in the previous suit he is precluded by the rule of *res judicata* from maintaining the present suit, either wholly or in part. According to the view of the law taken by the Subordinate Judge the omission of Bishar Bakhsh Singh to plead the

present title in the earlier suit is a complete bar to the entertainment of this suit, which relates not only to Bharkaspur, but to all the other villages comprised in the taluka. The question we have to decide is admittedly to be dealt with in the light of the provisions of S. 11, Civil P. C., and with particular reference to the language of Expl. 4, which lays down that any matter which might and ought to have been made a ground of defence or attack in the former suit, shall be deemed to have been a matter directly and substantially in issue in such suit; and first we have to examine the question as to whether Bisheshar Bakhsh Singh "might" have raised by way of defence the title which he is now asserting to the whole of the Samarpaha taluka.

There seems to be no doubt from the plaintiff's own statement in the witness-box during the trial of the present case that when he was called upon to defend this previous suit relating to Bharkaspur he was aware of the facts upon which he now relies for the purpose of showing that he is the rightful owner of the Samarpaha estate. He admitted that his father had a claim to the estate after the death of Dariao Kuar, a claim which he was prevented from putting forward because, it is said, Sher Bahadur Singh kept him under restraint. In fact Bisheshar Bakhsh Singh deposed that his father, Sheodat, used to assert his right to this estate even while Dariao Kuar was still alive. He deposed that Sher Bahadur Singh had kept his father under restraint because he knew that he (Sheodat) had a title to the property. We may take it therefore on this statement of facts that Bisheshar Bakhsh Singh might in the previous proceedings have pleaded this title to the village of Bharkaspur. He had on his own showing both the opportunity and the necessary knowledge which would have enabled him to do so. This being so, we proceed to consider whether he "ought" to have raised this defence.

The question as to whether a particular defence ought or ought not to be raised is one of some difficulty. It does not appear to be possible to lay down any rule of universal application and we have the authority of the judgment of Lord Morris in the case of *Kameswar Pershad*

v. *Rajkumari Ruttan Koer* (16) for the proposition that the question as to whether a particular ground of defence should be raised is one to be determined with reference to the facts of each case. His Lordship observes as follows:

"That it 'might' have been made a ground of attack is clear. That it 'ought' to have been appears to their Lordships to depend upon the particular facts of each case. Where matters are so dissimilar that their union might lead to confusion the construction of the word 'ought' would become important. In this case the matters were the same."

Further His Lordship observes

"that the principle is that persons should not be harassed by continuous litigation about the same subject-matter."

There is however judicial authority which lays down a general standard of duty which is to be observed by defendants, namely, the dictum of Lord Westbury in *Srimut Rajah Mootoo Vijaya Raganadha Bodha Gooroo Sawmy Periya Odaya Taver v. Katama Natchiar* (17), a dictum which has been frequently cited and followed. His Lordship in the judgment referred to says:

"When a plaintiff claims an estate and the defendant, being in possession, resists that claim, he is bound to resist it upon all the grounds that it is possible for him, according to his knowledge, then to bring forward."

The reason of this rule consists in the necessity of putting some term to litigation between the parties. It is expedient and proper that a period should be put upon the contentions of parties and it has been observed that there can be no more fit and proper period than that which affords a full and fair opportunity for the examination and decision of the parties' claims, and so the rule is that the plaintiff must support all the issues which are necessary to maintain his cause of action. The defendant, on the other hand, is bound to bring forward all the defences which he has to the cause of action asserted in the plaintiff's pleadings at the time they were filed. It being ascertained that the facts constituting the title which the plaintiff is advancing in the present suit might have been put forward by way of defence in the earlier suit relating to Bharkaspur, we think with reference to the dictum of Lord Westbury, which has just been cited, it was for him to justify his omission to raise this ground of defence. Bisheshar Bakhsh Singh himself has

16. (1893) 20 Cal 79=19 I A 234 (P C).

17. (1866-67) 11 M I A 50=10 W R 1 (PC).

given no explanation of his failure to do so. He does not seem to have been examined or cross-examined touching this matter. It has been left to his counsel to adduce reasons for the failure to defend the earlier suit on the title now set up. It has been argued, in the first place, that Bisheshar Bakhsh Singh could not legally have taken this plea in view of his defence that he was the under-proprietor of Bharkaspur and because he was urging in defence that Rameshar Bakhsh Singh was estopped from denying his (Bisheshar Bakhsh Singh's) status as under-proprietor because he had accepted rent from him in that character.

Section 116, Evidence Act, has been appealed to in this connexion, a section which lays down a well-known rule that no tenant of immovable property or person claiming through such tenant shall during the continuance of the tenancy be permitted to deny that his landlord had at the beginning of the tenancy a title to such immovable property. The argument is that Bisheshar Bakhsh Singh having pleaded attornment to Rameshar Bakhsh Singh by payment of rent for Bharkaspur, could not possibly deny Rameshar Bakhsh Singh's title so long as he retained possession and that it would only have been permissible for him to do so by walking out of possession. The fact appears to be however that no such plea of attornment was really raised. Bisheshar Bakhsh Singh's case was that he and his predecessors had been in adverse possession as under-proprietors for many years upon payment of the revenue and cesses due in respect of this village. We cannot allow that for the purposes of S. 116 there is any analogy between the position of a tenant and the position which Bisheshar Bakhsh Singh was taking up by way of defence. The title he was asserting was not a title derived from the superior proprietor, but an adverse, though it may be a subordinate, title. So much is clear from the allegations contained in para. 13 of his written statement, to which we have already called attention. It seems to us that there was absolutely nothing in this defence to show that the title upon which Bisheshar Bakhsh Singh relied was derivative and not adverse, and so we consider that S. 116, Evidence Act, does not apply to the case, for we think it is not

correct to say that Bisheshar Bakhsh Singh was setting up any title in the nature of a tenancy.

In the next place, it is argued that as Bisheshar Bakhsh Singh was pleading an under-proprietary title to this property, he could not at the same time have asserted a full proprietary title inasmuch as these rights are so dissimilar that they could not be pleaded together, for, it is said, to have done so would have led to confusion and have tended to embarrass and delay the fair trial of the suit. We have been referred in support of this argument to the terms of O. G. R. 16, Civil P. C., a rule which allows the Court at any stage of the proceedings to strike out matter in pleadings which may tend to embarrass or delay the fair trial of the suit. We think we may take it on the language of this rule that it is for the Court, and not for the parties, to determine what are the matters which may produce the confusion referred to in the rule. It cannot, in our opinion, be argued that a defendant is to be at liberty to put forward just as much as he chooses of his case for the defence and to reserve the rest, merely because he entertains the opinion that the raising of the other pleas which he has reserved might cause difficulty to the Court. To allow this argument would be to ignore the fundamental principle referred to by Lord Morris that persons should not be harassed by continuous litigation about the same subject matter.

The omission of Bisheshar Bakhsh Singh to put forward the present title by way of defence in an earlier suit is not to be justified on this ground. Nor again are we prepared to allow, if the point is to be argued at all, that Bisheshar Bakhsh Singh is necessarily excused on the ground that proprietary and under-proprietary titles are inconsistent. Assuming for the moment that they are so, there is no provision of law against the setting up of alternative titles by way of defence. The rules of pleading do not prohibit a party from alleging two or more inconsistent sets of material facts and from claiming thereunder in the alternative. It was held in *Berdan v. Greenwood* (18) that "a defendant may by his written statement raise as many distinct and separate, and therefore in-

18. (1878) 3 Ex D 251=47 L J Ex 628.

consistent defences as he may think proper, subject only to the provisions contained in R. 1, O. 27."

This latter rule corresponds to O. 6, R. 16, Civil P. C., which authorizes the Court to exclude pleas which may lead to embarrassment. It was also held in *Morgan. In re; Owen v. Morgan* (19) that a pleading is not embarrassing merely because it puts forward inconsistent sets of facts. In short, the law appears to be that a party to a suit cannot constitute himself the arbiter of what is likely to be embarrassing or confusing to the trial; that is a matter for the Court and must be left to the Court. A defendant cannot, we think, on this ground be excused from doing what is his duty, namely, to put forward all the defences he has. It seems to us therefore that there is no reason why Bisheshar Bakhsh Singh should not in the suit relating to Bharkaspur have raised by way of defence the title which he now asserts to Bharkaspur and the other villages comprised in the taluka.

The question then remains as to what should be the effect in law of Bisheshar Bakhsh Singh having omitted to raise this ground of defence in the previous suit. Is it to be held that he is barred from setting up his title in the present suit to the entire taluka or should we hold that the only penalty resulting from his omission is that he can no longer lay any claim to this particular village of Bharkaspur? It has been conceded by the learned counsel for the appellant that if we hold that Bisheshar Bakhsh Singh both might and ought to have pleaded title as proprietor of Bharkaspur he cannot now be permitted to set up title to this village, it having been finally determined by the judgment in the earlier suit that he has no title to this property. On the other hand, the learned advocate for the respondent supports the view taken by the Court below that not only is the present claim to Bharkaspur barred, but the claim to the entire taluka is shut out on the ground of *res judicata*. After careful consideration of the arguments addressed to us and after referring to the numerous authorities which were quoted for our information, our decision is that the judgment in the previous case cannot be set up for the purpose of

showing that the plaintiff's claim to the entire taluka is barred by the rule of *res judicata*. It is quite clear that the judgment in the earlier suit does not profess to decide anything more than the title to the Bharkaspur property. It is clear on all grounds that in the present suit the plaintiff cannot be allowed to put forward any case which would have the result of withdrawing this particular subject-matter (that is, the title to Bharkaspur) from the operation of the previous decree; but there having been no decision in the former case between the parties as to the title to the other villages comprised in the taluka, we are unable to hold that the previous judgment constitutes a complete bar to the entertainment of the present suit. While the decision in the previous suit of the issue relating to the title to Bharkaspur concludes the plaintiff from re-agitating that particular matter, it cannot, we think, be held that the case is one in which the former judgment is a complete bar to the present suit. This second action between the same parties is upon a different claim altogether, and it appears to us that the judgment in the prior action can only be treated as an estoppel with respect to the matters in issue or the points controverted in the earlier case upon the determination of which the finding was rendered. The doctrine of "might" and "ought" cannot, in our opinion, be pushed to the extent of holding on the facts before us that Bisheshar Bakhsh Singh's failure to put forward by way of defence the present title which he is alleging, raises an estoppel which precludes him from maintaining this suit in so far as it relates to property other than the village of Bharkaspur. The doctrine must be kept within limits and the extent of those limits is indicated by the principle to which Lord Morris refers, namely, that parties are not to be continually harassed by litigation in respect of the same subject-matter. As was said by Wigram, V. C., in *Henderson v. Henderson* (20):

"the plea of *res judicata* applies, except in special cases, not only to points on which the Court was actually required by the parties to form an opinion . . . but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time."

Applying this principle here it seems to us that it cannot be maintained that the title to the entire Samarpaha taluka was a point which "properly belonged" to the subject of the previous litigation, and while we are prepared to hold that the present title relied upon by the plaintiff was, *qua* the property then in dispute, a matter properly belonging to the subject of that litigation, we are satisfied that the title regarding the other villages in the taluka was not a matter which could properly be debated in the previous proceedings. This, we think, is equally clear if we refer to Lord Westbury's dictum above quoted:

"When a plaintiff claims an estate and the defendant, being in possession, resists that claim he is bound to resist it upon all the grounds that it is possible for him according to his knowledge, then to bring forward."

Bisheshar Bakhsh Singh was in possession at that time of the village of Bharkaspur and he was therefore under the duty which is described in these words: but he was not in possession of the other villages appertaining to the taluka, nor was he asserting any claim relating to those other villages, and so we hold that he was not under an obligation then to put forward the whole title which he is now asserting. In short we think that the rule laid down in Expl. 1 to S. 11, Civil P. C., can only properly be applied to cases where the subject of the two suits is the same.

It has been pointed out to us by the learned advocate for the respondent that in this previous suit Bisheshar Bakhsh Singh actually admitted the title which Rameshar Bakhsh Singh had got under the decree of the Privy Council, and so it has been argued with reference to the provisions of Expl. 3 to S. 11 that the title to the whole taluka was a matter directly and substantially in issue in the previous case. This result may indeed follow from the language of Expl. 3, but can it be said that because it was for this reason a matter directly and substantially in issue, it was also heard and decided? It can only be deemed to have been heard and decided if we apply the doctrine of constructive decision implied in Expl. 4. It seems to us that there can be no decision by necessary implication except in respect of those matters which might and ought to have been made a ground of attack or defence and in this view, we are for the reasons al-

ready given, unable to hold that Bisheshar Bakhsh Singh was under an obligation in the earlier case to call for a decision of the Court upon the question of his title to the entire taluka. The result therefore is that we are unable to agree with the view of this question which was taken by the lower Court. We hold that the present suit for recovery of possession of the Samarpaha taluka was not barred by *res-judicata*, except in so far as it relates to the village of Bharkaspur.

Estate.—We have only one other matter to notice with respect to the pleas which were raised and argued in the lower Court on behalf of the plaintiff-appellant. In the course of the preliminary arguments before the Subordinate Judge the plaintiff's counsel sought to argue that the Samarpaha taluka was not an "estate" within the meaning of Act 1 of 1869, for the following reasons: (1) because Dariao Kuar executed no *kabuliyat* for the villages which were settled with her at the Second Summary Settlement; (2) because there is no list naming the villages and lands comprised in the taluka, and (3) because the villages were not decreed to Dariao Kuar in the manner laid down by S. 1, Act 1 of 1869.

The learned advocate for the appellant here, while informing us that he did not abandon this ground of attack upon the lower Court's judgment, admitted that he could not press it strongly. We may say shortly that it appears to us that there is no substance whatever in this plea. The matter has been dealt with by the learned Subordinate Judge in the earlier part of his judgment and we agree with him in holding that the Samarpaha is an "estate" within the meaning of the Oudh Estates Act.

Relationship.—There only remains to be noticed one other matter which was raised in argument by the respondent's learned counsel, and that is with regard to the relationship between the plaintiff and Bisant Singh whose heir he claims to be. In para. 10 of the plaint in which a reference was made to the alleged custom prevailing among the Bais talukdars, it was stated that the rule of succession was that after the death of the widow the estate goes to the eldest among the nearest relations of her deceased husband descended from the com-

mon ancestor. In para. 12 it was stated that the plaintiff's father at the time of Dariao Kuar's death fulfilled these conditions and on the pedigree attached to the plaint in this suit the plaintiff represented himself to be the eldest son of his father Sheodat Singh. A good deal of oral evidence was given by both the parties on this question of relationship. The defendant put the plaintiff to proof of the pedigree attached to the plaint. From some expressions in the judgment of the lower Court it would seem that in coming to its decision of this question of relationship the Court was influenced by the fact that Rameshar Bakhsh Singh, the defendant, did not put in any pedigree by way of reply to that set up by the plaintiff. It seems to us that Rameshar Bakhsh Singh, not being a member of the family to which Basant Singh belonged, could not reasonably have been expected to furnish any independent pedigree in support of his own case. The most he could be expected to do was to adduce whatever evidence he could in order to meet the evidence led by the plaintiff in support of the pedigree upon which he relied. The learned Subordinate Judge came to the conclusion that on the evidence both oral and documentary the plaintiff had succeeded in showing that he was at the time when this suit was filed the eldest of all living collateral relations of Basant Singh. So far as this finding is concerned we are not disposed to differ from it.

We think that although the evidence led by the plaintiff is open to a good deal of suspicion, considering the fact that it has proceeded from witnesses who admittedly are deeply interested in the result of the case and some of whom at least are under the control or influence of the talukdar of Khajurgaon who, on the plaintiff's own admission, has been financing this litigation, it has been established that there is no collateral relative of Basant Singh in existence who is older than the plaintiff Bisheshar Bakhsh Singh. The Subordinate Judge however went further and held that Bisheshar Bakhsh is not only the eldest existing collateral relation of Basant Singh but that he is also descended in the senior line of kindred. It is upon this latter point principally that the learned counsel for the respon-

dent has challenged the judgment of the Court below. Before the issues were finally settled, it had been stated by the plaintiff's counsel that, as a matter of fact, Bisheshar Bakhsh Singh was not only the eldest living relative of Basant Singh but was also the eldest descendant in the senior line; and when evidence came to be given on this question of relationship the witnesses who were put forward deposed to both these facts. One difficulty which lay in the way of the plaintiff was that in certain earlier cases pedigrees of the family of Basant Singh had been put forward which do not tally in all respects with the pedigree relied upon now.

In particular there was put on record a pedigree which is marked Ex. 148 and which was filed in certain litigation which took place in the year 1877. This document was put in by one Sheo Prasad and it was treated as being admissible evidence by the Subordinate Judge. In the pedigree attached to the present plaint we find that Chhatardhari Singh, who was the grandfather of the present plaintiff, had four sons. They are put down in the following order of age, namely (1) Raghunath Singh (d. s. p.), (2) Sheodat Singh, (3) Dhaunkal Singh and (4) Udawat Singh. In the 1877 pedigree the sons of Chhatardhari Singh were put down in a different order. Dhaunkal Singh was shown as the eldest son, Udawat Singh as the second son, Sheodat Singh as the third son and Raghunath Singh as the next son. It may, of course, be that the different order in which the names of these sons appear in this latter pedigree is to some extent due to the former pedigree having been written in Hindi from left to right and not in Urdu from right to left. But even so it is apparent that the order in which Dhaunkal and Udawat are mentioned is different. Then we find that in the Bharkaspur case, of which mention has frequently been made, a pedigree was put in by the present plaintiff Bisheshar Bakhsh Singh in which he was shown not as the eldest son of his father Sheodat Singh, but as the middle son. This pedigree is Ex. A-80 and shows the three sons of Sheodat Singh in the following order: (1) Jagmohan Singh, (2) Bisheshar Bakhsh Singh, and (3) Sheo Shankar Singh. In the pedigree now before us the order is (1) Bisheshar

Bakhsh Singh, (2) Jagmohan Singh and (3) Sheo Shankar Singh.

It is true that Jagmohan Singh died before the present suit was brought. His son Randhir Singh is still alive and he has a grandson Gaya Bakhsh Singh who appeared in Court as P. W. 15. It is a curious fact that there should be this difference in the order of naming the sons of Sheodat Singh in the two pedigrees. Five of the witnesses, including the plaintiff himself, who were examined in this case in support of the pedigree set out in the plaint, were examined in the Bharkaspur case and on that occasion they all supported the pedigree which was then put forward and in which Bisheshar Bakhsh Singh was shown as the middle one of the three sons of Sheodat Singh. The depositions of these witnesses given in the earlier suit are upon the record, and it is quite clear that the statements which they then made do not tally with the statements made now regarding the respective seniority of the three sons of Sheodat Singh. It is true, as has been pointed out by the Court below, that these witnesses were not cross-examined with reference to their statements. The plaintiff himself attempted to give some explanation of the discrepancy between the pedigree then put forward and that upon which he now relies, an explanation which is altogether unsatisfactory and which could not possibly be accepted. He tries to make out now that the pedigree he gave in the earlier case must have been written wrongly by the pleader to whom he gave the original document. The futility of this explanation is apparent when we find that in the earlier suit Bisheshar Bakhsh Singh himself recited the whole of the pedigree in the course of his deposition and made it agree with the pedigree attached to the plaint in that suit.

The other witnesses who were called in that case, and who have been called in the present case, did the same thing, and all we can say is that the difference between the statements then made and those which have been made now cannot be explained in any manner which satisfies us. In dealing with this part of the case the Subordinate Judge observes that the difference no doubt looks striking, but he gets over the difficulty by saying that the point of Bisheshar Bakhsh

Singh's seniority was not material in the previous case and that might account for the difference. It seems to us that this cannot be treated as an adequate explanation of the discrepancy. It is not, as far as we are aware, the practice of parties who depose to pedigrees to recite the names in a promiscuous order. On the contrary, our experience is that names are always given in a fixed order, and this would seem to be inevitable when it is considered how these pedigrees have to be learnt. A pedigree which does not set out the various degrees of relationship in a fixed systematic order would be of no value at all. We cannot therefore help feeling that for the purposes of the present case a deliberate attempt has been made to show, for some reason or other best known to the plaintiff, that he belongs to the most senior branch of the relatives of Basant Singh descended from a common ancestor. If anything in the case turned upon this question of his belonging to the senior branch we should feel ourselves bound to hold, disagreeing with the Court below, that the plaintiff had failed to establish this proposition. We have now expressed our opinion upon the various points which were raised for consideration in this appeal and the result is that we affirm the decision of the Court below. The appeal fails and is dismissed with costs.

B.V./R.K. *Appeal dismissed.*

A. I. R. 1918 Oudh 61

LINDSAY, J. C.

Mt. Rabiunnissa and another—Plaintiffs—Appellants.

v.

Muhammad Ali—Defendant—Respondent.

Second Appeal No. 96 of 1917, Decided on 28th August 1917, against decree of Dist. Judge, Hardoi, D/- 22nd December 1916.

Custom — Unreasonable — House sites—Zamindar's right to eject occupants of houses in town on payment of costs is unreasonable and should not be enforced.

A custom entitling the zamindars of a town to eject the occupants of the houses built in the town area at any time on payment of three-fourths of the costs of the materials of their houses is unreasonable and a Court should not sanction the enforcement of such a custom.

[P 62 C 1]

Zakur Ahmad—for Appellants.

M. Wasim—for Respondent.

Judgment.—The appellants were the plaintiffs in this suit and the claim was to eject the defendant from possession of a certain house in the town of Sandila. The ground upon which the ejection was sought was set out in the plaint to be that a custom obtains in this town of Sandila by which the zamindars of sites in the town are entitled at any time to eject the occupants of houses built in the town area on payment of three-fourths of the cost of the materials of their houses. Some evidence regarding this custom was produced, but both the Courts below have refused to decree the plaintiffs' claim, being of opinion that even if the existence of such a custom was proved, it is unreasonable and therefore unenforceable by the Courts. It has been argued here before me that the custom is not unreasonable. I decline to accept this argument. It appears to me that no Court, which has to act in accordance with justice, equity and good conscience, could sanction the enforcement of such a custom as has been put forward in the plaint in this case. I dismiss the appeal with costs.

B.V./R.K.

Appeal dismissed.

A. I. R. 1918 Oudh 62

STUART AND KANHAIYA LAL, A. J. CS.

Ganga Bakhsh Singh—Plaintiff—Appellant.

v.

Gokul Prasad—Defendant—Respondent.

First Appeal No. 90 of 1915, Decided on 18th September 1917, from decree of First Sub-Judge, Sitapur, D/- 23rd August 1915.

(a) *Deed—Construction—Draft by layman—Words used should be given plain meaning.*

Where the language in which a deed is written is not the language of a trained draftsman or a skilled conveyancer but the draft is prepared by an amateur or a layman, all that is necessary to interpret such a deed is to give the plain meaning to the words used, neglecting grammatical errors and remembering the limitations and deficiencies of the draftsman. [P 67 C 1]

(b) *Will—Construction—Will in favour of wife—Testator held devised full and complete estate and not merely a life estate.*

Where a will executed by a Hindu gentleman in favour of his wife declared that he left his property to her absolutely and entirely, that he liked her to retain certain old servants in her employment so long as they behaved themselves, and that if she wished to utilise the powers she possessed in order to make an endowment of a religious or a charitable nature, such an object

would meet with his approval, though if she did this he would be opposed to her giving the manager of the endowment too free a hand:

Held: that under the above will the testator devised a full and complete estate, and not merely a life estate, to his wife. [P 68 C 2]

(c) *Pardanashin lady—Deed of endowment executed by—Execution after thoroughly understanding and of free and independent will—Independent advice from persons interested—Deed of endowment valid and legal disposition.*

Where the execution of a deed of endowment by a pardanashin lady was questioned, and the evidence showed affirmatively and conclusively that the deed was explained to her, and she thoroughly understood it and signed it after execution not under duress or undue influence but from her free and independent will, that the disposition of the property was a most natural disposition and that besides her strength of will and business capacity, she had independent outside advice coming from members of her own family who were interested in the promotion of the objects she had at heart.

Held: that the deed of endowment was a valid and legal disposition. [P 70 C 1]

W. Wallace, S. N. Sen, Shahanshah Husain, Guleb Chand Srimat, Bahadur Lal and Kalindri Prasad—for Appellant.

Gokal Prasad, Ram Chandra and Chhail Behari Lal—for Respondent.

Judgment.—Bisheshar Bakhsh Singh Kayesth was a member of the family of Kanungos of Rampur Kalan in the Sitapur District. Daryao Singh was the head of the family at the time of annexation. He had three sons Anant Singh, Balwant Singh and Hardeo Bakhsh Singh. There was a dispute as to the status of the family and the rule of succession, which was eventually decided by their Lordships of the Privy Council in *Shankar Baksh v. Hardeo Baksh* (1). Bisheshar Bakhsh Singh was the son of Hardeo Bakhsh Singh. On the death of his father he succeeded to certain rights in certain villages and he was entitled to make a will by which he could devise his property after his death to whomsoever he pleased. He was married about 1888 and he signed a document, which he called a will, on 6th August 1892. He died on 27th June 1898. He had no children. His widow Ram Kali succeeded to the whole of his property. She executed a deed of endowment on 8th August 1904. She died on 23rd August 1913. Ganga Bakhsh Singh, the son of Balwant Singh, instituted the suit out of which this appeal arises in the Court of the

Subordinate Judge of Sitapur. He claimed the estate of Bisheshar Bakhsh Singh as reversionary heir. He stated that Shankar Bakhsh Singh, the son of Anant Singh, was alive at the time of Ram Kali's death (he is alive still) but asserted that, although Shankar Bakhsh Singh would, if not disqualified, have been entitled to a reversionary interest equivalent to that of the plaintiff. Shankar Bakhsh Singh was disqualified from inheritance by reason of insanity. He therefore claimed the whole estate as reversioner.

He instituted the suit against the president of the trust formed under the deed of 8th August 1904. The reply was that Bisheshar Bakhsh Singh had authority to devise his estate as he wished after his death, that he exercised that authority and executed the will, to which reference has been made, on 6th August 1892, and devised a full estate to his widow Ram Kali, to which she succeeded on the death of the testator, that Ram Kali made the whole estate the subject of an endowment, and that the plaintiff had no right of any kind. It was further stated that Shankar Bakhsh Singh was not insane. To this plaintiff replied, that Bisheshar Bakhsh Singh had the right to devise his property by will, but that he had impaired his mind by excessive drinking to such an extent that he was incapable of making an intelligent and valid disposition, on 6th August 1892, and that further, at the time that he affixed his signature to the alleged will he was completely intoxicated, and did not know what he was doing. The plaintiff's first point thus was, that he contested the execution of the will. He was not satisfied with that. He continued that, even if the execution of the will was established, on its interpretation it transferred nothing more than a qualified life-estate to Ram Kali. There, as we understand it, he left the case. He did not set up any argument based on the provisions of Act 1 of 1869. At original p. 244 it is clearly stated, that the suit would be determined under the provisions of the Mitakshara Law. It is further clear that he set up no title as the heir of Ram Kali. He claimed as the reversioner of Bisheshar Bakhsh Singh. The learned Subordinate Judge decided that Shankar Bakhsh Singh was not insane, that Bisheshar Singh was not disqualified

by intemperate habits from making a valid will, that he was not intoxicated at the time that he made the will, that the will effected a valid disposition, and that on its interpretation it transferred a complete estate to Ram Kali. He dismissed the suit accordingly. The present appeal is filed by the plaintiff.

The position taken up in appeal is different to the position taken up in the lower Court. The learned counsel for the appellant has not argued on the question of the insanity of Shankar Bakhsh Singh. He has devoted practically no argument to the allegation that Bisheshar Bakhsh Singh's power of making an intelligent disposition was weakened by a general habit of intemperance. He has argued very faintly in support of the suggestion that Bisheshar Bakhsh Singh was intoxicated at the time that he made the will. He has based the greater part of his argument on the question of the interpretation of the will, but he has added a plea which is not only a new plea but which is in direct opposition to the case advanced for the plaintiff in the lower Court. He now puts forward the argument that on the showing of the defendant Ram Kali's estate derived from her husband was stridhan, and that as stridhan it would devolve in such a family as this on the heirs of her husband, that is on Shankar Bakhsh and himself, and as heir to the stridhan, he challenges the validity of the deed of endowment. We have already stated that the plaintiff clearly and distinctly based his claim to succeed on the plea that he is the reversionary heir of Bisheshar Bakhsh Singh and not that he is heir of the lady. It is true that in para. 12 of the plaint he suggested that in any circumstances he was the sole heir. But the decision on issue 19 shows his position. The learned Subordinate Judge writes:

"The plaintiff does not claim the property in suit as the representative of Thakurain Ram Kali so as to be bound by the deed executed by her. He claims the property as the reversionary heir of the lady's husband under the Hindu law."

By taking this attitude in the lower Court he avoided a discussion on the question of limitation. Having had the point of limitation decided in his favour he has now adopted an absolutely inconsistent position and placed the defendant-respondent at a disadvantage. We

shall refer to the admissibility of this plea later. We now proceed to decide the various points one by one. The first point is as to the insanity of Shankar Bakhsh Singh. The learned Subordinate Judge after considering the evidence arrived at the conclusion that Shankar Bakhsh Singh is not insane. The learned counsel for the appellant has not argued on the point. He has not withdrawn the plea but has not supported it. We have examined the evidence, and we find that the learned Subordinate Judge's conclusion is perfectly correct, and that Shankar Bakhsh Singh is not insane. Thus in any circumstances the appellant can only succeed in respect of half of his claim.

We next take up the allegation that Bisheshar Bakhsh Singh was so addicted to the use (or rather to the abuse) of alcohol that he was incapable of making a will or in fact of any intelligent act. Bisheshar Bakhsh Singh was a Kayesth, and as a Kayesth had no religious objection to the use of alcohol. Amongst the large majority of Kayesths it is not considered discreditable to take alcohol in moderation, and the circumstance that Bisheshar Bakhsh Singh was not an abstainer from alcohol reflects nothing upon his intelligence or his character. The evidence on the point leads us to the conclusion that Bisheshar Bakhsh Singh was a regular drinker, and that he was not invariably moderate. To use a colloquial expression, he was a fairly hard drinker, and in the course of his life was intoxicated on several occasions. But it is impossible to arrive at a conclusion that he was a drunkard, and the suggestion that he was so saturated with alcohol as to be incapable of making an intelligent disposition of his property or doing any other act which the law permitted him to do, is extravagant and unsupported by the right view of the evidence on the record. The plaintiff has recklessly put in a mass of false evidence to support his suggestion that his cousin was a besotted drunkard. By his own recklessness he has afforded a strong answer to his argument. Witness after witness has given suborned and perjured evidence to show that the deceased was practically a dipsomaniac, that he drank three or four quarts of spirits every day, that he was never sober and that he was incapable of any sort of intelligent

action. The story so told is a tissue of absurdities. If Bisheshar Bakhsh Singh had been as he is thus represented to be, if he had become a dipsomaniac at an early age, he would not have lived as long as he did. While the falsity of this evidence is exposed by its extravagance, and its intrinsic worthlessness is palpable on examination, the evidence given on the other side with regard to the habits of the deceased is moderate, reliable, and candid. Respectable Kayesth gentlemen have deposed that they knew Bisheshar Bakhsh Singh well, that he indulged in liquor, that he may have been occasionally intoxicated, but that there can be no suggestion that he was a hopeless drunkard or a dipsomaniac. There we may leave the point, noting that, in spite of the fact that the learned counsel for the appellant has shown a wise discretion in not pressing this portion of the case, we have nevertheless examined critically the evidence upon the subject and that we are in complete accord with the conclusions of the learned Subordinate Judge to the effect that, before the execution of the will, Bisheshar Bakhsh Singh was addicted to drink and at times used to drink to an excess, but that his mental capacity was not impaired by this act.

The next suggestion is that Bisheshar Bakhsh Singh was dead drunk at the time that he executed the will. This will was registered at the residence of Bisheshar Bakhsh Singh. Kazi Hadi Hasan, the Sub-Registrar who registered the document, was called as D. W. 2. If his evidence is believed, there can be no doubt as to the fact that Bisheshar Bakhsh Singh was in no way under the influence of liquor when he executed the will, that he thoroughly understood its contents and that the will expresses the deliberate intention of a man who was legally competent to make the disposition which it effected. The case in favour of the non-intelligent execution of the will is as follows: A certain Raghubar, P. W. 22, who was formerly a table servant of Bisheshar Bakhsh Singh has deposed that on the day of the execution of the will Bisheshar Bakhsh Singh was lying dead drunk in his house and that while the witness was rubbing oil on his head for a purpose which he did not disclose, the Sub-Registrar and a certain Sheo Dayal, now deceased, who

was the manager of the estate, entered the room with the will and induced Bisheshar Bakhsh Singh to sign the will without reading it. If this witness's evidence is believed, the Sub-Registrar was party to a disgraceful conspiracy and performed an act which rendered him liable to dismissal and prosecution. This witness was in receipt of Rs. 2 a month and his food and clothes from Bisheshar Bakhsh Singh.

After the death of the latter he obtained employment on slightly better wages from another master, and at the time he gave his evidence was out of work. His evidence is on the face of it untrue. Another witness Lalta Prasad P. W. 36, who was formerly a servant of Bisheshar Bakhsh Singh, has deposed that the deceased Shoo Dayal had discussed the continual drunkenness of Bisheshar Bakhsh Singh with a certain Ram Charan, now deceased, in presence of the witness, that these two persons had argued that, as Bisheshar Bakhsh Singh might become insane at any time, it would be advisable to cause him to execute a will, the contents of which he would not understand, by which he should leave the whole of his property to his wife, putting in clauses by which Shoo Dayal and Ram Charan and others should be retained in their employment and that the conspiracy resulted in the execution of the document, under which he (Lalta Prasad) was to be given something. He was then servant of Bisheshar Bakhsh Singh. Lalta Prasad has stated that it so happened that he was not present at the time that the will was executed. The learned counsel for the appellant has been unable to show us what the conspirators stood to gain by such a proceeding. It is to be noted that, if Bisheshar Bakhsh Singh had died without making a will, his widow would have succeeded to his estate during her lifetime as a Hindu widow with limited powers of alienation. As these persons, according to the witness, were only intent on keeping on good terms with the lady and securing their own interests, and as they were apparently on good terms with her already, all that was necessary was that she should succeed to the estate. They were not likely to survive her and as the evidence shows did not survive her. Under the terms of the will (as it will be seen) the lady had authority to dis-

miss them. This story appears to us to be a very foolish story and singularly unconvincing. Now it is to be remarked that this man Lalta Prasad since the death of Ram Kali has come into the employment of the plaintiff. He is the plaintiff's man, and has every reason to desire the success of the plaintiff's claim. His evidence was proved as absolutely false. We now come to the evidence of a certain Matadin, P. W. 3. Matadin has stated that the will was executed intelligently, that Bisheshar Bakhsh Singh was perfectly sober at that time of its execution, that he thoroughly understood its contents, and that it contained his wishes.

It is clear that the appellant cannot utilize anything which Matadin has said to support his case. But his position is that Matadin became his own servant, that Matadin had advised him to institute the suit, that Matadin has offered to give evidence in support of his claim, and that finally Matadin had turned on him and given evidence against him. It is true that Matadin had taken service with the plaintiff, that he assisted in the preparation of the plaint, and that after doing that he has given evidence in support of the authenticity of the will. We find that Matadin is an absolutely untrustworthy witness, except with regard to that portion of his evidence in which he attested to having attested the will. He did attest the will. It is sufficiently established that he at first took the side of the plaintiff, and has subsequently come up to give evidence for the defendant. But this circumstance does not help the plaintiff. It shows that Matadin is a very untrustworthy person, and that his evidence as to the habits of Bisheshar Bakhsh Singh and the manner in which the will came to be executed is unreliable. The next point taken for the plaintiff is that the scribe of the will Baz Bahadur, who is still alive, was not called as a witness. Baz Bahadur was, like Lalta Prasad, a servant of Bisheshar Bakhsh Singh. We do not know why the plaintiff has not chosen to produce him. But the fact of his non-production does not help the appellant's case. So far the case stands, that one apparently respectable and independent witness Kazi Hadi Hasan has given evidence which, if believed, shows that the will is a valid will. One wit-

ness Matadin has proved that he attested the will, as he certainly did, and given other evidence.

We place no reliance on the remainder of his evidence. Two witnesses Raghubar and Lalta Prasad have given evidence against the will which is palpably false. The learned counsel for the appellant has criticized the evidence of Kazi Hadi Hasan on one point. He has pointed out to us that Bisheshar Bakhsh Singh, while leaving the property to his wife, did not mention her name and told the Sub-Registrar that he did not know his wife's name. From this he would have us infer that Bisheshar Bakhsh Singh must have been drunk at the time. We do not find the inference established. Among Hindu gentlemen of the class of Bisheshar Bakhsh Singh it is not uncommon to find some who do not know their wives' names. Another point, which was taken in the Court below, but was not taken in appeal, was that the will was registered in an upper room. The significance here was that, if the executant had not been drunk, he would have executed it in a lower room. The learned counsel for the appellant has laid no stress upon this point. Before we leave the evidence as to the intelligent execution of the will we should refer to the depositions of three gentlemen, Babu Mahadeo Prasad, D. W. 6, a Deputy Collector in the United Provinces, Thakur Sripal Singh, D. W. 16, a member of a family of Talukdars in the Sitapur district, and a certain Radha Kishen, D. W. 18, who is a member of this family of Kayasths. All these three gentlemen have deposed that Bisheshar Bakhsh Singh told them of the contents of the will after he had executed it. The evidence of these gentlemen is absolutely reliable. On the question of intelligent execution we arrive at exactly the same conclusion as the learned Subordinate Judge. We find that Bisheshar Bakhsh Singh executed the will while in full possession of his senses and his intelligence, and understanding exactly what he was doing.

We now come to the interpretation of the will. The language in which it is written is not the language of a trained draftsman or a skilled conveyancer. The draft was prepared by an amateur or a layman, and the will must be interpreted remembering the conditions under which it was prepared. As there has been some

dispute with regard to the exact meaning of the words employed we have considered it advisable to translate this will ourselves. The translation that we have made has been carefully explained to the counsel who have had opportunities of the rendering of the Hindustani words into English. This is the final translation at which we have arrived:

"Will executed by Thakur Bisheshar Bakhsh Singh, Talukdar of Rampur Kalan and Biswan.

"1. I, Thakur Bisheshar Bakhsh Singh, son of Thakur Hardeo Bakhsh Singh, by caste Kayasth, resident of Kasba Biswan Khas, am a Talukdar of Rampur Kalan, Biswan, Paprawan, etc., situate in the Tahsils of Sidhauri, Biswan, Misrikh and Sitapur in the district of Sitapur.

"2. Whereas no reliance can be placed in any wise on this inconstant life, and whereas up till now I have no male issue from my loins, and besides this it is incumbent and necessary that I should nominate my heir and future representative in my lifetime, and at the same time should, by setting out those modes which are considered better and proper for the protection and good management of the estate and the rights attached to the taluka owned and possessed by me, declare my inmost intentions; therefore while I am in a state of sound mind and right understanding and in keeping with all the rights, Shastric and legal, (I undertake) to put down those necessary points in the manner following, which will be acted upon after my demise.

"3. *Firstly*, that it is necessary to state this fact that the executant's father, Hardeo Bakhsh Singh, having acquired the villages pertaining to the estate possessed by me as against other cosharers of the family in the taluka with reference to specification and division in the khewat by virtue of a decree of the civil Courts of the Province of Oudh and the Privy Council, got (his share) partitioned from other cosharers by the civil and revenue Courts, under which some entire villages, some pattidari villages and some entire mahals (partitioned) had been received by him; and after the death of Thakur Hardeo Bakhsh Singh, executant's father, five-annas share of this estate out of the 16-annas in the entire taluka has come into my proprietary possession exclusively by way of succession, without being shared or claimed by anyone as ancestral, divided and separate property and that there is no other sharer or claimant to the property owned and possessed by the executant nor can there be any; and the executant is in every way entitled to dispose of the property and to nominate a legatee.

"4. *Secondly*, that I make this devise in favour of my wife to the effect that after my death my wife, daughter of Chaudhri Rudra Prasad Sahab, Talukdar of Nanpur Koili, will remain owner with all the powers and (sic) transfers of a proprietor, and in possession and in enjoyment of the profits, and the ruler of the estate, and my wife as my successor shall possess all the powers and (sic) transfers in their entirety which I have in this property and estate.

"5. *Thirdly*, that by reason of the observance of the custom of pardanashini my wife is unable to exercise herself (i. e., personal) supervision

and management over the estate, therefore it is to be specially borne in mind that whatever agents and old servants, in whom I repose confidence and reliance up to the time of the execution of this (will) and whose names are written hereafter in this paragraph, will remain managers of the estate and also of the domestic arrangements, etc., subject to the orders of and in obedience to my wife:

"Munshi Sheo Dayal, Lalta Prasad Karinda, Baz Bahadur, Ram Charan Dubé, Lalta Muqaddam, and Bhajju Khidmatgar.

"6. *Fourthly*, that the maintenance of the employees mentioned above will be made, on condition that they remain honest and efficient and discharge their duties satisfactorily, from the collection of the profits of the estate; but should at any time the aforesaid servants be guilty of faults of dishonesty and causing injury to the estate the legatees will have power to dismiss and discharge the above mentioned agents, and this is also put down that Ram Charan will remain manager throughout his lifetime and after his death his brother Sitaram will be manager.

7. *Fifthly*, that in default of my having male issue, I authorize my wife to construct a shivata and thakurdwara and along with the expenses of the shivata and temple to establish a charitable allowance, in order to give help to travellers, the needy, orphans, and helpless widows, and from the collection of the estate which will be utilized in this work to entrust and transfer the profits by way of endowment in the name of the manager and administrator without power of sale or mortgage or transfer. Therefore the deed of will has been executed, that it may serve as an authority and be of use when needed."

Many reported decisions have been quoted to us which it is suggested provide the canons of the interpretation to be adopted in arriving at the meaning of a document like the present. But it is not necessary for us to refer to authority upon a point as simple as the interpretation of this will. All that is necessary to interpret a will like the present is to give the plain meaning to the words used neglecting grammatical errors and remembering the limitations and deficiencies of the draftsman. Upon the reading of this document the impression left on our minds is that the testator gave the draftsman the following direction.

He told him that he wished to leave his property to his wife absolutely and entirely, that he would like her to retain certain old servants in her employment as long as they behaved themselves, and that if she wished to utilize the powers which she possessed in order to make an endowment of a religious or a charitable nature, such an object would meet with his approval, though if she did this he would be opposed to her giving the manager of the endowment too free a hand.

These instructions appear to us to have been carried out perfectly correctly and clearly by the draftsman although in his use of language he has not been skilful, and has not always been grammatical. The learned counsel for the appellant has in argument treated the document as though it was drafted by a lawyer, and has endeavoured to find an exact connexion between every paragraph. Such a form of construction is impossible. Words are used loosely. Intentions are expressed that are not always fulfilled. There is much overlapping and there is considerable surplusage.

But even if the method of interpretation which he would have us employ were adopted, the result would not be essentially different. Great stress has been laid on the fact that, if the testator's main desire was to provide for the integrity and prosperity of his estate, that object would not be attained by his giving to his wife, a pardanashin lady aged at the time that the will was made about 18 years, a free hand to dispose of the property as she wished. This argument begs the question. The testator is proved to have been greatly attached to his wife. His devotion to her was considered remarkable by his friends. The lady is proved to have possessed some education, and to have possessed—which is more important—a character and capacity for business affairs which are unusual amongst pardanashin ladies of her class. Upon the evidence we would be disposed to think that she was the stronger character of the two. There is no reason to suppose that the testator would not have been justified in an opinion that for the benefit of the estate itself it would be better that it should be absolutely under the control of his wife; that she should have an unfettered discretion to provide for the succession in any manner in which she pleased and that she could be trusted with complete powers of alienation. The wording of para. 4 can leave no doubt as to the nature of the estate conferred. In the plainest words that an unskilled man could use, the draftsman has devised a complete estate to the lady. It is impossible upon the wording of Cl. 4 to arrive at a conclusion that the estate awarded was merely the estate to which the lady would have been entitled if Bisheshar Bakhsh Singh had died in-

testate. The learned counsel for the appellant goes further. According to his view the testator's object was to give the lady an estate even less than that of a Hindu widow. If that were his object he could not possibly have assented to the terms of para. 4. Not only does he describe the lady as "owner," he describes her as "owner with all the powers and transfers," by which is clearly meant "all the powers of transfer," "of a proprietor and in possession." He adds the rather meaningless expression "and in enjoyment of the profits." But he continues "and the ruler of the estate." The learned counsel for the appellant would have us translate the words here as meaning the owner of the profits with all the powers of transfer as proprietor with regard to the profits, and in possession of the profits, and in the enjoyment of the profits. Such a translation is opposed to the clear meaning of the words and would still leave the important words "and the ruler of estate" untouched. Further he continues:

"and my wife as my successor shall possess all the powers and transfers (i. e., the powers of transfer) in their entirety which I have in this property and estate."

Even if the remainder of the will contained statements repugnant to this clause, it would be difficult to arrive at a conclusion that a limited estate was devised to the lady. There is however no repugnance in any of the remaining clauses. It is true, that he continues by directing his wife to retain certain old servants in her employment subject to her orders and subject to the qualification that they should remain obedient to her, and continues that such servants are to be supported from the profits of the property so long as their work is satisfactory and honest. This provision is nothing more than an attempt to restrain his wife from dismissing these servants arbitrarily and unjustly. How far the servants could have pleaded this clause against an arbitrary and unjust dismissal, it is not necessary for us to discuss. Upon the facts the lady showed no indication to treat any of them unfairly. It is sufficient for our purpose to examine this clause on the allegation that it is a restriction of the powers of the owner of a full estate. We do not consider that there is anything in this clause which detracts from the lady's full power to dispose of the property as she pleased.

We now come to the last portion with regard to the power of the lady to make an endowment for religious or charitable purposes. This portion is obvious surplusage, as the lady had the full power to do what she wished to the property. She could make any endowment that she pleased. There is no direction here to the lady to make an endowment. All that the testator says is that such an endowment would not be displeasing to him—a pious expression of opinion which has no effect in detracting from her full powers to dispose of the property. On the question of interpretation we note that after a careful consideration we find that the restriction of the power of transfer is a suggestion that if such an endowment should be made, it would be advisable that the manager of the endowment should have no power of transfer of any kind. We are thus satisfied that under the will the lady had a complete estate.

We now come to the endowment made by the lady. We are in some doubt as to whether we should have permitted the appellant to argue on this point at all. In the lower Court he had clearly not claimed through the lady, but, inasmuch as the lower Court had taken a large mass of evidence as to the validity of the endowment, we with some diffidence permitted argument upon the point for the purpose of arriving at a short conclusion on the merits. Ram Kali belonged to a Kayasth family, many of the male members of which were connected with the legal profession. In this family the subject of the education of their caste fellows and the improvement of the position of Kayasths by affording them facilities for instruction was clearly of absorbing interest. The lady's brother Chaudhri Mahadeo Prasad, who was examined at unnecessary length as a witness in the case, is a wealthy gentleman of high position who was practically made the improvement of education amongst the Kayasths his life-work. He has himself given half a lac of rupees to the educational institution at Allahabad known as the Kayastha Pathshala and has created a trust in respect of his own property, by which half the profits will go towards the foundation of scholarships for Kayasth students. Ram Kali, as has been already stated, was a lady of exceptional intelligence and some educa-

tion. After her husband's death she appears to have applied her mind to the best use that she could make of her fortune towards the increase of religious merit for her husband and the improvement of the position of the members of her own community. After careful deliberation and close examination of various projects, after rejection of many proposals made to her, she finally selected a certain scheme to which the property left by her husband should be devoted. That scheme is embodied in the deed of endowment.

There is a mass of evidence to show that she took advice from various persons—advice not the less valuable because some of her advisers were members of her own family and because all of them were philanthropic gentlemen intensely interested in the improvement of the Kayasth community. She did not always accept the advice proffered and after mature deliberation she settled on a scheme, reasonable and intelligent, which combined the perpetuation of her husband's memory and the acquisition of the religious merit by him, the advancement of the religious principles which she had at heart, and the improvement of the condition of the poorer members of her own community. A mass of evidence has been called upon this point and the endowment has been made the subject of much criticism in this Court which in spite of its ingenuity, can only be described as infructuous. It was considered advisable in the interests of all parties to register the deed, not in Sitapur where the property was situated, but in Allahabad where the lady happened to be residing, and, to enable the deed to be registered in Allahabad, Chaudhri Mahadeo Prasad presented the lady with a little piece of land of no great value in Allahabad. She added this land to the other property endowed and thus enabled herself to register the deed in Allahabad. There was a decision of the Allahabad High Court in *Sheo Dayal Mal v. Hari Ram* (2), which stated that such a registration is bad in law. That decision was however dissented from in *Gulzari Lal v. Daya Ram* (3) and was overruled by their Lordships of the Privy Council in *Hari*

Ram v. Sheodayat Mal (4). There can be no doubt as to the fact that the registration was good in law. The learned counsel for the appellant, when the decision of their Lordships of the Privy Council was brought to his notice, frankly withdrew his argument upon this point.

But he continued to urge that the evidence on this record, if properly considered, must lead to the conclusion that the deed of endowment was bad, that the execution had not been established, and that the evidence showed that the deed had been executed under undue influence. There are many decisions as to the safeguards that must surround a pardanashin lady in executing a deed. It is unnecessary to refer to more than one in which their Lordships of the Privy Council have summed up the law on the subject in a comparatively recent case. That decision will be found in *Kali Bakhsh Singh v. Ram Gopal Singh* (5). At p. 89 (of 36 *All.*) their Lordships say:

"In the first place the lady was a pardanashin lady, and the law throws around her a special cloak of protection. It demands that the burden of proof shall in such a case rest, not with those who attack, but with those who found upon the deed, and the proof must go so far as to show affirmatively and conclusively that the deed was not only executed by, but was explained to, and was really understood by, the grantor. In such cases it must also, of course, be established that the deed was not signed under duress, but arose from free and independent will of the grantor. The law as just stated is too well stated to be doubted or upset. It was expressly reaffirmed by this Board in the case of *Sajjal Hussain v. Wazir Ali Khan* (6) and nothing that is now said can, or is intended to, disprove it."

At page 92 (of 36 *All.*) it is added:

"Their Lordships, as already mentioned, have fully in view the fact that the lady was a pardanashin lady, but the evidence as to her strength of will and business capacity, and the fact that the deed as granted is not in the circumstance of her life in any way an unnatural disposition of part of her property, go far, taken together with the evidence in this case, to convince them that the deed was granted by her as the expression of her deliberate mind and apart from any undue influence exerted upon it. In short, their view is that if independent outside advice, which is an essentially different thing from independent outside control, had been obtained, the lady would have acted just as she did. Much as their Lordships support and ap-

4. (18-8-89) 16 I A 12=11 I A 176 (P C).

5. (1914) 36 All 81=21 I C 985=16 O C 373 (P C).

6. (1912) 34 All 454=16 I C 197=39 I A 156=15 O C 271 (P C).

2. (1885) 7 All 590.

3. (1887) 9 All 46.

prove of the protection given by law to a par-danashin lady, they cannot transmute such a legal protection into a legal disability."

We have been taken through, but we need not refer to, the mass of the evidence called. It has been thoroughly discussed by the learned Subordinate Judge with whose conclusions we are in complete accord. Here the case in favour of the validity of the deed is even stronger than in the case just quoted. The burden of proof has been put upon those who founded upon the deed. The evidence shows affirmatively and conclusively that the deed was explained to and thoroughly understood by the lady. It was executed by the lady. It was not signed under duress. It arose from the free and independent will of the grantor. There was no undue influence. The disposition of the property was a most natural disposition. The lady had strength of will and business capacity. In addition she had outside advice. In many cases that outside advice came from members of her own family, and in all cases it came from gentlemen who were interested in the promotion of the objects which she had at heart. But the advice was independent. Upon the evidence as it stands there can be no possible doubt as to the fact that the deed of endowment is a valid and legal disposition.

The learned counsel for the appellant has added one small point. He objected to the refusal of the learned Subordinate Judge to call certain witnesses at the close of the case—a point which he states is referred to at original pp. 27 and 28 of the learned Subordinate Judge's judgment. We have only to say upon this point that we approve the action of the learned Subordinate Judge. The plaintiff's evidence was closed on 2nd June 1915. The defendant's evidence was closed on 7th July 1915. The plaintiff's rebutting evidence was called from 7th July 1915 onwards. It was the business of the plaintiff to have applied for the examination of the five witnesses in question before the 7th July 1915. He did not do so until 26th July 1915 and the learned Subordinate Judge rightly refused his application. There are many other points taken in the grounds of appeal, but we need not refer to any of them, as with the exception of the points that we have already

decided the remainder were withdrawn in argument. We conclude that Bishe-shar Baksh Singh executed a valid and effective will by which he devised a full proprietary estate to Ram Kali and that Ram Kali made a valid and effective endowment which leaves the appellant no interest of any kind in the property in dispute. We therefore dismiss this appeal. The appellant will pay his own costs and those of the respondent.

B.V./R.K.

Appeal dismissed.

A. I. R. 1918 Oudh 70

LINDSAY, J. C.

Ghirrao and others—Defendants—Appellants.

v.

Karam Singh—Plaintiff—Respondent.

Second Appeal No. 259 of 1917, Decided on 3rd January 1918, from decree of Sub-Judge, Bahraich, D/- 31st May 1917.

Landlord and Tenant — Tenant ejected from holding has no right to occupy house in village abadi.

Where a tenant is ejected from his agricultural holding in a village, he has no right to occupy a house in the village abadi against the will of the zamindar. [P 71 C 1]

Basudeo Lal—for Appellants.

Mohammad Naseem, Mumtaz Husain and Imtiyaz Ali—for Respondent.

Judgment.—This appeal has arisen out of a suit in ejectment. The plaintiff Sardar Karam Singh is the talukdar of the village and the allegation in the plaint was that the three defendants, Ghirrao, his son Babu Ram and his brother Mata-din, had been tenants in the village of Damodra belonging to the plaintiff. It was alleged that they had been ejected by process of law from their holding and the plaintiff brought this suit for the purpose of having them ejected from the residential house which they occupy in the village. The plaintiff's case was that having ceased to be cultivators in the village the defendants had no longer any right to retain the house. The talukdar stated that he was unwilling to allow them to remain in the village. He asked them to vacate the land upon which their house stands and they had refused to do so; and it was this refusal which constituted the cause of action for this suit.

It was admitted that Ghirrao, defendant 1, had been ejected from the holding in the village but the plea was taken that the members of the family to which

the defendants belonged were not really cultivators but village Pandits. It was denied that defendants 2 and 3 had followed the calling of an agriculturist. This question was determined against the defendants by both the Courts below. The learned Subordinate Judge in his judgment has come to the conclusion that the defendants are agriculturists and that the family originally settled in the village as such. There is documentary evidence to show that Bhawani Din, the father of defendants 1 and 3, was a cultivator in this village as far back as the year 1808. I am bound by the finding of the lower appellate Court and this matter is concluded. It follows therefore that if these people have been ejected from their agricultural holding in this village, they have no right to occupy a house in the village abadi against the will of the zamindar. This is, as I understand it, the general law which applies in this part of the country to the relations between landlords and tenants. The law has been expounded in a judgment of Knox, J., which is to be found reported as *Shohrai Singh v. Jhagra* (1). There it was laid down that the general law of the land is that if a tenant is ejected from the tenancy or abandons it then, unless there be some special custom to the contrary, the site upon which he has built his house reverts to the zamindar and the tenant must remove the materials therefrom. The same principle has been followed by another learned Judge of the Allahabad High Court in a judgment which is to be found reported as *Phul Bibi v. Zahar Ali* (2). So far as I am aware, this law laid down with respect to the relations between zamindars and tenants in the Agra Province is equally good law for Oudh, and the learned advocate for the appellants has not been able to refer me to any authority of this Court which lays down the law in the contrary sense. The judgment of the lower appellate Court appears to me therefore to be quite correct and is not open to interference on any ground of law. The appeal fails and is dismissed with costs.

B.V./R.K.

Appeal dismissed.

1. (1915) 30 I C 782.
2. (1915) 28 I C 849.

A. I. R. 1918. Oudh 71

LINDSAY, J. C. AND KANHAIYA LAL,
A. J. C.

Emperor

v.

Sahab Din—Accused.

Criminal Appeal No. 234 of 1917, Decided on 8th November 1917, against order of Sess. Judge, Hardoi. D/- 13th June 1917.

Criminal Trial—Prosecution evidence not conclusive—Accused must be acquitted.

Where the prosecution evidence is unsatisfactory and doubtful the Court should give the accused the benefit of the doubt without going into the question whether he has been able to establish his defence. [P 75 C 2]

Nagendra Ghoshal Bahadur—for the Crown.

Jagat Narayan—for Accused.

Judgment.—This is an appeal against an order of acquittal passed by the Sessions Judge of Hardoi in the trial of a dacoity case in which three persons Bisheshar, Lalta and Sahab Din (or Sahab Lal) were concerned. The Sessions Judge convicted Bisheshar and Lalta and acquitted accused 3 Sahab Din. Consequently Bisheshar and Lalta appealed to this Court. Their appeals were dismissed by the First Additional Judicial Commissioner. The present appeal has been filed by the Local Government and the principal ground taken is that the evidence against the two men who were convicted is exactly the same as the evidence which was tendered against accused 3 Sahab Din and that if the charge was established in the case of the two former, it was also established as against Sahab Din with whose case we are now dealing.

The main facts as they appear from the evidence may be set out as follows. On the early morning of 3rd March 1917 about 2 or 3 hours before dawn, a dacoity was committed in the hamlet of Atwa in a hut which was at the time inhabited by one Jeorakhan and his family. It is stated that at the time this affair took place the village people had vacated their houses on account of the prevalence of plague and had established themselves in chhappars (huts) erected for the most part round the platform of a Mahadeo temple in the village. The complainant Jeorakhan is a Bania and apparently carries on an extensive business as a money-lender and it is said that at the time the dacoity took place

money and other valuables of the value of over Rs. 9,000 were taken away by the dacoits. The first report of this affair was made at 8 o'clock on the morning of 3rd March at the Beniganj police station which is some four miles from the scene of the occurrence. The report purports to have been made by the complainant Jeorakhan and to contain a detailed statement of all that took place. The police took action at once. The accused Bisheshar who lives in the same hamlet as the complainant was arrested almost at once. Lalta was found on 10th March and accused 3 Sahab Din surrendered in Court on 4th April after proceedings against the other two accused had commenced. It is admitted that no stolen property was found in the house of Sahab Din the houses of the other accused were not searched. The Sub Inspector says he did not expect to find any property there.

The defence which Sahab Din put forward was an alibi and four witnesses were called to establish that on the night when this affair is said to have taken place he was at the village of Pihani attending a marriage ceremony. Pihani is a very long distance from the hamlet of Atwa and if the statement of these witnesses be true then it was not possible for Sahab Din to have been concerned in the dacoity under inquiry. This alibi evidence appears to have had an impression upon the Sessions Judge and to have led to the acquittal of Sahab Din, the Judge being of opinion that there was some doubt regarding his guilt there being a possibility of mistaken identity. The judgment is unsatisfactory and the learned counsel who has appeared on behalf of the accused Sahab Din here has not attempted to rely upon the reasoning of the Judge in support of his contention that the case against his client was not proved. His case is that the evidence of the witnesses who deposed to the presence of Sahab Din at this dacoity ought not to be accepted. It is urged that it is unreliable and that as a matter of fact it should be held that these people never identified Sahab Din at all. Ten witnesses in all who profess to have any knowledge of the affair were examined on behalf of the prosecution. All of these with the exception of one Saif

Ali are close relations of the complainant Jeorakhan. Saif Ali, it may be mentioned, did not profess to have recognized any of the dacoits at the time the offence was being committed. We have then the evidence of Jeorakhan, the complainant, of his son Jagannath, his sister-in-law Mt. Radha, two nieces of his, Mt. Maikin, Mt. Phul Kuar, three brothers, Dwarka, Mihin Lal, Jhao Lal and a nephew of his named Ganesh. All of these witness with the exception of Ganesh depose that they recognized all three accused Lalta, Bisheshar and Sahab Din. Ganesh mentions only one of them, namely, the accused Bisheshar.

It need not be doubted that a dacoity took place on the night in question in the hut which was occupied by Jeorakhan's family. It also seems clear that it must have been a deliberate affair carried out according to a pre-arranged plan. According to the statement of Jeorakhan, the dacoits carried with them two heavy hammers which were used afterwards for the purpose of breaking open an iron safe in which a lot of money and valuables were stored away. It is proved that the handle of one of these hammers was found on the spot after the dacoits had taken their departure. It is somewhat unusual to find a weapon of this description being used in a dacoity case and the circumstances point to the fact that the people who committed this crime intended to raid Jeorakhan's house and had made preparations for breaking open his strong box in which they knew he must have his valuable property concealed. The night was, on the admission of all the witnesses, a dark night and the question at once arises what opportunities these witnesses had for recognizing the accused.

It may be stated here that all the three persons who were put on their trial were well known to Jeorakhan from before. Bisheshar and Lalta who are brothers, reside in the same hamlet as Jeorakhan and the third man Sahab Din is a nephew of these two brothers and has been in the habit of visiting his uncles. The witnesses, when asked how they were able to identify any of the criminals, stated that a lantern was burning on the premises occupied by the family and that it was by the light of this lantern that they were able to

recognize the faces of the men whom they named. There is no definite evidence on the record to show where this lantern was placed. The Court below does not seem to have examined the witnesses particularly upon this point; but we gather from the statement made by Jeorakhan himself that the lantern was inside the enclosure which constituted his habitation. It is to be explained here that this enclosure was made by the erection of tatts (hurdies), and according to the statement of the Sub-Inspector these hurdles are only about breast high so that a person from outside could easily look over and see into the courtyard of Jeorakhan's premises. Jeorakhan himself at the time the place was invaded was outside this enclosure. He says he was warming himself at a fire outside to the north of the courtyard. Jeorakhan's story is that the dacoits came from the north and that they or some of them, were dressed in a kind of uniform resembling the uniform of the police. On challenging them he says that one of them declared that he was the police darogha. Jeorakhan was asked who he was and replied that he was a Pasi. He then tried to slip away being convinced that the visitors were dacoits. He says he was attacked with lathis and received several blows. He ran at once some distance to the north to the house occupied by the village chaukidar. The chaukidar, it is said, refused to give any assistance and the complainant's own story is that not a single person of the village turned out except one Ram Bakhsh. Ram Bakhsh is a cousin of Jeorakhan and he has not been called as a witness.

The story goes on that the dacoits entered Jeorakhan's courtyard and plundered the inmates most of whom were women. They also went into one of the sheds in the enclosure where they broke up the iron box and other boxes in which valuable property was contained. It is said that while the offence was going on the dacoits either fired off guns or let off bombs in order to keep the village people at a distance. In the report which was made three or four hours after the offence had been committed, the names of all three accused were mentioned by Jeorakhan. He also deposed that the same people had been identified by the other inmates of the house and so we find

these persons giving evidence to the effect that they recognized the three accused. The persons who were inside the house were Jagannath a son of the complainant, Mt. Radha, his sister-in-law, and his two nieces, Mt. Maikin and Mt. Phul Kuar. Both of these latter witnesses are children of tender years. The other witnesses, namely, Dwarka, Ganesh, Mihir Lal and Jhan Lal, occupied huts adjacent to the hut of Jeorakhan. They do not pretend to have come out of their own huts, but they say that they were able to see what was going on inside Jeorakhan's enclosure. Whether these statements are to be believed or not is a matter for grave consideration. All of the witnesses spoke about the lantern which was burning and say that it was the light which this lantern afforded which enabled them to recognize the dacoits. In the first report it was stated by the complainant that the dacoits had their faces wrapped up with cloths and on this point there is a conflict of evidence. Jagannath at the Sessions trial still maintained that the dacoits had their faces wrapped up but declared that notwithstanding this their features were visible. Mt. Radha on the other hand declares that the accused wore white turbans but had no cloths wrapped round their faces. Mt. Maikin, one of the nieces, was unable to remember whether the accused's faces were masked or not. The other niece Phul Kuar declared that the dacoits wore no masks. Dwarka, a brother of the complainant who was in his own hut, says that the dacoits had no cloths round their faces and a similar statement is made by Ganesh who deposed to having recognized only Bisheswar.

It is difficult therefore to come to any definite conclusion as to whether an attempt was made by the dacoits to disguise their appearance; but if we accept the very positive statement of the complainant which was made at the thana and which he has since repeated we have it that the dacoits were masked. If this be so, then their recognition must have been a matter of great difficulty. As regards Jeorakhan himself it may well be doubted whether there was any light to help him on this business, for on his own statement he was outside the compound whilst the lantern was burning inside his house, and further it is to

be gathered that he first retreated, he remained at a distance from the scene. Then as regards the statement of the three women Mt. Radha, Maikin and Phul Kuar it may fairly be observed that if they were attacked by a number of men in the manner described, they must have been in a state of great terror and it may well be doubted whether they had their wits sufficiently collected to enable them to recognize anybody. We can hardly think that a lantern fixed up in one part of the premises could have thrown much light into the various huts on one side or other of the enclosure in which these women were sleeping at the time. As for the statements of the other witnesses Dwarka, Ganesh and Mihin Lal it is difficult to believe them in view of their admissions that they never came out of their own huts. A reference to the map which is on the record shows that the exits from the huts of Mihin Lal and Dwarka are to the south, whereas Jeorakhan's compound opens to the north and it is very difficult therefore to accept the statement of these two men when they say that they saw all that was going on inside Jeorakhan's enclosure.

It may be that they could see over the hurdles into Jeorakhan's compound, but looking at the map it is not easy to ascertain how they could have seen what was taking place inside the three huts which are marked respectively Nos. 2, 3 and 4 and which occupy two sides of the courtyard of Jeorakhan's premises. Jhao Lal who occupies a hut on the east side of Jeorakhan's enclosure, has been disbelieved by the learned Judge who made a note on the record to the effect that his demeanour was unfavourable. As for Ganesh who occupies another hut still further to the east all he can say is, that when he attempted to come out of his door which faces towards the north he was threatened by the accused Bisheshar, and consequently he had to retreat and keep inside his own habitation. Saif Ali who occupies a hut next to that of Ganesh has not identified anyone. It has been argued by the learned counsel for the accused that the story about the lantern being alight, is a fiction and there is some support for this contention in the statement of the prosecution witness Saif Ali who says that Jeorakhan as not in the habit of keeping a

lighted lantern in his hut at night. There are certain of the defence witnesses who were living in the hamlet at the time who deposed to the same effect. On the whole we think it is not unlikely that there was a lantern somewhere or other in the compound of Jeorakhan. At the same time we think it extremely likely that it could not have given forth a very strong light two hours before day break after having been burning all night and we very much doubt therefore whether it is possible to accept the theory that these three accused persons were recognized by the aid of the light of this lantern. Further, as we have pointed out, there is a considerable discrepancy regarding the point whether the dacoits had their faces concealed or not. We are inclined, as we have said, to hold that they had their faces wrapped up in some way or other. Consequently we are led to doubt whether it was possible for Jeorakhan, Jagannath and the women who were inside the house, to clearly identify any of the persons who were concerned in this crime. As for the evidence of the outside witnesses Dwarka, Ganesh, Mihin Lal and Jhao Lal, we hold that it would be utterly unsafe to rely upon it.

It may be asked then how it was possible for these three men to be named at the police station a few hours after the crime had been committed. The case put forward by the learned counsel for the accused is that they were mentioned purely out of suspicion. There is on record evidence to show that there had been disputes between Jeorakhan on one side and the two accused Bisheshar and Lalta on the other; and according to Saif Ali's deposition (and he is a prosecution witness) these quarrels had been going on almost up to the time when the dacoity took place. Similar evidence is to be found in the statement of some of the defence witnesses. It may we think be safely taken that Jeorakhan was not on good terms with Lalta and Bisheshar. Then as the learned counsel for the accused points out, there are other indications in the report which was made at the police station to show that Jeorakhan was acting rather on suspicion than on actual observation. He mentions for example a person named Jagannath Brahman in this first report saying that the appearance of one of the dacoits cor-

responded with that of Jagannath, and in para. 1 of his report he seems to throw suspicion upon one Umrai Singh who is the headman of the village. He mentions that Umrai Singh, although he had a sword, did not turn out to render any assistance at the time the dacoits came. A further point is made in connexion with this first report. Towards the end of it, we have a statement made by Jeorakhan concerning a talk which he had with three banias one of whom is named Salik. This was to the effect that before the dacoity had taken place, one man riding on a horse and two others on foot had been seen in the southern part of the hamlet just before the dacoity was committed. Salik has not been called as a witness in the case. It is hardly to be denied that for the reasons just given, there is some ground for holding that the complainant was acting on suspicion only. If, as is supposed, Jeorakhan had been on bad terms with Lalta and Bisheshar then his naming of these two persons, and of their nephew Sahab Din at the thana, is intelligible. Considering the terms upon which the complainant was with these men it would not take Jeorakhan long to make up his mind that these enemies of his were probably concerned in the dacoity.

With regard to the accused Sahab Din it has been pointed out that he is a well-to-do man and that it was therefore not likely that he would be concerned in an adventure of this kind for the purpose of robbing Jeorakhan. Documents were produced in the Court below to show that Sahab Din has some money-lending business and that he has a sum of close on Rs. 5,000 out on loan. It may, of course, be that the dacoits had other motives than that of plundering and that the crime was committed by way of revenge. It is a matter of common knowledge that money-lenders are not always popular in the neighbourhood in which they reside and that attacks like these are made on them in cases where they have incurred the hostility of the village people round them. There is not however any serious suggestion of enmity between Sahab Din and the complainant. All that we have is that there had been quarrels between Jeorakhan and Sahab Din's two uncles.

To sum up: the case appears to us to

be at best a doubtful one. We do not think it necessary to examine the alibi evidence which was put forward on behalf of Sahab Din. We are content to say that the prosecution evidence is, in our opinion, unsatisfactory and we are left with doubts as to whether it was at all possible for the complainant or any of the other witnesses to recognize Sahab Din at the time the dacoity was taking place. We think that the surrounding circumstances were not such as to give any good opportunity for identification and we should hesitate, as the assessors did, to act upon the statements of these prosecution witnesses. We hold therefore that the order of the Sessions Judge can be supported on the ground that the prosecution evidence was not sufficiently reliable to establish the guilt of Sahab Din. We are unable therefore to allow the appeal and to convert the order of acquittal into one of conviction. The appeal is dismissed accordingly.

B.V./R.K.

Appeal dismissed.

A. I. R. 1918 Oudh 75

LINDSAY, J. C.

Balwant and others—Defendants—Appellants.

v.

Ram Dat and others—Plaintiffs—Respondents.

First Appeal No. 158 of 1916, Decided on 11th September 1917, against decree of Addl. Sub-Judge, Banabanki, D/- 6th September 1916.

(a) *Hindu Law—Alienation—Widow—Reversioners consenting to alienation—Strong presumption of legal necessity arises—Alienation is valid and binding.*

Where it is clearly proved that the nearest reversioners for the time being gave their real consent to an alienation made by a Hindu female i. e., they did so with a full knowledge of the effect of their consent upon their interest and with an intelligent intention to consent to the production of that effect, there is a strong presumption that there was legal necessity in fact, so that the alienee acted with circumspection and made inquiries which induced the honest belief that such legal necessity did in fact exist, and the alienation is valid and binding on the actual reversioners if the said presumption is not rebutted by very cogent proof. [P 79 C 1]

(b) *Transfer of Property Act (1882), S. 3—Mere attestation is not sufficient proof of consent to alienation.*

Mere attestation of the deed of transfer is not sufficient proof of consent to the alienation, there must be clear proof of real consent.

[P 79 C 1]

Gokaran Nath Misra, Jagmohan Nath Chak and Harkaran Nath Misra — for Appellants.

Bisheshwar Nath Srivastava—for Respondents.

Judgment.—These four appeals arise out of two suits which were tried together by the Additional Subordinate Judge of Bara Banki. The defendants in both the suits consisted of the same parties, 16 defendants in all. These defendants represent a joint family and the principal member of the family who figures in these cases is one Suraj Bali. He is the defendant who has given evidence in the case and professes to know the full details of the transactions which are called in question. There are two sets of plaintiffs. One suit was filed by a plaintiff Ram Adhin alone. That suit was numbered 21/35 of 1916 in the Court of the Subordinate Judge. The claim of Ram Adhin was decreed in part and both parties appealed to the District Judge against the decision of the Subordinate Judge. Those appeals have been called up to this Court for decision. In the other suit which was numbered 20/34 of 1916, there were six plaintiffs, the principal ones being Ram Dat and Ram Ratan. These claims were brought for the recovery of shares of certain immovable property which once belonged to a person named Dal Chand. Dal Chand died many years before these suits were brought. The exact date of his decease has not been ascertained, but there is reason to believe that he died at least 30 years before the present cases were instituted. Dal Chand left two widows, Mt. Hansa and Mt. Janaka and he also left a son named Asharfi Lal, who died very soon after he came into possession of his father's property. Mt. Hansa and Janaka both lived long after the decease of Asharfi Lal. Janaka was the mother of Asharfi Lal and it seems that after the latter's death she took possession of the estate, but admitted her co-widow Mt. Hansa to possession over the property. Hansa died before Mt. Janaka and the latter died in the year 1904. The precise date of Janaka's death was one of the matters in dispute in the lower Court and was of importance, because one of the pleas set up by way of defence was that both the suits were barred by limitation, having been brought more than 12 years after the date of Mt.

Janaka's death. The plaintiffs in the two suits claimed to be the reversioners who were entitled to the property after Janaka's death. Of the property which was in possession of this lady the plaintiff Ram Adhin claims a one-third share whilst the plaintiffs in the other suit, that is to say, Ram Dat and others, claim the remaining two-thirds.

The main defence put forward by the defendants was a defence of title based upon a conveyance which was executed in favour of one of the defendants Balwant on 1st December 1897. This deed is marked Ex. A-10. It was executed by two persons, namely, Ram Adhin the plaintiff in one of the suits before me and the widow Mt. Janaka. The document was registered on 2nd December 1897 and the case for the defendants shortly put is this, namely, that by this deed of sale they acquired an absolute title to the property in dispute and that the plaintiffs are not in a position to maintain any claim for recovery of any portion of it. As against the plaintiff Ram Adhin it is pleaded that he was a party to this transfer and cannot now be allowed to impeach it. As against the other plaintiffs Ram Dat and Ram Ratan, the defence was that they were also debarred from bringing this suit inasmuch as their fathers, two men named Baij Nath and Debi Din respectively, were attesting witnesses to the deed of transfer just named and had given their consent as reversioners to the transfer which was made by Mt. Janaka. The other plaintiffs in the suit to which Ram Dat and Ram Ratan were parties were said to have no title to the property as reversioners, as they were lower in degree than the reversioners who were in existence at the time when Mt. Janaka died.

The Court of first instance decreed both the claims in part. Dealing with the document of transfer of 1st December 1897 the Subordinate Judge came to the opinion that a part of the consideration represented debt which had been incurred by Mt. Janaka for legal necessity, and decrees were given subject to the payment by the plaintiffs of their shares of the sum so found. With regard to the suit in which Ram Dat and five others were concerned, the Subordinate Judge held that only the first two plaintiffs Ram Dat and Ram Ratan had any

claim to a share in the property. The claims of the other plaintiffs were dismissed on the ground that they had no title. There are cross appeals against the decisions in each of the two suits and it will be convenient to deal with the cases together.

I will take first the appeals filed by the defendants which are respectively No. 158 of 1916 and No. 29 of 1917. Three points have been argued on behalf of the defendant appellants in these two appeals, the first being the question of limitation. The point taken for the appellants is that the lower Court ought to have found that the claims were time barred. The limitation which governs both the suits began to run admittedly from the date of Mt. Janaka's death. It was the case for the defendants that Janaka died on 25th March 1904 and that as these suits were not brought till 6th April 1916 they had been put in after the expiry of the period of twelve years. On the other hand the case for the plaintiffs was that Mt. Janaka died on 15th April 1904 and that the suits were consequently not within time. So far as this question of limitation is concerned, I think the decision of the learned Subordinate Judge was perfectly correct and that the defendants-appellants cannot hope to succeed here on this issue.

A good deal of criticism has been offered concerning the evidence which was put forward by the plaintiffs in the Court below to establish the date of Mt. Janaka's death. I do not think it necessary for me to discuss all this evidence, or to consider the question whether some of it, and in particular an entry in the chaukidar's register of deaths, was admissible in evidence. There is one piece of evidence which, in my opinion, is conclusive of the matter and that is the statement of P. W. 5, the village patwari, a man named Ram Adhin. It is proved beyond all doubt that very shortly after the death of Mt. Janaka, a claim for mutation was made in the revenue Courts in respect of her property. The original record of these proceedings was before the Subordinate Judge, and Ex. 3 on the record is a certified copy of the statement which was made by the Patwari Ram Adhin before the revenue Court. Ram Adhin in his evidence in the Court below stated

that, some five or six days after the death of Mt. Janaka, he was taken to the tahsil by the plaintiff Ram Adhin. He deposes that an application for mutation was made and that his statement was recorded in connexion with that application. According to what we find in Ex. 3, the copy of the statement made by the patwari in the mutation case, Mt. Janaka died on 15th April 1904.

As the learned Subordinate Judge observes this is a very important piece of evidence for it cannot be suggested that at the time these mutation proceedings were taken, it was to the interest of anybody and least of all to the interest of this patwari to make a false statement regarding the date of Mt. Janaka's death. There can, I think, be no reason whatever for doubting the statement of the patwari to the effect that he made this statement only a few days after Janaka had died and while the event was still fresh in his memory. I am satisfied therefore that for the purpose of this case it must be taken that Mt. Janaka died as deposed to by the patwari on 15th April 1904 and that consequently the suits were within time. I need only add that the evidence put forward by the defendants in support of their case relating to the date of Janaka's death consisted of the statement of a solitary witness, a man named Mahabir. I regard his evidence as absolutely untrustworthy and consider that the Subordinate Judge was right in rejecting it.

I may deal here shortly with a defence by way of estoppel which was raised against the two plaintiffs Ram Dat and Ram Ratan. It was argued that these men in the year 1911 received from the defendant Suraj Bali grants of land in consideration of their giving up any claims they professed to have to a share of the property which had been in Janaka's possession. Two documents were produced on behalf of the defence, namely, Exs. A-18 and A-19. These documents show that grants of 4 bighas were made (1) to Ram Dat and (2) to Ram Ratan and his brother Sant Bakhsh, who has since died. The plaintiff Ram Dat gave evidence as to the transactions evidenced by these two documents. He admitted that these deeds had been executed and that these grants had been made, but his story was that they had been in consideration of his and Ram

Ratan's undertaking not to sell their rights of redemption with respect to certain property which was held in mortgage by the defendant Suraj Bali. On the other hand, the defence produced three witnesses, for the purpose of showing that these grants were made with the object of buying off claims which Ram Dat and Ram Ratan threatened to make in respect of the property now in dispute.

The learned Judge of the Court below disbelieved the evidence produced for the defence on this issue and I am satisfied that his decision was correct. The man who gave the most detailed evidence regarding this part of the case was the defendants' witness Lalta. He deposed that in consequence of the threats which were being made by Ram Dat and Ram Ratan it was decided to have the matter settled amicably between them and Suraj Bali. Lalta says that he and two other men were called in as Panches to settle the dispute and that it was on their suggestion that Suraj Bali made these grants of 4 bighas to Ram Dat and Ram Ratan. This witness Lalta fared badly in cross-examination, and as for the evidence of Puttu Lal and Ram Prasad it was, if anything, worse than that of Lalta. In short the whole story told by these witnesses seems on the face of it to have been concocted for the purposes of this case. We are asked to believe that Ram Prasad who was one of the Panches and the other man Puttu Lal, who also acted in the same capacity, decided this dispute between the parties without knowing what the dispute was about. As is pointed out by the Court below, there is not a word in either of the documents Ex. A-18 or Ex. A-19 relating to the grants of these lands to indicate in any way that this property was given for the purpose of satisfying the claims of Ram Dat and Ram Ratan with respect to the property now in dispute. It was on the pleadings for the defendants to establish the estoppel against these two plaintiffs. I agree with the Court below that they have failed to do so.

I come now to what is really the principal issue in the case. It has been mentioned that Ram Adhin was a party to the document Ex. A-10, which was executed on 1st December 1897. It is also proved, and that fact is no longer in

dispute, that this conveyance was attested by Ram Adhin's two brothers Baij Nath and Debi Din. Baij Nath is dead and is now represented by Ram Dat, plaintiff 1 in one of the suits. Debi Din is likewise dead and was represented in the same suit by his two sons Ram Ratan and Sant Bakhsh, of whom the latter died after the suit was instituted. The defendants' plea was that by reason of Ram Adhin joining in the execution of this deed of transfer and by reason of the fact that Baij Nath and Debi Din attested the document the transfer is binding and cannot be called in question either by Ram Adhin himself or by the representatives of his two brothers Baij Nath and Debi Din.

It is now admitted that at the time when Mt. Janaka died Baij Nath, Ram Adhin and Debi Din, who were all brothers, were the nearest reversioners to the last male owner of this property. It was indeed sought to be made out in the Court below that there existed a family custom by which not only the nearest reversioners but also the more remote reversioners were all admitted to succeed together, and it was on the strength of this custom that three of the plaintiffs in the suit brought by Ram Dat and others were joined as parties. The object of raising this plea of custom was of course to show that Baij Nath, Ram Adhin and Debi Din between them could not by their consent affect the interests of other reversioners who were entitled to succeed with them. However it is sufficient to say that no reliable evidence of this unusual custom was produced before the Court below. The Subordinate Judge found that no such custom existed and although an attempt has been made to press the point here it was only very faintly argued. I dismiss this part of the case at once with the remark that no custom of this kind was established.

We have it therefore that at the time when the succession opened the three reversioners who would have been entitled to the property once belonging to Asharfi Lal were Ram Adhin and his two brothers Baij Nath and Debi Din; and what we have to consider now is the legal effect of these persons having taken part in the execution of the sale-deed upon which the defendants base their title. Ram Adhin, as has already been

said, was one of the executants of this document, while it is proved beyond all doubt that Baij Nath and Debi Din affixed their signatures to the deed as attesting witnesses. Consequently the defence is that the consent of the nearest reversioners having been obtained to this transfer long before the succession opened, the validity of the transfer can no longer be called in question. The law on this part of the case may for the sake of convenience be briefly referred to here. It has, in my opinion, been very clearly expounded in the judgment of a Full Bench of the Calcutta High Court reported as *Debi Prosad Chowdhry v. Golap Bhagat* (1). It was there held that an alienation made by a way of mortgage by a Hindu widow of a portion of the estate for her deceased husband, without proof either of legal necessity or reasonable inquiry and honest belief as to its existence, but with the consent of the next reversioner for the time being, is valid and binding on the actual reversioner if the presumption of legal necessity or of reasonable inquiry and honest belief raised by such consent is not rebutted by more cogent proof. Where the consent of the nearest reversioners is given to an alienation made by a Hindu female the consent is evidence, and strong evidence, to show either that there was legal necessity in fact, or that the transferee acted with circumspection and made inquiries which included the honest belief that such legal necessity did in fact exist. Before this presumption can be raised, it must be well established as a fact that the consent of the reversioners was given to the transaction. Mere attestation of the deed of transfer is not sufficient proof of consent to the alienation.

There must be clear proof of real consent, and for this purpose it is necessary to show that the consent was given with a knowledge of its effect upon the interest of the person who gave it and it should moreover be established that there was an intelligent intention to consent to the production of that effect. The strength of presumption does, of course, vary with the circumstances and would, for example, be much stronger in the case where the reversioner was actually a party to the conveyance than in the case where he merely signed the

document as an attesting witness. In the cases now before me we have it that one of the parties, namely, Ram Adhin, joined in executing the deed. Then again the presumption arising from consent would be very much stronger in cases where it was shown that consideration was given for the consent of the reversioners. In the present case an attempt was made by the defendants to show that the two attesting witnesses Debi Din and Baij Nath were paid Rs. 500 each in consideration of their consent to the transaction. But I agree with the learned Subordinate Judge that this is a point upon which the defendants' case broke down. It will be necessary now to discuss the evidence in some detail, but it is to be observed that the record is for the most part a welter of perjury and it is almost impossible to extract the few grains of truth which lie hidden under a huge mass of false testimony. There are however certain circumstances which assist us in coming to a decision upon which side the balance of truth lies. Of the persons who took part in the execution of this document only Ram Adhin and the defendant Suraj Bali are alive. All the attesting witnesses, four in number are dead. There is in addition the evidence of the scribe, a man named Mohamed Ishaq, who drew up the deed and who was examined as a witness, for the defence. According to Mohammad Ishaq's evidence upon which I do not wish to lay any great stress, although the Subordinate Judge seems to have accepted it the terms of this document of transfer were fully explained not only to the executants Janaka and Ram Adhin but also to the two attesting witnesses Baij Nath and Debi Din. It is probable that this document was read over and explained to the parties, but it seems to me, after a consideration of some of the other facts which have been brought to light, that there was very little need to explain the operation of this deed of transfer to Ram Adhin and his two brothers, for I am convinced from other evidence in the case that they knew perfectly well what was being done and what the result of the transaction on their own interests was likely to be.

Ram Adhin has given evidence in the case, and all that I can say about his statement is that it is a tissue of false-

1. (1913) 40 Cal 721=19 I C 273.

hoods from beginning to end. He has lied in the most unblushing way, and given a denial to practically every fact which was suggested for the purpose of showing that he was fully cognizant of all that took place when the sale deed was written out and registered. It is to be noted that the deed of transfer conveys not only the property which was in possession of Mt. Janaka but also a certain small share amounting to $1\frac{1}{2}$ pies which belonged to Ram Adhin himself and which he had acquired in a pre-emption suit to which the defendant Suraj Bali was also a party. Ram Adhin got this $1\frac{1}{2}$ pies under a decree by which he was made liable to pay Rs. 900 for the privilege of pre-empting. There is no doubt that he borrowed this money from the defendant Suraj Bali in order to deposit it in Court and that at the date of the execution of this sale-deed this $1\frac{1}{2}$ pies share stood mortgaged to Suraj Bali for Rs. 900, which the latter had advanced by way of a loan. A few remarks regarding the contents of the deed will not be out of place here, for I have to record my emphatic dissent from the finding which the Subordinate Judge has come to, namely, that the intention and the operation of this deed was to transfer only the life interest which was held by Mt. Janaka as a Hindu female. That opinion is utterly erroneous and I find some difficulty in following the reasoning by which the Subordinate Judge arrived at this conclusion. If there ever was a document in which the language clearly imported the intention to transfer an absolute estate and not a mere life-interest, this is that document.

It would, I think be superfluous for me to elaborate the point by referring to the various clauses in the deed. It is sufficient for me to say that it was stipulated that the purchaser was to redeem the mortgages already existing on the property and was to take possession as a proprietor. And further it is important to note that in the document it was declared that the sale was being effected with the consent of the heirs and relations (*warisan o aizzae*) of the family. I am satisfied therefore that it never occurred to anybody acquainted with the negotiations which ended in the execution of this deed that Mt. Janaka was only transferring the minor interest in

the property which she had as a Hindu female. As for Ram Adhin's story that he knew nothing about this transaction and that he was only interested so far as the transfer of his own share was concerned, this has been rejected with scorn by the Subordinate Judge, and rightly so. It is an absolutely untrue story and I do not propose to say anything more about it except this, that it is proved that a considerable time before the deed was executed the stamp for the conveyance had been purchased by Ram Adhin himself.

No one could possibly accept what Ram Adhin says now, namely, that he and his two brothers, the attesting witnesses, knew absolutely nothing about the circumstances attending the transfer of Janaka's share. It is proved that not only did they know that Janaka was transferring but it is shown that Debi Din and Baij Nath took a much more lively interest in the proceedings than that of mere attesting witnesses. Ram Adhin presented the document for registration on 2nd December 1897 and Baij Nath and Debi Din both attended the registration office and assisted in the identification proceedings. So far as Ram Adhin's own interest in this document is concerned, I have already mentioned that his share was mortgaged to the defendants' family for a sum of Rs. 900. Ram Adhin has had to admit that when this document was executed he was paid a sum of Rs. 1,400 although Suraj Bali stated that the amount was Rs. 1,470. Ram Adhin asked the Court to believe that the sum of Rs. 1,400 received by him represented the value of his $1\frac{1}{2}$ pies share. On the contrary Suraj Bali's evidence was that out of this sum Rs. 500 had been paid to Ram Adhin for his consent to the transfer of Janaka's share. While I am not prepared to accept many statements of Suraj Bali as gospel in this case, I am inclined to believe that this part of the story is true. I do not believe that the $1\frac{1}{2}$ pies share which Ram Adhin was disposing of was worth Rs. 1,400. As I have said above Ram Adhin got it under a pre-emption decree and paid only Rs. 900 for it; and I think it highly probable that this sum of Rs. 900 represented as much as the property was worth. I am disposed, therefore to hold that so far as Ram Adhin is concerned, he was paid a sum

of Rs. 500 for joining as a co-executant in this deed.

The case against the two attesting witnesses Baij Nath and Debi Din is of course not so strong, but there is other evidence which to my mind excludes any theory that they were ignorant of the terms of the transaction and of what the result on their interests would be. I have mentioned in an earlier part of the judgment that Dal Chand, the man who once owned the share in dispute, died more than 30 years before these cases were brought. His son Asharfi Lal succeeded him only for a short time and after his death there were left three persons at least who had claims to be maintained out of this property, namely, Dal Chand's two widows and Mt. Mahiana, the widow of Ram Charan who was a son of Dal Chand and predeceased his father. The plaintiffs' own evidence establishes one fact beyond all doubt, and that is that after the death of Asharfi Lal Ram Adhin and his two brothers took over the management of the property which was in the hands of these widows. There can be no doubt that Ram Adhin, Baij Nath and Debi Din all lived as members of a joint family. They occupied a house close to the house inhabited by the widows and we have the statements of two daughters of Dal Chand, namely, Mt. Lallo and Mt. Chhogar, to show that Ram Adhin and his brothers looked after the whole of the management of the estate.

It is impossible therefore to imagine that during the years that elapsed after the deaths of Dal Chand and his son Asharfi Lal these three brothers could possibly have remained in ignorance of the condition of the family left by Dal Chand. Dal Chand, so far as I can gather from the record, cannot have been in very affluent circumstances. He had but a small share in this village and he had a very large family consisting of six daughters and two sons, one of whom predeceased him. The defendants gave evidence to show that at the time when Dal Chand died, his two daughters Mt. Lallo and Chhogar were not married and that money had to be borrowed by the widows to defray the marriage expenses. A strong attempt was made on behalf of the plaintiffs to make out that these two girls were married before their father's death and the two women themselves

gave evidence to that effect, which the Subordinate Judge has rejected. I think after a careful perusal of the record that he was right in doing so, for the evidence of these two women, apart from its being highly interested, is extremely vague and unsatisfactory. They have no notion of time or of numbers and the impression which I have gathered from a perusal of their statements agrees with the impression which was made upon the mind of the lower Court, namely, that they had been tutored and put forward to give false evidence in the case. On the other hand, the defence seems to me to be more reliable in this respect and it indicates these two girls were married after their father's death. I have mentioned these facts for the purpose of showing that these widows, after they came into possession of this property, were in all probability pressed for money and that was a fact which was well understood by Ram Adhin and his two brothers who were looking after the widow's interest.

Further, there is abundance of evidence on the record to show that various documents executed by the widows for the purpose of raising loans were attested by Ram Adhin and in one, if not in two instances, there is proof that one of the other brothers also attested documents of a smaller kind. Ram Adhin was confronted with several documents to which he had put his name as a witness and was called upon to explain why he had attested them. He took refuge in a lie by saying that he either remembered or knew nothing about the circumstances. These facts appear to me to lend support to the conclusion at which I am arriving, namely, that Ram Adhin and both his brothers were fully alive to the legal consequence of the execution of this deed of transfer, Ex. A-10.

I now come to what appears to be the most conclusive piece of evidence, which is to be found in two documents on record, namely, Exs. A-30 and A-31. I have in an earlier part of the judgment referred to the mutation proceedings which took place in the Revenue Courts after the death of Mt. Janaka. In the course of those proceedings Ram Adhin was examined in the Revenue Court and Ex. A-30 is a certified copy of his statement. The original record was, as I have

mentioned, before the Court below. In the course of that statement Ram Adhin deposed as follows :

"About four years ago Mt. Janaka sold the property to Suraj Bali of Gursel and she sold it with our consent (*ham logon ki raramandi se.*")

He made a further statement saying : "We people have made no claim," and then he wound up by adding, "we are about to sue for cancellation of the sale-deed." It is important to observe who are meant by the "we" referred to in the statement. This is explained by Ex. A-31, from which it appears that Baij Nath, Debi Din (the brothers of Ram Adhin), Mata Din and Ganga Ram were also examined before the revenue Court. Mata Din was one of the collateral relations of Asharfi Lal and he is now represented by Bachchu Lal, who is plaintiff 6 in the suit brought by Ram Dat and others. Ganga Ram, according to the pedigree, is the man who appears in the same suit as plaintiff 4. These four men were examined by the revenue Court and Ex. A-31 is a certified record of their statements.

What they said is this: "Our story is the same story as has been told by Ram Adhin." The record shows that the signature of each one of the four persons is attached to the deposition. These documents were pressed strongly on the attention of the learned Subordinate Judge. He admitted that so far as Ram Adhin was concerned, his statement Ex. A-30 was a strong piece of evidence against him for the purpose of showing that he had consented to the transfer with a full knowledge of all the facts. But so far as Baij Nath and Debi Din were concerned, the Subordinate Judge treated the Ex. A-31 as not containing any admission made by them to the effect that they too had consented to the transfer. In this the Subordinate Judge appears to me to be clearly wrong. There can be no doubt whatever that Ram Adhin's statement was made in the presence and hearing of these four others and that they expressed their assent to every statement which was made by him, including the statement that they had been consenting parties to the transfer made by Mt. Janaka in favour of Suraj Bali. I can conceive no stronger evidence of a true and full consent on the part of Debi Din and Baij Nath than what is contained in this deposition

which was made more than seven years after the transfer had taken place ; and I decline altogether to accept the view taken by the Subordinate Judge that Debi Din and Baij Nath, although they put their names as witnesses to the deed, cannot be treated as having had that full knowledge which is essential in order to make out a case of real consent. Indeed in dealing with this question the Subordinate Judge has involved himself in contradiction.

I find in one part of his judgment that he says that he has no doubt that Ram Adhin and his brothers were aware on 1st December 1897 that Mt. Janaka was about to sell her property, and he further says that they were well aware that they were the next reversioners and that their action in connexion with the execution of this document amounted to more than a mere attestation. Afterwards however he proceeds to evolve a theory for the purpose of showing that, although these reversioners were aware that a transfer was being made by Mt. Janaka, they must have been under the impression that what she was transferring to Suraj Bali was merely her limited interest in the property. In the earlier part of his judgment on this issue the learned Judge set down the law regarding consent of the reversioners quite correctly and in much the same sense as that in which I have referred to it above. But having in some way or other come to the opinion that the document represented only a transfer of Mt. Janaka's limited interest, the Subordinate Judge proceeded at a later stage to lay down some rules of Hindu law which have no merit except perhaps that of novelty.

He says that in dealing with questions of consent by reversioners to transfers made by Hindu females there are two kinds of consent to be considered, namely, one, where the reversioners assent to the alienation by a widow of her limited interest. Where this is the case, says the Subordinate Judge, the consent of reversioners is evidence of the propriety of the transaction and of the legal necessity. Then he goes on to say that the other kind of consent is where the reversioners agree to the destruction of their rights in expectancy and allow the widow to pass absolute title. From this statement it appears to me that the Subordinate Judge has not properly understood

the law on this subject. I know of no authority for the proposition invented by the learned Judge of the Court below that the reversioner's consent is required to the alienation by a widow of her limited estate in the property of her husband. I have already expressed my opinion before, that no question arises here of the transfer of life-interest. On the face of it the deed clearly conveys a full estate and was intended to do so.

Turning now to the two statements Exs. A-30 and A-31, Ram Adhin, as might be expected from the tenor of the rest of his evidence, attempted to give the lie to his previous statement. He was confronted with his own statement as recorded in Ex. A-30 and he had the impudence to assert that the record was not correct. He asked the Court to believe that the statement he made before the Revenue Officer was that the transfer had been made not with, but without, his consent. Bachchu Lal plaintiff G in the other case, who is the son of Mata Din, one of the other men who made a statement to the Revenue Court in Ex. 31, also had the audacity to depose in the same terms as Ram Adhin. This evidence may be disregarded altogether as being entirely false. With regard to Bachchu Lal, the only observation I need make for the purpose of explaining his false evidence is that he is the person who has found the funds for the prosecution of both these suits with which I am now dealing. We have it then that Ram Adhin, Debi Din and Baij Nath in the year 1897 were fully aware of all the dealings by the two widows with the property which had been left by Dal Chand. They were themselves parties as witnesses to some of the transfers which had taken place and they were thoroughly acquainted with the financial situation in which these ladies found themselves.

We find that with this knowledge they took part in the execution of this deed of the 1st December 1897 and that more than seven years afterwards, when there was really no occasion for them to make any statement against their own interest, they assured the Revenue Officer who was dealing with the mutation application that this sale in the year 1897 had been effected with their consent. I can imagine no proof more conclusive than this of a consent which the law regards

as binding upon the persons who gave it and who at the time the consent was given were the persons entitled to take the property on Mt. Janaka's death. It is a fact to be considered that, although Mt. Janaka lived on from the year 1897 till the year 1901, none of these reversioners ever took any steps to have the alienation set aside, and in fact it is only when limitation has all but expired that we find them coming into Court, 10 years after the alienation has taken place, for the purpose of having it set aside in their favour. For these reasons I hold that the defendants here have succeeded in establishing, as against Ram Adhin, Debi Din and Baij Nath, that being the nearest reversioners they gave a full and intelligent consent to the transfer which was made in December 1897, and on the authorities I hold that this transfer is binding and cannot be called in question either by Ram Adhin himself, who was one of the executants of the deed or by the other plaintiffs Ram Dat and Ram Ratan, who claim through Debi Din and Baij Nath respectively. In my opinion, the Subordinate Judge ought to have held that the transaction was binding and ought to have dismissed both these suits. In view of these findings it is not necessary for me to enter into a discussion regarding the proof of legal necessity, for each of the items which go to make up the consideration of the deed in question.

Once the factum of consent by the nearest reversioners has been established and once it has been proved that this consent was given with full knowledge of its effect and with a thorough appreciation of all the circumstances in which it took place, the presumption is so strong as to be practically conclusive. I do not, of course, intend to say that such a presumption is ever conclusive, but it must be overturned by very cogent evidence; and in these suits I can find no evidence of this description whatever. Even the learned counsel for the plaintiffs will hardly contend that Ram Adhin's statement can in any way be treated as cogent evidence which can be relied on for the purpose of overturning the presumption. I hold therefore that the decrees of the Court below are wrong and must be reversed. Both the suits should have been dismissed and I now dismiss them both with costs. The re-

sult therefore is that the appeals filed by the defendants, namely First Civil Appeal No. 158 of 1916 and First Civil Appeal No. 29 of 1917, are allowed with costs and the appeals filed by the plaintiffs, namely, First Civil Appeal No. 138 of 1916 and First Civil Appeal No. 30 of 1917, are dismissed with costs.

B.V./R.K.

Appeal allowed.

A. I. R. 1918 Oudh 84

LINDSAY, J. C.

Manna Lal and another—Decree-holders—Appellants.

Sardar Singh—Judgment-debtor—Respondent.

Appeal No. 30 of 1917, Decided on 2nd November 1917, against execution of decree of Dist. Judge, Lucknow, D/- 11th May 1917.

Limitation Act (9 of 1908). Art. 182—Payment of process-fee is not step-in-aid.

The mere payment of process fees by a decree-holder, being merely an act supplementary to an application for execution, cannot be treated as equivalent to an application to the Court to take some step-in-aid of execution. [P 85 C 1]

H. N. Misra—for Appellants.

Ram Bharose Lal—for Respondent.

Judgment.—The sole question for disposal in this second appeal is one of limitation. The appellants, decree-holders, maintain that their application for execution which has been dismissed by the lower appellate Court was not beyond time. The Court of first instance, I may observe, had declared that the application was within time and had directed execution to issue. The facts may be very briefly stated as follows :

This decree is dated 20th December 1909, and the application for execution which we have to consider here was filed on 7th January 1917. I may omit all reference to the first and second applications for execution. It is clear that the third application for execution was made on 2nd September 1913. That application purported to be under O. 21, Rr. 15 and 24, Civil P. C. R. 15 just referred to deals with the case of an application made for execution by joint decree-holders, and R. 22 is the rule which requires the issue of a notice in cases where application for execution is made more than one year after the date of the decree. The prayer in this application of 2nd September 1913 was that proceedings might be first taken under

R. 22 and afterwards that steps should be taken in accordance with Rr. 20 and 43, O. 21; that is to say, the Court was asked to attach and bring to sale the moveable property of the judgment-debtor. It seems from the record of the executing Court that action was taken under O. 21, R. 22, and that notice was directed to issue to the judgment-debtor. Notice apparently had to be issued on more than one occasion as service was not obtained. We come now to the crucial date in the case, namely 30th January 1914. On this date it appears that the decree-holder himself was present in Court. The judgment-debtor was not in attendance, but it was noted on the record that there had been sufficient service. Consequently it is made to appear that on 30th January 1914 process fees were received from the decree-holder in order to enable the necessary notice to issue regarding attachment of the moveable property. The case came up again for hearing on 25th February. On that date neither party was present and the application for execution was consigned to records. Now we have this fourth application dated 17th January 1917. If what took place on 30th January 1917 did not amount to the making of an application by the decree-holder to the Court to take some step-in-aid of execution, then the Court below is right in holding that this last application for execution is time-barred.

I may say at once that from the record it does not appear that anything more was done on 30th January 1914 than the depositing in Court of the process-fees by the decree-holder. The record itself does not set out that any application, oral or otherwise, was made to the Court asking the Court to take any step-in-aid of execution. I am told that the decree-holder had an affidavit ready to the effect that he did make an oral application to the Court to receive the process-fee and to issue the notices. This is a very late stage to produce evidence and no attempt seems to have been made to place the affidavit before the lower Court; but I go the length of saying that even if the decree-holder did, as he says, make an oral application to the Court, that would not make any difference upon the legal point which is involved. I have been referred to a great deal of authority on the question of the inter-

pretation of Art. 182 of the Schedule to the Lim. Act, that is to say, cases in which the Courts have had to consider the meaning of the words

"applying in accordance with law to the proper Court for execution, or to take some step-in-aid of execution."

It is agreed, apparently on all hands, that the mere paying in of a process-fee in order to secure the issue of a notice is not the making of an application to a Court within the meaning of these words as used in Art. 182. The only case which seems to indicate an opinion to the contrary is a ruling of the Calcutta High Court, which is to be found in *Bhupendra Narayan Dutt v. Rajendra Nath Dutt* (1). There it was held that the payment of a process-fee was to be treated as equivalent to an application to the Court to take some step-in-aid of execution. It was said that payment of such fees imports a request to the Court to go on with the execution proceedings. The rulings of the Calcutta High Court do not appear to me to be reconcilable, and as there is a divergence of opinion in Courts it seems to me that my proper course is to follow the law as laid down in a ruling of this Court to be found reported as *Juggi Lal v. Ganga Prasad* (2). That ruling follows a much earlier decision of this Court, namely, Select Case No. 185, which was decided many years ago by Mr. Young. The case which was before Mr. Chamier was very similar to the one which is before me. There apparently the decree-holder's agent being present in Court asked the Court to issue a warrant of arrest. A note of this request was made on the order-sheet. In spite of this it was held by Mr. Chamier that in the circumstances this oral request made to the Court by the decree-holder's mukhtar did not amount to the making of an application such as is referred to in Art. 182. Mr. Chamier cites with approval the dictum in Select Case No. 185, in which it was laid down that ordinary acts supplementary to an application for execution are not in themselves applications to the Court to take steps-in-aid of execution. This ruling is one which I ought to follow, and apart from that I think it contains a correct exposition of the law. I am unable to

admit the proposition that even if the decree-holder in this case on 30th January 1914 orally asked the Court to receive the process-fee and to issue notice, there was on his part an application to the Court to take steps-in-aid of execution. It is to be noticed that in the application which had been filed on 2nd September 1913 the decree-holder had already prayed the Court to take the necessary steps for attachment of the moveable property after the required preliminaries had been observed; and I am unable to see why in these circumstances a fresh application or request made to the Court on 30th January by way of jogging the Court's memory or repeating a prayer which had already been made in the petition of 2nd September 1913, should be held to be an application to the Court to take steps-in-aid of execution. The Court on 30th January 1914, if it was addressed by the decree-holder, was not asked to do anything more than it had been asked to do in the petition of 2nd September 1913. In these circumstances I think the decision of the learned District Judge is quite correct. The application which was before him was clearly time-barred. I dismiss the appeal with costs.

B.V./R.K.

Appeal dismissed.

A. I. R. 1918 Oudh 85

LINDSAY, J. C.

Bisheshar Singh and another—Plaintiffs
—Appellants.

v.

Brij Bhookhan Singh and others—Defendants—Respondents.

Second Appeals Nos. 456 of 1915 and 178 to 184 of 1916. Decided on 19th September 1917, against decrees of Addl. Judge, Fyzabad, D/- 11th October 1915.

(a) Partition—Rights determined by competent Revenue Courts by division of lands are conclusive—Civil Court will not entertain suit, result of which is to disturb allotment of village lands based upon proprietary title of each cosharers.

As between the parties to a partition whose rights have been determined by a competent Revenue Court, the division of the lands as made by the Court and recorded in its proceedings is conclusive, and no suit can be entertained by a civil Court at the instance of any of such parties the result of which would be to disturb the allotment of the village lands made upon the basis of the proprietary title of each of the cosharers, as it stood at the time when partition was made.

[P 87 C 1]

(b) Partition—Revenue Courts are not concerned with existence or non existence of

1. (1913) 18 I C 455.

2. (1911) 14 O C 124=10 I C 182.

mortgage charges on property of partition proceedings but only with division of joint proprietary interests in mahal.

The law, relating to partitions made by the Revenue Courts does not contemplate the investigation by those Courts of the existence or non-existence of mortgage charges upon particular portions of the property which forms the subject-matter of the partition proceedings. The Revenue Courts are concerned only with the division of the joint proprietary interests in the mahal which is to be partitioned. [P 87 C 1]

In a suit, where the plaintiff seeks to enforce the proprietary title conferred upon him at the time of partition, the defendant cannot be allowed to plead that an entry in the partition papers describing him as a mortgagee is, as against the plaintiff, conclusive proof of his right to hold as such. [P 87 C 2]

Gokaran Nath Misra—for Appellants.
Samiulla Beg—for Respondents.

Judgment.—These second appeals have been referred for disposal to a Bench for the purpose of obtaining a definite ruling as to the proper manner of disposing of a certain class of suits, framed as suits for ejectment, in which the legal relation of the parties concerned has arisen out of partition proceedings carried out by a Revenue Court. A large number of these suits have come before this Court in recent years and it appears that no uniform rule has been followed in disposing of them. It is said that various Judges of this Court have expressed divergent opinions as to the legal principles which are to be applied in determining the rights of the parties. The typical case may be stated as follows. A village is partitioned by a Revenue Court between the cosharers *A*, *B* and *C*. Lists of the village lands allotted to the cosharers in accordance with their shares are made, and it is found that in the final record of the partition certain of the lands assigned to *A* are described as being subject to mortgage, say, in favour of *B*. Some years after partition takes place, we find *A* bringing a suit in ejectment against *B*, alleging that the latter is in possession without title. *A*, for purpose of the suit, relies upon the title which he has acquired at partition, his case being that he is the proprietor of all the lands which the Revenue Court has assigned to him. *B*, on the other hand, denies that he is in possession without title and refers to the entries in the partition record, which show that he holds certain of the lands allotted to *A* as a mortgagee. As a rule

B, the defendant, pleads inability to furnish particulars of the mortgage under which he claims to hold. He alleges in a general way that he is holding under a mortgage of ancient date, that the document of mortgage is no longer forthcoming and that the entry contained in the partition record is a bar to his being treated by the plaintiff as a trespasser.

In other cases the defendant *B*, while relying upon the partition record, sets up the further plea that his mortgage has become irredeemable and that the plaintiff's title as proprietor has become extinguished. The result in some of the cases has been that the civil Courts, relying upon the entries in the partition papers, have dismissed the suits and held that the parties stand in the relation of mortgagor and mortgagee. No finding is come to as to the terms of the mortgage: there is nothing more than a decision that the parties stand in the above relation and the plaintiff who is seeking possession is referred for his remedy to a suit for redemption. If he then brings a suit for redemption, the onus of showing that he has a right to redeem is cast upon him: he is for this purpose expected to prove the terms of a mortgage about which he knows nothing and the defendant who calls himself a mortgagee produces no evidence of his title as such, leaving it to the plaintiff to make out his claim if he can: as a rule he cannot and the suit for redemption fails. In other cases where the defendant in the suit for ejectment sets up an irredeemable mortgage, the plaintiff may succeed if it is made to appear that the mortgage relied upon by the defendant had become irredeemable at the time the partition was made by the Revenue Court. In cases like this the principle is that if the holder of an irredeemable mortgage fails to set up his proprietary title at the time of partition, he cannot be allowed to do so afterwards: any title he had has been swept away by the assignment of the lands to the plaintiff as proprietor. On the other hand, if it is found that the mortgage was still subsisting at the time of partition the plaintiff's case fails: he must sue for redemption and if, since the date of partition, he has suffered his right of redemption to be extinguished by the law of limitation, he must endure the consequences.

The common characteristic of most of these suits is the absence of any definite evidence from which the relation of mortgagor and mortgagee may be deduced and is well exemplified in the suits out of which the Second Appeals Nos. 178 to 184 of 1916 now before us have sprung. In every one of these cases the defence is the same, a plea that the defendants are mortgagees of long standing, a further plea that the mortgage-deeds having been lost or destroyed, the terms of the mortgage contract cannot be definitely discovered and finally, the assertion that the defendants are not under any obligation to disclose the conditions of their mortgages, inasmuch as the plaintiff is bound by the entries in the partition record in which the defendants are described as mortgagees and cannot be heard to say that the defendants are mere trespassers. It is well understood that as between the parties to a partition, whose rights have been determined by a competent Revenue Court, the division of the lands as made by the Court and recorded in its proceedings is conclusive, and no suit can be entertained by a civil Court at the instance of any of such parties, the result of which would be to disturb the allotment of the village lands made upon the basis of the proprietary title of each of the cosharers, as it stood at the time when partition was made.

On the other hand, it is equally clear that the law relating to partitions made by the Revenue Courts does not contemplate the investigation by those Courts of the existence or non-existence of mortgage charges upon particular portions of the property which forms the subject-matter of the partition proceedings. The Revenue Courts are concerned only with the division of the joint proprietary interests in the mahal which is to be partitioned.

As a matter of practice and convenience, the Revenue Courts do in many cases make a record of the fact that lands assigned to one cosharer as proprietor are held in mortgage by another cosharer whose possession is maintained at the time of partition. These entries are made in accordance with admissions made by the parties in the Revenue Court, but they cannot be deemed in any way to be conclusive evidence of the mortgage relation, much less of the incidents of that

relation, those being matters outside the jurisdiction of the Revenue Court.

It seems to me therefore that in suits like those now before us, where the plaintiff is seeking to enforce the proprietary title conferred upon him at the time of partition, the defendants cannot be allowed to plead that the entry in the partition papers describing them as mortgagees is, as against the plaintiffs, conclusive proof of their right to hold as such. *Prima facie* the title in these cases is with the plaintiff and the defendants, if they desire to hold on to the lands in dispute, must adduce proof of a definite title to do so. They may of course rely upon the entries in the Revenue Record for what they are worth as evidence of the title they claim. But it is clear that a defendant cannot displace the proprietary title accruing to the plaintiff by partition and the right to possess which such a title carries, except by proof of definite facts which constitute in him a right to retain possession notwithstanding the title vested in the plaintiff. In connexion with this subject we have to consider the law of limitation relating to mortgages in Oudh. In order to quiet titles which were conferred by the British Government subsequent to the confiscation effected by Lord Canning's Proclamation, it was found necessary to make special provision regarding the right to enforce mortgages which had been made anterior to the date of the British occupation of Oudh in February 1856. The special law is now contained in S. 37, Oudh Civil Courts Act of 1879 (Act 13 of 1879). This lays down the general rule that a mortgagee who has obtained possession under a mortgage executed prior to 13th February 1856 cannot be sued for redemption, notwithstanding any subsequent acknowledgment by him of the right of the mortgagor or his representative in interest to redeem. An exception to this general rule is declared by which a right to redeem is preserved where the mortgage-deed fixes a period for redemption. If the term expired before 13th February 1856 the right to redeem is gone, if the term continued after that date a suit for redemption will lie, the limitation applicable being that provided by the ordinary law.

When therefore in suits of the type we are considering here a defendant

puts forward the plea that he holds under a mortgage "of very long standing" or a mortgage which was executed "in the time of native rule," it is obvious that the Court is unable, in the absence of further information regarding the date of execution of the mortgage and the terms of the mortgage, to come to any conclusion on the question whether there is or is not subsisting mortgage on the property in suit. A mortgage of old date which was executed in the days of native rule may have become irredeemable with reference to the enactment cited above at the time when partition took place. If this is the case then, as has been ruled in many cases, the right of the defendant who pleads the mortgage is gone, for having under the rule of limitation acquired a proprietary title at the time when partition was made, he was bound to plead it and to ask for its recognition in the course of the partition proceedings. On the other hand, it may be that the case falls within the exception mentioned above: it may so happen that at the time of partition by reason of the special circumstances referred to in the exception the mortgage was still running. But however the case may be, the defendant who pleads a mortgage cannot be allowed to fence with the plaintiff and to resist his claim with vague and inconclusive statements. He must make definite allegations regarding the mortgage right he is putting forward, and he cannot shelter himself behind a bald entry in the partition record which as often as not contains no mention of the date or of the terms of the mortgage. And if he is unable to adduce any proof of the mortgage more definite than that contained in an entry which merely recites that he is holding as a mortgagee, the plaintiff ought to succeed. His title based upon partition is clear and must prevail so as to justify the award of possession.

These, in my opinion, are the principles which ought to guide the Courts in dealing with this class of cases. To come now to the facts of the cases which are before us. Second Civil Appeal No. 456 of 1915 arises out of a suit brought by the plaintiffs-appellants for possession of certain specified plots.

Both Courts below have found with respect to certain of these plots that the

contesting defendants have under-proprietary rights in them and have refused the plaintiff's claim to actual possession of these lands. There is no longer any dispute as regards these lands: it is admitted that the decision of the lower Courts cannot be disturbed. As regards certain other plots, the contesting defendants set up their rights as mortgagees. The First Court held that the mortgage relation was not established. The lower appellate Court, relying principally upon certain observations of mine in my judgment in Second Civil Appeal No. 497 of 1913 (*Lachi Kuar v. Paroti Singh*), has dismissed the claim for possession which the First Court had decreed, and has held that the plaintiffs are bound by the entries in the partition record which show that the predecessors-in-title of these defendants were, at the time of partition, recorded as mortgagees in the column relating to tenants. The learned Additional Judge was of opinion that the plaintiffs could only get possession by bringing a suit for redemption.

In addition to the entry in the partition record the defendants relied upon certain proceedings at the time of the First Regular Settlement, in the course of which it is stated that the rights of their predecessors as mortgagees were admitted. The evidence as to this part of the case is as follows:

At the time of the First Regular Settlement an application was presented to the Settlement Officer by Bindesri Bakhsh Singh and others, of which Ex. E 2 is a certified copy. From the contents of this it appears that the patwari had drawn up a list of the village lands and these applicants desired to have a record made that some of these lands were in their possession as mortgagees. It was said that there were several mortgage bonds in existence, but no particulars were given of any of them. The petitioners said they wished a record of the mortgages to be made so that they might go on paying the Government revenue for the mortgaged lands, amounting to Rs. 79 per annum. It was stated that the area of the mortgaged property was 60 bighas 19 biswas, and that the mortgage debt amounted to Rs. 1201 in cash and 250 kacha maunds of grain. It was also stated that redemption was claimable in any year, "after

the cutting of the crops." Ex. E-1 is a copy of the statement made in reply to the above petition by Jawahir Lal, the general agent of the lambardars Hanuman Bakhsh Singh and Udit Narain Singh. He stated that it was admitted that mortgages did exist in favour of Bindesri, Ausan and Shankari Bakhsh, the applicants. Ex. 3 is a copy of the order made made by the Extra Assistant Commissioner on 29th June 1870. It reads as follows;

"Mortgage decrees in respect of 60 bighas 19 biswas at a jama of Rs. 79 in favour of the plaintiffs on confession of judgment by the defendants. Let a parwana issue to the Sadar Munsarim and let a certificate be given."

Exhibit E-4 is a copy of the list of plots making up the area of 60 bighas odd which, it is said, were held in mortgage. Reading these documents all together, it appears to me that the proper interpretation to be put upon them is this. The claim of the applicants (who in the final order are styled the plaintiffs) was to have certain entries made in the Settlement Record acknowledging their rights as mortgagees: the claim was recognized by the lambardar, and an order was made accordingly for the record to be prepared as desired. The entries were made in accordance with the list Ex. E-4 and, it seems, have been perpetuated since. It is admittedly on the basis of these proceedings that the defendants' claim to be mortgagees rests, and I may observe here that I do not follow the Judge of the First Court when he says that the ancestors of defendants, by means of these proceedings, got a decree against the lambardars as mortgagees "under some irredeemable mortgage or mortgages." What happened after the year 1870 was this. In 1888 the village was divided into two mahals, namely, (1) mahal Shankari Bakhsh, 11 annas and (2) mahal Gajraj Singh, 5 annas. Of these the first was held after partition, by plaintiffs and defendants 1 to 16 in the present suit, and the area of 60 bighas odd above referred to was distributed between the two mahals.

Then in the year 1900-01 a further partition took place and mahal Shankari Bakhsh was split up into four new mahals. One of these retained the old name of Shankari Bakhsh, and another of them was called mahal Drigbijai Singh. The lands of this latter mahal

were assigned to the plaintiffs, while defendants 1 to 16 got mahal Shankari Bakhsh.

By this partition there was a further division of the share of the "mortgage" lands which had been situated in the old mahal Shankari Bakhsh (11 annas) and it is admitted that the lands now in dispute, regarding which the defendants set up rights as mortgagees, were allotted to the plaintiffs' separate mahal. A note was made in the plaintiffs' chitthi showing that the defendants were mortgagees and their names, with this remark, were recorded in the column showing "tenants." Consequently, the question now is whether the defendants, by reason of these entries and of the proceedings which took place before are entitled to say that they are mortgagees of these plots and that the plaintiffs, who are the proprietors by reason of the separate title conferred by the partition of 1901-10, can only obtain possession by bringing a suit for redemption.

I have, in an earlier part of this judgment, referred to the peculiar law of limitation relating to mortgage suits in Oudh, which is now enacted in S. 37, Oudh Civil Courts Act of 1879 (Act 13 of 1879). That law has been in force since the year 1866 and S. 37 is a reproduction of Ss. 2 and 3 of Act 13 of 1866, so that this special law was applicable in the year 1870 when the proceeding between the parties took place in the Settlement Court. By S. 2 of Act 13 of 1866 it is provided that the law of limitation therein laid down is to take effect in spite of any acknowledgment made of the right of the mortgagor to redeem and so, for the purpose of determining whether the mortgages relied upon by the defendants here are still subsisting, or whether the right to redeem has become barred and, if so, when no regard can be paid to the statement in Ex. E-2 to the effect that the mortgages were liable to be redeemed in any fallow season. That admission would not, according to the law just mentioned, operate so as to render redeemable mortgages which the law had already declared to be incapable of redemption. Nor can any account be taken of the admission in Ex. E-1 that the applicants were in possession as mortgagees.

The result is that we have no information at all to enable us to Judge whether

these mortgages relied upon by the defendants are still subsisting mortgages in virtue of which they can claim possession as against the plaintiffs who are undoubtedly the proprietors of the lands in dispute. No particulars as to dates of execution are forthcoming so as to show how the alleged transactions of mortgage are affected by the provisions of S. 37, Oudh Civil Courts Act, and in the absence of this information, which apparently the defendants are not now in a position to give, my opinion is that the defendants cannot in their suit be allowed to maintain that they are mortgagees and that the plaintiffs must redeem. The mortgages have either become irredeemable or they are still capable of redemption, and it is for the defendants who set them up to disclose the facts which will enable the Court to pronounce judgment. The documents which were referred to in the application of 1870 (Ex. E-2) are, or ought to be, with the mortgagees and should have been produced, or the failure to produce them explained by the defendants.

If the mortgages had become irredeemable either in 1889, or 1900-01, when the two partitions took place, the defendants had by then acquired a proprietary title which they were bound to put forward and did not. In that case they have lost all title to the lands in dispute. The only other alternative is that the mortgages are still running, and of this the defendants have given no proof. They cannot in my opinion be allowed to say that anything which was done or said in 1870, or any entry since made in the village papers at the time of the partition of 1888 or of 1900-10 amounts to proof of subsisting mortgages. I have mentioned the fact that the lower appellate Court in deciding this appeal has relied upon certain observations of mine in my judgment in *Second Civil Appeal No. 497 of 1913, Lachi Kuar v. Paroti Singh*.

I still adhere to what I said there, namely, that the question of the existence or non-existence of a mortgage is not a matter with which the Revenue Courts engaged in making partitions are competent to deal, and so a mortgagee is not under any obligation to ask in the course of the partition proceedings for any investigation into his title as mortgagee. Where, however, the mortgage

has become irredeemable, if he is party to the proceedings for partition, he is bound to assert his claim as owner on penalty of losing his title to the lands. The Revenue Courts in such cases are authorized to deal with the question of proprietary title raised; they can adjudicate themselves or refer the parties to the civil Courts for a decision. As for the other observations in any judgment in the second civil appeal above cited, I think it proper to say that on consideration I am no longer prepared to hold that entries in the partition record declaring that the parties stand in the relation of mortgagor and mortgagee are binding so as to prevent the question of the relation between the parties being agitated in a subsequent civil suit. The entries may certainly be looked at as evidence of disputed relation, but they cannot be treated as conclusive evidence, the reason being that they are not made under the orders of Court authorized to investigate questions of title by mortgage as distinguished from questions of proprietary title.

I have to notice here that in addition to the evidence referred to above, the defendants put forward a document of mortgage purporting to be 70 years old with the object of proving that they were mortgagees of the particular plot No. 383. The Court of First Instance observes that even if this document be presumed to be genuine, there is nothing in it to show that it relates to this plot No. 383. The lower appellate Court also points out that No. 383 is not included in the list of plots prepared at the time of the First Regular Settlement (Ex. E-4). My opinion therefore is that the defendants have failed to establish any title by mortgage to the plots in dispute (excluding the plots referred to in the sixth issue in respect of which defendants' rights as under-proprietors are now conceded). The plaintiffs are entitled to possession on the strength of their proprietary title. We ought to reverse the decision of the lower appellate Court on this question of title and to send the case back for disposal on the only other issue which relates to these plots, namely, the issue regarding mesne profits. The First Court had found that the plaintiffs were entitled to Rs. 78 on this account. The finding was attacked in the lower appellate Court, but the

learned Judge came to no decision after expressing the view that the plaintiffs' suit for possession must fail.

There remain the seven Second Appeals Nos. 178 to 184 of 1916. In all these cases the defence raised was that the lands in dispute were held under mortgages of ancient date, that the deeds had been lost or destroyed, and that it was no longer possible to give particulars concerning the dates of execution or the terms of the contracts. It was pleaded that the plaintiffs were bound conclusively by the entries in the partition record. It is admitted that the proprietary right to the plots in dispute is vested in the plaintiffs by reason of the partition which took effect in 1903.

The lower appellate Court has dismissed the plaintiffs' suits, being of opinion that the entries made in the partition record concluded the plaintiffs from denying that the defendants were their mortgagees. For the reasons stated above I hold that this principle of decision is erroneous and that the appeals should now be sent back for decision upon the merits in the light of the law as we have interpreted it in this judgment.

It is to be noticed here that in one of the cases, namely, Suit No. 110, out of which Second Civil Appeal No. 178 has arisen, the defendants pleaded that they were no parties to the partition of 1903, so that their case does not stand on the same footing as those of the defendants in the other suits. It will be for the lower appellate Court in each of the cases to determine what proof has been given of the mortgage title asserted and to decide whether the defendants are mortgagees as they claim or trespassers as the plaintiffs allege them to be. The entries in the partition record may be taken for what they are worth as evidence, but they must not be treated as conclusive evidence of the mortgage relation. All the appeals will be remanded under O. 41, R. 23, Civil P. C., for disposal in accordance with the above directions. As regards costs, I think the appellants in Second Civil Appeal No. 456 of 1915 are entitled to them in this Court. In the other appeals (i. e., Nos. 178 to 184 of 1916) costs will follow

the result of the decisions of the Court below.

Kanhaiya Lal, A. J. C.—I agree.

B.V./R.K.

Appeals allowed.

A. I. R. 1918 Oudh 91

LINDSAY, A. J. C.

Ram Datt and others — Plaintiffs — Appellants.

v.

Deota Din — Defendants — Respondents.

Second Appeal No. 332 of 1917, Decided on 21st November 1917, from decree of Dist. Judge, Gonda, D/- 22nd May 1917.

Mortgage—Money advanced by two mortgagees—Shares not specified—Advance of half by each should be presumed—Satisfaction accepted by one as to his interest—Interest of other co-mortgagee extends to one-half of mortgage money.

Where money is advanced by two co-mortgagees without any specification of shares, the presumption is that each of them advances half the money and if one of them accepts satisfaction of his interest as mortgagee from the mortgagor, the result is that the only mortgagee interest outstanding is the interest of the other co-mortgagee which extends to one-half of the mortgage-money. [P 92 C 1, 2]

Bandeo Lal—for Appellants.

Judgment.—This appeal is up for admission under O. 41, R. 11. I have heard the learned advocate for the appellants and I am satisfied that the decision of the lower appellate Court is correct. The suit was brought by two plaintiffs who are the appellants here, namely, Ram Datt and Ghirrao. The defendant was one Deota Din and the suit was for possession of certain plots of land and for mesne profits.

It appears that these plaintiffs claimed title under a mortgage which was executed in their favour by one Sukha, who was an occupancy tenant. The mortgage was a mortgage with possession and was executed on 11th January 1912. After the date of this deed the mortgagees were dispossessed by the present respondent Deota Din. They brought a suit against him for recovery of possession and won their case. In that case Deota Din put forward a plea that Sukha had no interest in the property. Later on, that is to say in the year 1915, Sukha, the mortgagor, executed a deed of gift in favour of Deota Din by which he handed over all his property including the plots which are now in dispute. After this Sukha brought a suit against Deota Din

for cancellation of the deed of gift. While this suit was pending Sukha died and the case was continued by his legal representative who is one of the present plaintiffs, namely, Ram Datt. Eventually Ram Datt and Deota Din settled the case by a compromise. Ram Datt surrendered his interest in all the property of Sukha, including the plots in dispute, in consideration of a payment of a sum of money by Deota Din. Now the present suit has been brought by Ram Datt and Ghirrao mortgagees.

On the facts I have mentioned Ram Datt would appear to be completely out of Court, but he has sought to maintain that when he made the compromise with Deota Din to which I have just referred, he had no intention of surrendering his rights as mortgagee. The suggestion is that all he parted with was his interest in the property as the representative and heir of Sukha. The learned Judge, on the other hand, and rightly in my opinion, has held that Ram Datt intended to divest himself of all his interest in the property in consideration of the money which he was to receive from Deota Din. I am quite clear therefore that Ram Datt had no locus standi to maintain the suit for possession. On the other hand, Ghirrao, who was no party to the compromise, can claim that his interest in the property has not been affected and the Courts below have given effect to his claim and upheld the mortgage to the extent of one-half. Relief has been given to Ghirrao on these terms. It has been argued here again that Ram Datt did not, by the compromise, divest himself of his interest as a mortgagee in this property, but I am unable to agree. The terms of the *sulehnama*, which I have had read to me, do not suggest that there was any reservation by Ram Datt of any interest in the property.

Then it is said that Ram Datt had no power by entering into this compromise to affect the legal relation which exists between the mortgagor and the joint mortgagees. I am not disposed to yield to this argument. It seems to me that when the money was advanced without any specification of shares, the presumption is that each of the co-mortgagees advanced half the money, and as one of them has accepted satisfaction of his interest as mortgagee from Deota Din, the result is that the only mortgagee interest

now outstanding is the interest of Ghirrao, which extends to one-half of the mortgage-money. The decision of the Court below is, in my opinion, correct. I dismiss the appeal.

B.V./R.K.

Appeal dismissed.

A. I. R. 1918 Oudh 92

LINDSAY, J. C.

Kalka Singha and another—Plaintiffs—Appellants.

v.

Suraj Bali Lal and others—Defendants—Respondents.

Second Appeal No. 441 of 1916, Decided on 18th June 1917, from decree of Addl. Sub-Judge, Fyzabad, D/- 16th September 1916.

(a) *Deed—Construction—Superior proprietor executing deed of grant wound up with declaration that it was perpetual lease, putting grantee in possession of specific share in village and of all rights attaching thereto—Deed also containing express declaration that grant was for generation after generation provided lessee observed certain conditions to payment of malguzari amount and also malikana—Grantors to have mutation made in favour of grantee by setting his name recorded in 'khana milkiat' and giving him powers of distraint and of suing for arrear of rent—Deed held conferred rights of perpetual lease and not of under-proprietor.*

Where a deed of grant which was executed by the superior proprietors of a village and wound up with a declaration that it had been drawn up as a deed of perpetual lease, put the grantee in possession of a specified share in the village and of all rights attaching thereto; declared expressly that the grant made to him was for generation after generation, provided that the grantee as lessee was to deposit a certain amount of money per year in the Government Treasury for malguzari and in addition to pay the *lessois* another sum per year by way of *malikana*; stipulated that the grantors were to have mutation made in favour of the grantee by setting his name recorded in "khana milkiat"; and gave the lessee the powers of distraint, of suing for arrears of rents and of ejecting tenants:

Held: that the deed conferred upon the grantee rights of a perpetual lessee and not of an under-proprietor. [P 95 C 1, 2]

(b) *Deed—Construction—Terms of deed clear enough and purporting to be nothing more than lease—Intention to confer rights of transfer should not be attributed to lessor in absence of express words or necessary implication.*

In construing a deed the terms of which appear to be clear enough and which purports to be nothing more than a deed of lease, it is not permissible to attribute to the lessor an intention to confer rights of transfer unless there are express words to that effect or unless such an intention is necessarily implied in the language of the grant. [P 95 C 1]

Gokaran Nath Misra—for Appellants.
Ram Chandra—for Respondents.

Judgment.—After hearing this case argued at length by the learned counsel on both sides I have come to the conclusion that the decision of the Courts below is wrong and that this appeal should be allowed. The suit which has given rise to the appeal, was a suit for declaration brought by two plaintiffs, Kalka Singh and Sital Singh, against three defendants Suraj Bali Lal, Kali Din Lal and Ram Narain Lal. The declaration which the plaintiffs asked for, was that the defendants had neither proprietary nor under-proprietary rights in a 2 biswas 18 biswansis, 4 kachwansis, 13 nanwansis share in mauza Amrethi Dadiha. The defendants relied upon a deed which was executed in their favour by the predecessors-in-interest of the plaintiffs who were owners of a certain share in this village. This document bears date 4th March 1901. On the face of it, it purports to be nothing more than a deed of perpetual lease. It is an admitted fact that after this lease had been executed the name of the lessee, Bindeshuri Lal was entered in the register of proprietors. After the present plaintiffs had succeeded to their interest in the village it is admitted that they made an application to the Revenue Courts to have the khewat corrected, alleging that under the terms of the document just mentioned, Bindeshuri Lal or his successors had no right to be recorded as proprietors. The plaintiffs asked that they should be recorded as under-proprietors. The Court in which this application was made, seems to have entertained considerable doubts as to the proper manner in which the entry should be made. However an entry was made and subsequently by reason of an order passed by the Commissioner in appeal it was finally settled that the names of these defendants should be recorded as under-proprietors. The plaintiffs now bring this suit asking for a declaration that the defendants have no proprietary or under-proprietary interest in the property affected by the deed of 1901. It is admitted frankly in the plaint that the plaintiffs had previously, by a mistake of law, been under the impression that the defendants were under-proprietors and that it was principally in consequence of that admission that

the entry was made in the revenue records which the plaintiffs now desire to have corrected by means of this declaration. Both the Courts below have held on their interpretation of this document of 4th March 1901, that Bindeshuri Lal acquired the rights of an under-proprietor.* There can be no doubt as to the meaning of the expression "under-proprietor" which is defined in S. 3, Cl. 8, Oudh Rent Act, where it is said that an "under-proprietor" means any person possessing a heritable and transferable right of property in land for which he is liable to pay rent."

If we look to the terms of the deed which is relied upon by the defendants-respondents, we find that the lessee Bindeshuri Lal was put in possession of the share specified and of all rights attaching thereto and it was expressly declared that the grant made to him was for generation after generation. A further term of the deed was that Bindeshuri Lal as lessee was to deposit in the Government Treasury Rs. 60 a year for malguzari exclusive of cesses and was in addition to pay the lessors the sum of Rs. 10 per annum by way of malikana. In Cl. 3 of the document the grantors were to have mutation made in favour of Bindeshuri by getting his name recorded in what is described as "khana milkiat." Then it was provided that the lessee was to have the powers of distraint of suing for arrears of rent and of ejecting tenants and finally the document winds up with a declaration that it had been drawn up as a deed of perpetual lease. It is not disputed by either party that Bindeshuri under the terms of this document acquired a heritable interest in the property of which he was put in possession, but that fact would not of course be sufficient by itself to constitute him an under-proprietor regard being had to the definition which I have mentioned above. It must also be shown that a transferable right was created in favour of Bindeshuri. Both the Courts below have admitted that there is nothing in the language of the deed to show expressly that any power of transfer was granted and it seems to me that unless it can be shown from the language of the document, which on the defendants' own case is the source of all the title they possess, that a power of transfer was granted either expressly or by neces-

sary implication it, follows that these defendants cannot claim for themselves the status of under-proprietors. The learned Subordinate Judge has laid great stress on the clause in the document by which the grantors agreed to have the name of Bindeshuri entered in the revenue registers in the "khana milkiat" but I think undue importance has been attached to this clause especially when it is borne in mind that lessees are under the Land Revenue Act treated in certain respects as if they were proprietors.

A reference to S. 32, Land Revenue Act (U. P. Act 3 of 1901) and in particular to the explanation attached to the section shows that for the purpose of maintaining the registers which go to make up the Record-of-Rights the terms "proprietor" and "under-proprietor:"

"include a person in possession of proprietary or under-proprietary rights under a mortgage or lease."

It cannot therefore be said that the use of the words "khana milkiat" in this document necessarily imports that the intention of the grantors was to confer upon Bindeshuri Lal any proprietary interest including a power of transfer with respect to the property referred to in the deed. It is true, and the learned counsel for the respondents is entitled to rely upon the fact, that the terms of the document provide that the lessee is to pay the lessors a certain annual sum by way of malikana and it is true, as has been argued that in a manner this position assigned to the lessee is similar to the position of an under-proprietor who pays the revenue in the same way and pays a percentage on the revenue to the superior proprietor. But I should be very unwilling to concede that the use of these terms can be treated as indicating with anything like certainty an intention on the part of the grantors to give the lessee, Bindeshuri, a right of transfer which would make him an under-proprietor within the meaning of that expression as used in the Oudh Rent Act. It is quite true of course that the perpetual lessee Bindeshuri and his successors-in-interest have a certain power of transfer which they acquired by virtue of the statute (cf. S. 108, T. P. Act). There is no doubt that the interest of a lessee may be transferred absolutely or by way of mortgage or

sub-lease in the absence of any contract to the contrary. But, in my opinion, this statutory right of transfer cannot be called in aid for the purpose of demonstrating that the person to whom this perpetual lease was granted is an under-proprietor, for in my view of the law in order to constitute a person an under-proprietor by a grant it is necessary that his power of transfer should be derived from the grant and not from the statute law. The statute merely says that the interest which the lessee acquires by the execution of a lease in his favour is capable of transfer with certain conditions but what we have to determine in this case really is the nature of the interest which was conferred by the document itself and that question must be determined without any reference to the language of the Transfer of Property Act and obviously there is a wide distinction between the power of transfer which a lessee has under S. 108 of the Act and the power of transfer which an under-proprietor possesses. However many transfers of the lessee's interest there may be under the power which is granted by S. 108 B, Cl. (j), T. P. Act, the law says that the lessee does not cease by reason of the transfers to be subject to any of the liabilities attaching to the lease.

On the other hand, I think, it is well-understood that if a person possesses an under-proprietary interest in the land and transfers that interest to a third party he ceases ipso facto to be liable to the superior proprietor for the payment of any rent in respect of the land. The superior proprietor is bound to accept the transfer and to look for his rents to the transferee. He cannot in any way hold the under-proprietor who has parted with his interest, liable for the payment of anything by way of rent. In the course of argument I have been referred to a number of cases to be found in the reports of this Court: *Kesho Singh v. Chaudhri Mohammad Azim* (1), *Mohammad Mehdi Ali Khan v. Ram Charan* (2) and *Nand Ram v. Amanat Fatima Begam* (3), and an unreported case decided by Mr. Chamier (*Second Civil Appeal No. 230 of 1910, Anant Bahadur v. Ram*

1. (1900) 3 O C 108.

2. (1902) 5 O C 187.

3. (1903) 6 O C 94.

Adhin). I cannot see that there is anything in these cases which really helps much the decision of the case which is before me. Cases like these must be decided on their own facts and the law being well understood the only question in each case is how the law is to be applied to the particular facts which are put before the Court. Mr. Ram Chandra, however, relies strongly upon an observation made by Mr. Chamier in the second civil appeal to which I have referred. His argument is that as there can be no doubt that Bindeshuri acquired a heritable interest under the terms of this perpetual lease, the inference should be, in the absence of language to the contrary, that the intention was to grant also an interest which was transferable. Mr. Chamier observed as follows in connexion with him:

"It cannot be said that every shankalapdar is an under-proprietor, but where under a deed of shankalap or otherwise a person is shown to have a permanent heritable interest in land under a grant and no right of re-entry is reserved to the grantor it must, I think, be presumed that the interest is transferable."

I am not prepared to accept this dictum as being one of general application and I certainly could not apply it in the case of a deed which, as in the present instance, purports to be nothing more nor less than a perpetual lease. In the case of shankalap grants there may perhaps be some reason for attributing to the grantor an intention to give a transferable right because under the customary law it is understood generally that shankalap tenure is an under-proprietary tenure; but I am not prepared to allow that in construing a deed, the terms of which appear to me to be clear enough and which purports to be nothing more than a deed of lease, it is permissible to attribute to the lessor an intention to confer rights of transfer unless, as I have already observed, there are express words to that effect or unless such an intention is necessarily implied in the language of the grant. On my interpretation of this document the right of Bindeshuri Lal and his successors-in-interest is clear enough. They are perpetual lessees entitled to hold from generation to generation upon payment of Rs. 60 Government revenue into the Treasury plus Rs. 12 per annum to the superior proprietors by way of malikana and it is not to be denied that they have certain rights of

transfer or assignment rights which are allowed to them by Statute and no others.

But I am bound to hold, in view of the definition of the term "under-proprietor" and of the law relating to under-proprietary tenures as well settled in this Court, that this document of 4th March 1901 did not confer upon Bindeshuri the status of an under-proprietor. I think therefore, that in these proceedings the plaintiffs were entitled to have a declaration that the defendants have no proprietary nor under-proprietary rights in the land referred to in the suit. As regards the admissions made by the plaintiffs in the course of the proceedings which were taken in the Revenue Court for the purpose of having the entries in the registers corrected, I have already referred to them. The plaintiffs acknowledge that the admissions were made under a mistake of law and on my interpretation of the document which I have just set out it must, I think, be held that there was a mistake of law on the plaintiffs' part. The question of the plaintiffs' mistake is only of importance in considering the matter of costs; and as it is apparent that it was the plaintiffs' mistake which contributed in a large degree, if not entirely, to the wrong entry which is now found in the revenue record, I consider they are not entitled to any costs in any of the three Courts through which this case has gone. I, therefore, allow the appeal and grant the declaration sought for in the plaint, but I allow the plaintiffs no costs in any of the three Courts.

B.V./R.K.

Appeal allowed.

A. I. R. 1918 Oudh 95

KANHAIYA LAL, A. J. C.

Baij Nath—Defendant—Appellant.

v.

Radha Rawan Prasad—Plaintiff—Respondent.

Second Appeal No. 234 of 1917, Decided on 15th August 1917, against decree of Dist. Judge, Gonda, D/- 14th March 1917.

(a) Civil P. C. (1908), O. 32, R. 4 (3)—Guardian ad litem—Consent may be express or implied—Certificated guardian proposed as guardian of minor—Omission to appear in response to notice is tantamount to indication of willingness to act as guardian.

The consent referred to in O. 32, R. 4 (3), Civil P. C., may be either express or implied.

Thus where the proposed guardian of a minor defendant in a suit is also the certificated guardian of the minor, the omission of such guardian to appear before the Court in response to a notice intimating the proposal to appoint him as guardian of the minor defendant is tantamount to an indication of her willingness to act as his guardian for the purpose of that suit, and the Court is fully justified in appointing such guardian as the guardian of the minor defendant.

[P 97 C 1,2]

(b) Civil P. C. (1908). O. 32, R. 4—Minor represented by guardian ad litem—Ex parte decree cannot be impeached unless guardian is guilty of gross negligence in conduct of suit.

Where a minor defendant in a suit is properly represented, the mere fact that his guardian ad litem allowed an ex parte decree to be passed against him does not entitle him to impeach that decree by means of a subsequent suit, unless he succeeds in establishing that in the previous suit his guardian was guilty of gross negligence in the conduct of the suit, i. e., that he could have made a valid defence or produced evidence in support of it with some chance of success.

[P 97 C 1,2]

Manmohan Nath Chak—for Appellant.

Surendro Nath Roy—for Respondent.

Judgment.—The defendant-appellant obtained a decree against the present plaintiff under the guardianship of his mother, Mt. Gulab Dei, from the Court of the Additional Subordinate Judge of Cawnpore on 4th June 1916. The allegation of the plaintiff is that his mother did not receive any summonses for the hearing of the suit in which that decree was passed, that he was not indebted to the defendant and was not aware whether his father Lachmi Prasad had contracted any debt from him, and that the defendant obtained an ex parte decree against the plaintiff by practising deception upon the Court. In what manner the deception was practised is not stated, but it is suggested that the defendant failed to invite the attention of the Court to O. 32, Rr. 3 and 4, Civil P. C. It is also stated that the father of the plaintiff was addicted to immorality and that, but for the neglect of the guardian of the plaintiff and the fraud and cleverness of the defendant, a decree for the alleged debt would not have been passed against him. As the decree was sought to be executed in the Court of the Subordinate Judge of Gonda, the present suit was filed by the plaintiff in that Court for a declaration that the decree aforesaid was null and void, and for an order restraining the defendant from executing it. The defendant denied

the allegations made by the plaintiff and pleaded that the plaintiff had no cause of action, that the suit was not cognizable in the Court of the Subordinate Judge of Gonda and that the claim was barred by limitation. The Courts below decreed the claim. Their findings were that there was no proof of any fraud either in the service of summonses or in the method in which the decree was obtained, that the minor was not properly represented in the suit brought at Cawnpore, and that his guardian had neglected to put in a proper defence on his behalf. On the question of limitation and jurisdiction the findings of the Courts below were in favour of the plaintiff.

The first question for consideration is whether the minor was properly represented in the suit brought against him at Cawnpore. It is not disputed that his mother, Mt. Gulab Dei, was his certificated guardian under O. 32, R. 4, Civil P. C. No other person could have been appointed guardian for the minor, unless for some particular reason the Court was satisfied that it would be for the minor's welfare that another person should be permitted to act or be appointed in her place. It is also not disputed that the minor was living at that time with his mother in the place where the services of notices and summonses were effected on the minor and his mother in the Gonda District. The minor and his mother were personally served and it was open then to the present next friend of the minor, or to any other person who wanted to protect the interest of the minor, to represent to the Court at Cawnpore that the certificated guardian of the minor was not a fit and proper person to be appointed his guardian of the suit.

There was no suggestion then, nor is there any suggestion now, that the mother had any interest adverse to the minor and it cannot therefore be said that the minor was not properly represented in the suit by the person who had previously been appointed for the protection of his person and property. The lower appellate Court has pointed out that the application for the appointment of Mt. Gulab Dei as guardian of the minor was duly accompanied by an affidavit; and the mere fact that she did not appear when the notice intimating

the proposal to appoint her as guardian of the minor was sent to her, does not show that she was unwilling to act in that capacity. She had undertaken when she obtained a certificate of guardianship from the Court of the District Judge of Gonda to look after the minor's person and property; and her omission to appear in response to that notice was tantamount to an indication of her willingness to act as his guardian for the purpose of that suit. The consent referred to in O. 32, R. 4, sub-R. 3, Civil P. C., may be either express or implied; and the procedure adopted by the then plaintiff or by the Court which passed that decree in appointing her as guardian of the minor is not open to any objection. Unquestionably the minor was properly represented in that suit by the person who looked after his welfare and was best qualified to protect his interest during the pendency of that suit.

The next question is whether the mother of the minor was guilty of gross negligence in not properly defending the suit filed against the minor. It is the duty of the Court as far as possible to prevent the minor from being injured by fraud, laches or negligence of his next friend or guardian for the suit, and as suggested in *Hoghton, In re, Hoghton v. Fiddey* (1), it might allow a case to be re opened on review or otherwise if it is satisfied that such injury has been improperly caused to his interest by reason of any of the circumstances mentioned. But a next friend or guardian however vigilant he may be, may not always succeed in finding evidence to support the minor's case or in getting a decision to his benefit; and the general rule therefore is that if the minor be properly represented in the suit and no fraud or collusion between his next friend or guardian and the opposite party be established or no gross negligence on the part of his next friend or guardian be proved, the minor would be bound by a decree or order made in that suit or proceeding, whether it be for his benefit or not, as if he were of full age: *Trevelyan on the Law of Minors*, 3rd Edn., pp. 330 and 331. It is not the business of the guardian to defend every suit brought against the minor, for, as pointed out by their Lordships of the Privy

Council in *Baboo Lekraj Roy v. Baboo Mahtab Chand* (2):

"the interests of infants would seriously suffer if a notion were to prevail that guardians were bound for their own security to contest all claims against an infant's estate whether well or ill-founded."

In *Lalla Sheo Churn Lal v. Ramnandan Dobey* (3), where a suit filed by a next friend on behalf of two minors was allowed by the next friend to be dismissed for default, it was held in a subsequent suit brought by the minors on attaining majority that gross negligence on the part of the next friend in the conduct of the suit brought on behalf of the persons under disability prevented the operation of the bar contained in S. 103, Civil P. C. to the institution of a fresh suit by such person when the disability ceased. In *Cursandas Natha v. Ladkavahu* (4) it was held that an infant could impeach a decree passed in a suit in which he was represented by a guardian, where his guardian had been guilty of fraud or negligence in allowing the decree to be passed against him. In *Madavi v. Har Dayal* (5) and *Hanmantappa v. Jirubai* (6) decrees obtained against a minor who was properly represented in that suit were held to be binding, because no fraud or gross negligence on the part of the guardian of the minor was established.

The decree in the present case was obtained on account of the price of cloth supplied and money advanced to the father of the present plaintiff. No evidence was however produced in this case to show that that debt was not due or was not legally recoverable from the family property or from the property left by his father. One of the issues in the case was whether the decree in question had been fraudulently obtained; but no evidence was adduced on the point. It is difficult in the circumstances to say whether Mt. Gulab Dei could have made any valid defence or produced evidence in support of it with any chance of success. Negligence implies a failure to discharge the duty imposed on a guardian and in the absence of evidence to show that the debt in question was fictitious or was not binding on the minor, no

2. (1870-72) 14 M I A 393=17 W R 117 (P C).

3. (1895) 22 Cal 8.

4. (1895) 19 Bom 571.

5. (1910) 13 O C 158=7 I C 538.

6. (1900) 24 Bom. 547.

1. (1874) 18 Eq 573=43 L J Ch 758.

failure to discharge that duty or gross negligence can be attributed to his guardian. The Courts below have proceeded to pass a decree in favour of the present plaintiff on the consideration that no decree ought to have been passed against his person. That error is palpable and could easily have been rectified by an application for review to the proper Court. In any event it is unnecessary to set aside the entire decree. The only portion which is affected by the gross negligence of the guardian is that by which the minor has been made personally liable.

The question of jurisdiction is of no importance, because under S. 21, Civil P. C., no objection as to the place of suing can be entertained in appeal unless there has been a consequent failure of justice. The plaint was properly stamped as for a declaratory relief and an injunction to restrain the defendant from executing his decree. But no declaratory decree need be granted in this case, as the decree cannot be set aside in part and the reopening of the entire decree is undesirable. The small rectification needed in the decree can be easily effected by the Court which passed it. An injunction restraining the present defendant from enforcing the personal liability of the minor will suffice for the purposes of this case. The appeal is therefore allowed in so far that the present defendant will be restrained by injunction from enforcing the decree against the person and personal or self-acquired property of the minor plaintiff. The plaintiff will in the circumstances get one-fourth of his costs here and below from the defendant who will bear his own costs throughout.

B.V./R.K. *Appeal partly allowed.*

A. I. R. 1918 Oudh 98

LINDSAY, J. C.

Baldeo Bakhsh—Plaintiff—Appellant.

v.

Pahlad Singh—Defendant—Respondent.

Second Rent Appeal No. 58 of 1917, Decided on 7th November 1917, from decree of Dist. Judge, Sitapur, D/- 15th May 1917.

Civil P. C. (1908), S. 11—Decision in previous suit for profits between cosharers as to rate of profits is not *res judicata* in sub-

sequent suit between cosharers in respect of profits for other years.

A decision in a previous suit for profits between the cosharers of a village that the *sir* and *khudkasht* of a particular cosharer yielded profits at a certain rate in the years in suit, does not operate as *res judicata* in a subsequent suit between the same cosharers for profits in respect of other years. [P 99 C 1]

Ishwari Prasad—for Appellant.

Judgment.—The only question which arises for decision in this second appeal is with regard to the manner of taking account between the parties. The suit was a suit between cosharers for profits and there is no dispute that the defendant-respondent Pahlad Singh is in possession of certain lands as *sir* and *khudkasht*. It is on the basis of the profits of these *sir* and *khudkasht* lands that the account has to be settled between the parties and the argument for the appellant here is that in estimating the profits the account should be made up on the basis that the land yields profit at the rate of Re. 1.6.0 per *kachcha* *bi*-*gha*. It is claimed that in a previous litigation between the parties with respect to other years than the year now in suit, this rate was adopted by the Court in making up the account and so the contention is that on the principle of *res judicata* the same rate ought to be applied in the present instance. The learned Judge of the Court below has met this argument by saying that any previous decision of the Court laying down a uniform rate of Re. 1.6.0 per *kachcha* *bi*-*gha* could not be treated to be binding on the parties because in suits for profits what has to be looked at is the amount of the actual profits during the years in suit and the proportion in which these profits must be divided.

I have looked at the previous decision which was relied upon by the plaintiff for the purpose of enforcing the principle of *res judicata*. It certainly appears to me that it has never been laid down by any Court that in all suits between these parties for profits the rate of profit is to be calculated on the basis that each *kachcha* *bi*-*gha* of land in the occupation of the defendant yields a profit of Re. 1.6.0 a year. I understand from the judgment which I have perused that all that was found, was that during the years then in suit this was a reasonable rate to assume in the case of *sir* and *khudkasht* lands occupied by the defendant-respondent Pahlad. The pro-

fit of any particular land may vary from year to year and it may very well be, as I pointed out to the learned counsel for the appellant, that lands which a few years ago might reasonably be charged at the rate of Re. 1-6-0 per kacheha bi-gha might now, in view of altered circumstances, be liable to be charged at the rate of Rs. 3. I think the *res judicata* argument is altogether untenable in the case and that the Courts below were right in making up the account on the basis of the actual profits during the years in suit calculated on the actual rent rates prevailing in the village during the period which the suit covers. This is the only point which has been argued before me and I think the appeal must fail. The decision of the Court below appears to be quite correct. I dismiss the appeal. No order as to costs as the defendant-respondent has not entered an appearance.

B.V./R.K.

Appeal dismissed.

A. I. R. 1918 Oudh 99

STUART, A. J. C.

Nurul Hasan and others—Plaintiffs—Appellants.

v.

Sarju Prasad—Defendant—Respondent.

Second Appeal No. 253 of 1916, Decided on 9th July 1917, from decree of Dist. Judge, Fyzabad, D/- 10th April 1916.

(a) U. P. Land Revenue Act (3 of 1901), S. 111 (1) (b)—“Civil Court.”

The words “Civil Court” in S. 111 (1) (b), mean a civil Court of competent jurisdiction.

[P 100 C 2]

(b) U. P. Land Revenue Act (3 of 1901), S. 111 (1) (b)—Suit instituted in wrong Court within three months of order under S. 111, but presented beyond three months in proper Court, on return for presentation to proper Court, cannot be entertained.

Therefore a suit originally instituted within three months from the date of the order passed by a revenue Court under S. 111 (1) (b) in a civil Court having no jurisdiction, and subsequently, on the plaint being returned for presentation to the proper Court, instituted in a civil Court having jurisdiction but beyond the said three months, cannot be entertained.

[P 100 C 1]

(c) U. P. Land Revenue Act (3 of 1901), S. 111—Suits contemplated under S. 111 are not governed by Limitation Act (9 of 1908).

The Limitation Act has no application to suits contemplated by S. 111, U. P. Land Revenue Act.

[P 100 C 1]

Wazir Hasan—for Appellants.

Gokaran Nath Misra—for Respondent.

Judgment.—In the course of the hearing of an application for partition under the provisions of Ch. 7, Act 3 of 1901, the plaintiffs-appellants filed an objection in the Court of the officer conducting the partition involving a question of proprietary title, which had not been already determined by a Court of competent jurisdiction. Under the provisions of S. 111, Act 3 of 1901, the officer conducting the partition had either to decline to grant the application until the question in dispute had been determined by a competent Court, or to require the plaintiffs-appellants to institute within three months a suit in the civil Court for the determination of such question, or to proceed to inquire into the merits of the objection. He took the second course and directed the plaintiffs-appellants to institute within three months a suit in the civil Court for the determination of the question. The result of this order was that, if the plaintiffs-appellants failed to comply with the requisition, the point had to be decided against them. If they complied with the requisition and instituted a suit within three months of the date of the order, the point would have been decided in accordance with the decision of the civil Court.

The determination of the objection on the merits is removed entirely from the jurisdiction of the officer conducting the partition when the course in question has been adopted. The officer conducting the partition in such circumstances has only to look at the decision of the civil Court, if any. If the civil Court decides the point in favour of the objector, the officer conducting the partition also decides in his favour. If the civil Court decides the question against him the officer decides the question against him. If there is no decision the officer decides the question against the objector and there must, of course, be no decision when no suit has been instituted within three months in the civil Court for the determination of the question. The order directing the plaintiffs-appellants to institute the suit was passed on 9th May 1913. On 8th August 1913 they instituted proceedings in the Court of the Additional Munsif of Fyzabad. The

other side raised an objection that the Additional Munsif of Fyzabad had no jurisdiction to hear the suit as the value of the subject-matter was more than Rs. 1,000. The Additional Munsif upheld this objection and returned the plaint on 27th February 1914 for presentation to the proper Court. On 27th February 1914 the plaint was filed in the Court of the Subordinate Judge of Fyzabad. The officer dismissed the suit on the ground that it had been filed in his Court more than three months after 9th May 1913. The learned District Judge upheld the decision and the plaintiffs-appellants have come to this Court praying for a reversal of those orders in Second Appeals Nos. 253 to 256.

It is settled law in Oudh that, in a case in which an officer conducting a partition has ordered under the provisions of S. 111 Act 3 of 1901, an objector to institute a suit within three months in the civil Court and the objector has not instituted the suit within three months, such a suit cannot afterwards be entertained by a civil Court: *Narendra Bahadur Singh v. Moti Lal Singh* (1). The learned counsel for the plaintiffs-appellants does not contest this view of the law. But he has argued that the suit was instituted within three months, on the ground that the institution in the Court of the Additional Munsif was a valid institution according to law although the Additional Munsif had no jurisdiction to entertain or decide the suit. His point is that the plaint was a good plaint although it was filed in wrong Court and that an error made as to the forum does not affect the validity of the institution. He does not contend that the provisions of S. 14, Lim. Act (9 of 1908) can be invoked to assist his clients, as he admits the correctness of the decision in *Dhanesh Prasad v. Gaya Prasad* (2). In that decision the Judicial Commissioner found that the Limitation Act did not apply to suits which were contemplated by S. 111, Land Revenue Act. There can be, in my opinion, no doubt as to the correctness of that decision.

The learned counsel for the plaintiffs-appellants took this case upon other grounds. He argued that S. 111 has not specified the Court in which such a suit

should be instituted beyond stating that it is a civil Court. He further laid great stress upon the inconveniences that could arise and the hardships which might ensue if the view taken by the learned District Judge were accepted. He pointed out that, if this view were applied strictly, an objector who had made a bona fide mistake as to the forum might, owing to delay in decision on the question of jurisdiction by the Court to whom the plaint had been presented by error, be precluded by causes outside his own control from instituting the suit, before the Court having jurisdiction, within three months from the date of the order. Such hardships undoubtedly could arise if the view of law taken by the learned District Judge were accepted. But if the view taken by the learned District Judge interprets the law correctly that view must be accepted whatever hardships may arise, and it will be for the legislature to remove those hardships by an express enactment and not for the Court to interpret the law incorrectly in order to attain an object which may appear to it desirable. I cannot read the words "civil Court" in S. 111 (1) (b) as meaning anything except a civil Court of competent jurisdiction, and it follows that a suit instituted in the civil Court not of a competent jurisdiction cannot be held to be instituted at all. Such an institution is not legal institution. The section undoubtedly requires improvement. There are other cases in which great hardships might arise. But I have to interpret the law as it stands, and, as the law stands, I do not consider it possible to hold that these proceedings were instituted within three months of the date of the order. These appeals therefore fail. I dismiss Appeals Nos. 253 to 256. The appellants will pay their own costs each instance and those of the respondents.

R.V./R.K.

Appeal dismissed.

A. I. R. 1918 Oudh 100

LINDSAY, J. C.

S. Farkhund Ali and another—Plaintiffs—Appellants.

v.

Mohammad Sahib and others—Defendants—Respondents.

Second Appeal No. 104 of 1917, Decided on 27th August 1917.

1. (1908) 11 O C 114.

2. (1915) 18 O C 243=33 I 65.

Practice—New case—New case cannot be set up in appeal.

A new case cannot be allowed to be set up in appeal. [P 102 C 1]

*Wazir Hassan and Ali Mohammad—*for Appellants.

*Shahanshah Hussain Rizwi—*for Respondents.

Judgment.—Having heard counsel for the plaintiffs-appellants in these two appeals I consider that the order of the lower Court must be set aside. The facts of the case may be briefly stated as follows:

The plaintiffs came into Court alleging a right to redeem mortgages affecting certain property described as consisting of a seven-annas share in the village called Purania. I understand at present the matters in dispute between the parties are confined to only six annas out of this seven-annas share. There were two plaintiffs in the case, Farkhund Ali and Mahabir Prasad, and they claimed to have derived title to bring this suit for redemption from a person called Ali Bahadur. This Ali Bahadur was represented as having inherited the equity of redemption in six annas of the mortgaged property. It is perfectly true that in the pedigree which was filed with the plaint there was an error committed with respect to Ali Bahadur's relationship to one Umrao. He was shown as the son of Umrao, whereas it subsequently turned out that he was not related in this way. He was the son of Umrao's mother's sister. An application was made to the Court sometime after the trial had begun and as a result of this application the true relationship between Ali Bahadur and Umrao was set out in the plaint as amended. It is to be observed that when this order for amendment of the plaint was made, the defendants put in no plea by way of answer to the amended pleading. The inference is therefore that they had no answer to give. After the case had been tried out, the Subordinate Judge came to the conclusion that it was established that Ali Bahadur was the heir of Umrao and that for this reason he was able to pass to the plaintiffs a good title which would enable them to maintain this suit for redemption. The result of the case was that a decree for redemption was passed on payment of a particular sum. Both parties brought an appeal to the

District Judge. The plaintiffs-appellants objected to the sum which had been declared to be payable in respect of redemption. With that matter I am not concerned at present.

The defendants brought an appeal and the gist of their case before the Judge was that Ali Bahadur was not heir of Umrao and that therefore he could not transfer to the plaintiffs a good right to redeem the property. For the first time in the history of the case the plea was put forward on behalf of these defendants-appellants that even assuming Ali Bahadur to be related to Umrao in the manner mentioned in the amended plaint, nevertheless one Qasim Husain who was a brother of Ali Bahadur's mother was a nearer heir and would consequently exclude Ali Bahadur. The learned Judge, for reasons, which I am unable to accept, allowed this new case to be pleaded before him and eventually he gave judgment for the defendants-appellants on the ground that the plaintiffs had failed to prove that Qasim Hussain was dead and that consequently Ali Bahadur was the nearest relative of Umrao. It is complained here, and I think with justice, that the defendants-appellants were allowed to raise a new case in the Court of first appeal. The learned Judge has written a great deal explaining why he allowed this defence to be raised, but I am quite unable to follow the reasons which he gives. It cannot be pretended for a moment that the defendants were in any way prejudiced by the mistake which was made in the pedigree which was filed with the plaint. The learned Judge seems to have thought that the defendants had been misled by this pleading but I am unable to agree with him. There was before the Court a clear statement made on 16th July 1915 that the pedigree contained a clerical error. The true relationship of Ali Bahadur to Umrao was disclosed and therefore it is idle for these defendants here to contend that after this they were under any misapprehension as to the real nature of the title which Ali Bahadur was pleading. It is to be noted that in the written statement which was filed in answer to the plaint as it originally stood, these defendants did not merely deny in a general way the title which Ali Bahadur set out, but they took upon themselves the responsibility of naming certain per-

sons who were described as the true heirs of Umrao, namely, Waris Ali and Gauhar Ali, etc. Who these "etc.," are is, of course, best known to the defendants.

There is nothing on the record to show who they are. Perhaps it is suggested now that they include Yasim Husain. Consequently when we find that these defendants undertook to put forward a special defence and named certain persons as the heirs of Umrao they cannot now be heard to make any complaint on the ground that an erroneous pedigree was filed in the Court of first instance which had the effect of misleading them. There was nothing in the pedigree as it stood originally which could have led to the pleas in which were raised the justitii of "Waris Ali, Gauhar Ali, etc." I am informed by the learned counsel for the respondents that the defence which was put forward in the lower appellate Court in connexion with the mention of Qasim Husain as a nearer heir was suggested by a statement which was made by Ali Bahadur in a Revenue Court in connexion with mutation proceedings in the year 1908. A certified copy of this document is on the record Ex. A-13. There no doubt it is stated by Ali Bahadur that his mother was Mt. Munga and that her sister was Badshah Begam and that both the ladies "had" a brother named Qasim Husain; but there is not a word in the statement to indicate that Qasim Husain was in existence at that time. It is further to be noted that Ali Bahadur was never asked a question about this matter in the course of the trial of the present suit before the Subordinate Judge and so it all comes to this that an obscure passage in the certified copy of Ali Bahadur's statement made in the year 1908 is fastened upon. Not a question is asked from Ali Bahadur in the witness-box in the Court of the Subordinate Judge, but when the case comes up before the Additional Judge in appeal we have Qasim Husain trotted out for the first time as being an heir of Umrao who stood in the way of Ali Bahadur's inheritance. Altogether it seems to me that the lower Court has erred grievously in allowing this new case to be set up and it is for this reason that I accept these appeals and set aside the decree of the Court below. As this was the only point which the learned

Additional Judge decided, the result is that both these appeals, namely, Nos. 104 and 106 of 1917, will go back to the Court of the Additional Judge for disposal on the merits. Costs here and hitherto will abide the result.

B.V./R.K.

Cause remanded.

A. I. R. 1918 Oudh 102

KANHAIYA LAL, A. J. C.

Debi Baksh Singh and another — Judgment-debtors—Appellants.

v.

Bed Nath — Decree-holder — Respondent.

Appeal No. 8 of 1917, Decided on 7th June 1917, against Execution of decree of Sub-Judge, Sitapur.

(a) Oudh Land Revenue Act (1876), S. 174 — S. 174 points to property actually under superintendence of Court of Wards and not to profits that may be deprived after release or to property acquired therefrom.

The language used in S. 174 points to the property which was actually under the superintendence of the Court of Wards and not to any profits that may be derived therefrom after its release or to any acquisition made from the same.

[P 103 C 1]

(b) Oudh Land Revenue Act (1876), S. 174 — Contract while estate under Court of Wards — Property purchased after its release is liable to attachment in execution of decree.

Property purchased by a person from the profits realized by him from his estate after its release from the superintendence of the Court of Wards, is liable to attachment in execution of a decree obtained against him in respect of a contract entered into while his estate was under the superintendence of the Court of Wards.

[P 102 C 2]

Gokaran Nath Misra—for Appellants.

A. P. Sen—for Respondent.

Judgment. — The question for consideration in this appeal is whether property acquired by a person after the release of his estate from the Court of Wards is liable to attachment in execution of a decree obtained against him in respect of a contract entered into while his estate was under the superintendence of the Court of Wards. The estate, in the present instance, was released from the superintendence of the Court of Wards in 1898. The property in question was purchased in 1909. It is not disputed that the purchase was made from the profits, realized by the debtor, from his estate after its release from the superintendence of the Court of Wards. The learned counsel, who appears for the judgment-debtors contends that the pro-

tection afforded by S. 174, Oudh Land Revenue Act (17 of 1876) extends as much to the estate as to the profits which may be realized from the same after its release or to any acquisition made therefrom. But S. 174 extends the protection only to "such property" as was actually under the superintendence of the Court of Wards. Any profits accruing from the property after its release would be absolutely at the disposal of the holder of that property, and he would be at liberty to apply the same in paying his old debts or acquiring other property therewith or in any manner he likes.

In *Jhamman Lal v. Himanchal Singh* (1) it was held that the prohibition contained in para. 2, S. 205-B, Act 19 of 1873, which contained a similar provision applicable to what was then known as the North Western Provinces, did not apply to rents and profits of property which accrued after the release of the corpus from the superintendence of the Court of Wards. Any acquisition made from those profits would similarly be excluded from that prohibition. The language used in S. 174, Oudh Land Revenue Act points to the property which was actually under the superintendence of the Court of Wards and not to any profits that may be derived therefrom after its release or to any acquisition made from the same. The object of the provisions, as pointed out by their Lordships of the Privy Council in *Debi Bakhsh Singh v. Shadi Lal* (2), was to protect the property under the superintendence of the Court of Wards against transactions entered into by a person under tutelage and against the consequences of any execution, in respect of contracts entered into by such a person, and so long as the tutelage lasts, the property and the profits partake of the same character, but when it ceases, the protection ends, so far as the enlargement of the estate from future profits or by acquisition is concerned. Such future profits do not form accretions to the estate for the purposes of that protection which is limited in character. The appeal is therefore dismissed with costs.

B.V./R.K.

Appeal dismissed.

A. I. R. 1918 Oudh 103

LINDSAY, J. C.

Dularey Singh—Plaintiff—Appellant.
v.

Suraj Bali Singh and others—Defendants and Plaintiffs—Respondents.

Second Appeal No. 359 of 1916, Decided on 2nd July 1917, against decree of Sub-Judge, Unao, D/- 13th July 1916.

(a) Evidence Act (1 of 1872), S. 114—Paternity admitted—Legitimacy is to be presumed—Burden of proof is on person denying.

Where a party admits the paternity of the other party but pleads that he is of illegitimate descent, the legal presumption being in favour of legitimacy the onus lies on the party alleging illegitimacy to prove it. [P 104 C 2]

(b) Civil P. C. (5 of 1908), S. 100—Burden of proof.

The adjustment of the burden of proof is a question of law. [P 105 C 1]

Gokaran Nath Misra—for Appellant.
A. P. Sen—for Respondents.

Judgment.—The suit out of which this appeal has arisen was brought by two plaintiffs, Sheo Dayal Singh and Dularey Singh, for the purpose of obtaining possession of certain plots of land held in under-proprietary tenure. The property in question was stated to have belonged to one Zalim Singh and plaintiff 1, Sheo Dayal Singh claimed to be the nearest reversioner of Zalim Singh and to be entitled to the property after the death of Zalim Singh's widow, Mt. Janki Kuar. Plaintiff 2 in the suit was a person who had taken an assignment of an eight annas share of plaintiff 1's interest in this property. The principal defendant in the suit was defendant 1, Suraj Bali Singh. The other defendants in the suit were persons who had taken a transfer by way of mortgage from the widow Mt. Janki Kuar. So far as these latter defendants are concerned, we have nothing to do with their defence in deciding this appeal. They tried to make out that the mortgage made in their favour by the widow was binding inasmuch as it had been made for legal necessity. No evidence as to the existence of this legal necessity was put forward and consequently defendants 2 to 5 are no longer interested in the case. The chief contest was between plaintiff 1, Sheo Dayal Singh and defendant 1 Suraj Bali Singh. In his plaint Sheo Dayal Singh alleged that Suraj Bali Singh was in possession of the property without any title. It was stated that

1. (1902) 24 All 136.

2. A I R 1916 P C 1=38 All 271=19 O O 55=33 I C 681 (P C).

this man Suraj Bali Singh was the offspring of a Goshain woman whom Nattha Singh used to keep. This Nattha Singh was the first cousin of the plaintiff Sheo Dayal Singh. In para 5 the plaintiff said that Suraj Bali Singh had been born of this woman some four years after Nattha Singh had died. Suraj Bali Singh, defendant 1, retorted with the defence that the plaintiff was of illegitimate descent. He admitted that he was the son of Jawahir Singh, but pleaded that he was the offspring of an illicit intimacy between Jawahir Singh and a Kachhi woman. Evidence was given in the case. The Court of first instance held that the plaintiffs were entitled to succeed, the Munsif being of opinion that it was in the circumstances for defendant 1, Suraj Bali Singh to establish his allegation that Sheo Dayal Singh was illegitimate. In appeal the Subordinate Judge reversed this finding. He was of opinion that the burden of proving his legitimacy was upon plaintiff 1 Sheo Dayal Singh. He held that he had failed to do so and that he had also failed to establish that he was the nearest reversioner of the deceased Zalim Singh.

So far as this latter point is concerned the Subordinate Judge omitted to notice that the pedigree which had been put in by the plaintiff was admitted by the defendant in the course of the proceedings in the Court of first instance. Indeed the pedigree which defendant 1 set up tallied almost exactly with the pedigree attached to the plaint. The only thing which was denied by defendant 1 was that Sheo Dayal came within this pedigree inasmuch as he was an illegitimate child. Looking at the defendant's own pedigree it is quite clear that his case was that there was no nearer relative of Zalim Singh in existence than himself. It follows, therefore that if the plaintiff Sheo Dayal Singh can be held to be the legitimate son of Jawahir Singh, the suit ought to have been decreed and the decision of the lower appellate Court is wrong. On the pedigree set out by both the parties Sheo Dayal Singh is a degree nearer in relationship to Zalim Singh than Suraj Bali Singh, assuming that both of them are of legitimate descent. The argument here has been that the lower appellate Court wrongly laid the burden of

proving legitimacy on the plaintiff and in my opinion this contention is a good one and must be given effect to. The view of the law taken by the Subordinate Judge is clearly wrong and the Munsif rightly held that on the pleadings the burden of proving the illegitimacy of plaintiff 1 was cast upon defendant 1. It is of course necessary, as the Subordinate Judge observes, for the plaintiff to establish that he is the nearest reversioner of Zalim Singh; but so far as the question of legitimate descent is concerned, in establishing his case plaintiff 1 is entitled to rely upon any presumption which the law makes in his favour, and there is a legal presumption in favour of legitimacy.

Here we have the paternity of plaintiff 1 admitted. The defendant admits that he is the son of Jawahir Singh. That being so, the presumption would be that he is Jawahir Singh's legitimate son; and if the case for the defendant was that he was not a legitimate son but the son born of a Kachhi mistress, then I hold that it lay upon the defendant to establish this point. The law as to the presumption in favour of legitimacy is well understood. I have had a long argument addressed to me by the learned counsel for the defendant-respondent who referred me to the provisions of S. 112, Evidence Act, but the general presumption in favour of the legitimacy does not arise under that section. That section raises a presumption, which the law says is to be conclusive unless a particular fact to the contrary is established. S. 112 has nothing to do with the general presumption of legitimacy which the law allows. The presumption arises under S. 114 and not under S. 112. Of course in order to raise a presumption of this kind there must be some facts to support it. Here we have the one fact, namely, that the paternity of plaintiff 1 was admitted by the defendant. I might also refer to certain documentary evidence on the record, which shows that plaintiff 1, Sheo Dayal Singh has been recorded in the khewats for many years as being in possession of under-proprietary shares in this village, shares which he seems to have inherited equally with Nattha Singh, who is said to be the father of defendant 1. This evidence strengthens the presumption which the law allows

and makes it more difficult to overturn. So far as we have to deal with the defendant's evidence I hold, agreeing with the Munsif, that it is worth nothing at all. The result therefore is that the decision of the Court below must be deemed to be erroneous on the point of law. The adjustment of the burden of proof is a question of law and it is on this question of law that the lower appellate Court has gone wrong. It only remains to be noticed that the appellant in this case is Dularey Singh who, as I have said, is a transferee of an eight annas share in this property. Sheo Dayal Singh has submitted to the judgment of the lower appellate Court and no relief is claimed by him here. I may mention here a fact which is referred to in the decision of the Subordinate Judge. It seems that when the appeal came on before him for hearing this man, Sheo Dayal Singh put in an affidavit in which he acknowledged that he was of illegitimate descent. The Subordinate Judge very rightly refused to pay any attention to an affidavit put in such circumstances and I think it was in all probability a collusive statement made because Sheo Dayal Singh had, in some way or other, been won over by some of the defendants. This statement or affidavit cannot be taken into consideration for the purpose of determining whether the decision of the Court below is right or wrong. I hold that the burden of proving illegitimacy was on defendant 1, and that that burden was not discharged. Consequently the finding must be that Sheo Dayal Singh, plaintiff 1, is of legitimate descent. Dularey Singh who is the appellant here and who has taken a transfer of plaintiff 1's interest is entitled to have his transfer protected. The result therefore is that the appeal is allowed, the decree of the lower appellate Court is set aside, and it is ordered that a decree be passed in favour of Dularey Singh giving him possession of an eight annas share of the property in dispute. The respondents will pay the appellant's costs in proportion in this Court and in the lower Courts.

B.V./R.K.

Appeal allowed.

S. N. Dutt
Advocate High Court
Jammu & Kashmir
Srinagar.

A. I. R. 1918 Oudh 105

LINDSAY, J. C.

Sheodarshan Lal and another—Defendants—Appellants.

v.

Assesar Singh and another—Plaintiffs—Respondents.

Second Appeal No. 224 of 1917, Decided on 7th February 1918, from decree of Dist. Judge, Rae Bareilly, D/- 7th March 1917.

(a) Practice—New plea—Fresh plea arising out of facts coming to light during progress of suit and not within knowledge of either party before, can be raised during progress of suit.

A party to a suit is quite competent to raise a fresh plea during the progress of the suit, if that plea arises out of facts which come to light during the course of the suit, and which were not in the knowledge of either party.

[P 106 C 2]

(b) Civil P. C. (1908), S. 100—Finding of fact can be questioned in second appeal if lower Court failed to consider entire evidence on record.

A finding of fact can be questioned in second appeal, if it is found that the lower appellate Court failed to consider the entire evidence on the record relating to that fact. [P 107 C 1]

(c) Evidence Act (1872), S. 114—Presumption.

The presumption arising under S. 114, Evidence Act, as to the legality and correctness of a Court's proceedings can only be overturned by exceptionally strong evidence. [P 107 C 2]

(d) Civil P. C. (1908), S. 47—Executing Court—Powers of—Directions as to execution in decree—Jurisdiction of Executing Court must be determined with reference to them—It cannot grant relief in any other manner than decree allows and cannot go behind decree so as to question legality or correctness of it—Relief not provided for in decree cannot also be granted.

The jurisdiction of a Court conducting execution proceedings must be determined with reference to the directions contained in the decree, including any direction which the Court may give regarding the manner in which the relief granted by the decree is to be secured to the person entitled to it. The powers of the executing Court are circumscribed by any such directions set out in the decree and it has no jurisdiction to award relief in any other manner than the decree allows. It has no power to go behind the decree so as to question its legality and correctness. [P 108 C 2]

A decree in a mortgage suit provided that possession of the mortgaged property was to be made over to the mortgagee on a certain date in the event of the mortgagor not paying to the mortgagee a fixed sum together with the costs of the suit before that date. The mortgagor having failed to pay to the mortgagee the fixed sum and the costs before the said date, the mortgagee applied for delivery of possession of the mortgaged property and possession was delivered to him accordingly. Thereafter he applied to the Court for realization of the costs mentioned in the

decree. For that purpose the Court sold the mortgaged property in his possession :

Held : that the sale was void, inasmuch as the executing Court had no authority to order the sale, for which there was no provision in the decree : 6 All 269 (P C) and 7 All 102 (P C), Dist. [P 108 C 1]

Gokaran Nath Misra and Harkaran Nath Misra—for Appellant.

Sami Ullah Beg and Mujtaba Husain—for Respondents.

Judgment.—The suit out of which this appeal has arisen was brought by the plaintiffs-respondents for redemption of a mortgage of certain shares in three villages, which were mortgaged to one Bhagwandin Tewari on 24th August 1873 without possession. The plaintiffs are the representatives of the three mortgagors, who were three brothers named Mardan Singh, Bhairon Bakhsh Singh and Rughubir Bakhsh Singh. It is proved that one of the terms of this mortgage was that if interest were not paid at the stipulated periods, the mortgagee was to be entitled to take possession of the property and to appropriate the profits in lieu of interest. Accordingly a suit was brought by the mortgagee Bhagwandin in the year 1876 and ultimately a decree was passed upon a compromise, in accordance with which possession of the mortgaged shares was to be made over to the mortgagee from the 1st Kartik 1284 Fasli in the event of the mortgagors not paying to the mortgagee a sum of Rs. 1,921 together with the costs of the suit (including the vakil's fee) by the end of Kunwar. There was a further declaration in the decree to the effect that the amount of costs payable to the mortgagee-respondent was Rupees 222-10-0.

To turn for a moment to the defence which was raised in the present suit, the case for the defendants was that the right of redemption had been extinguished. It was pleaded that Bhagwandin, who was the predecessor-in-interest of the defendants, had acquired the mortgaged property by sale in execution of a decree. It is obvious from the record that when the defendants were called upon in the Court of first instance to give particulars of the manner in which the property had come to be purchased by Bhagwandin, they were unable to give any definite information. As it subsequently turned out, the sale took place in the year 1877 and most probably the

defendants had no precise information regarding the circumstances of the sale at the time when their pleader was called upon to state his case. He first of all told the Court that Bhagwandin the mortgagee had purchased the property in suit in execution of a money-decree. Later on when certified copies of the proceedings of the years 1876 and 1877 had been procured, it became apparent that Bhagwandin had actually got this property sold for the purpose of realizing the costs which were specified in the decree of 24th August, the terms of which I have set out above. It will be remembered that the amount of costs declared to be due by the decree came to Rs. 222-10-0. On these facts being discovered, the plaintiffs put forward a case that the decree had been fraudulently executed, that the sale in execution was invalid and that there was no bar to their right of redemption. In consequence of this new plea an issue was raised as to whether the execution proceedings, in the course of which Bhagwandin came to purchase this property, were or were not fraudulent. Eventually the Subordinate Judge came to the conclusion that the proceedings were fraudulent. He came to this finding upon the ground that it appeared that these proceedings in execution were taken behind the backs of the judgment-debtors, that is, the mortgagors. The result was that he gave the plaintiffs a decree for redemption.

This decree has been upheld in appeal by the lower appellate Court. Now the case for the defendants here is that both the Courts below were wrong in holding that any fraud on the part of Bhagwandin had been established. In the first place, it is pointed out that no case of fraud had been set out in the plaint. But that fact is easily explained by what has been said above. It is manifest that both parties to the suit had very little personal knowledge of what had taken place so far back as the year 1876. The plaintiffs were minors at the time and the defendants have derived their title from the original mortgagee and probably knew little or nothing about the real facts. It was, in my opinion, quite competent to the plaintiffs, when the particulars of the execution proceedings in the year 1876-1877 came to be revealed, to raise the plea that

Bhagwandin had acted fraudulently in executing the decree for costs. The substance of the charge made by the plaintiffs, after they became aware of the real facts, was that Bhagwandin worked a fraud on the Court by representing that he was entitled to have the property brought to sale for the purpose of recovering the costs which the Court had awarded him.

There was a good deal of oral evidence of an extremely vague nature given in the course of the trial. The plaintiffs attempted to show by the statements of their witnesses that the three mortgagors Mardan Singh, Bhairon Bakhsh Singh and Raghubir Bakhsh Singh had left the village almost immediately after Bhagwandin got his decree for possession in the year 1876. On the other hand, the defendants produced some oral evidence for the purpose of showing that the three brothers remained in the village for some considerable period after the result of the suit in 1876. All this oral evidence appears to me to be practically of no value at all. At the same time I should be bound by the finding of the lower appellate Court, were it not for the fact that it seems to me that no attention has been paid to the documentary evidence in the case, which consists of certified copies of various orders which were passed in the execution proceedings.

It is not to be doubted that as soon as the period mentioned in the decree had expired, Bhagwandin applied for delivery of possession over the mortgaged property and it is quite certain that possession was delivered to him accordingly. It is also quite clear that very soon after taking possession he made an application to the Court asking for the realization of the costs which were mentioned in the decree. It would seem that at first he had applied for the arrest of one or other of the judgment-debtors and that some attempt had been made to attach certain property without result. Eventually however he got execution taken out against the property which had been mortgaged to him, and after a long series of proceedings this property was brought to sale and purchased by Bhagwandin himself. I lay stress upon the fact that these proceedings extended over a considerable time, because it seems to me that the presumption ought to be made that

what the executing Court did in the course of executing the decree was all done rightly and in order. It is fairly certain that on various occasions processes must have been issued to the judgment-debtors.

We find that the ordinary steps were taken for attachment of the immovable property, that inquiries were made for the purpose of preparing the sale statement, that reports were sent through the Revenue Authorities to the Local Government for the purpose of obtaining sanction to the sale of the judgment-debtors' property and also that the Revenue Authorities arranged that the occupancy rights were to be reserved to the judgment-debtors in a portion of the property which was to be sold. In these circumstances the plea that all these proceedings were taken behind the backs of the judgment-debtors when they had left the village and had no knowledge of what was going on, seems to me to be one which could not be rightly entertained. The presumption in favour of the legality of these proceedings is an exceedingly strong one and could only be overturned by exceptionally strong evidence which is not to be found upon this record. Indeed, as I have said, the evidence regarding the absence of these mortgagors from their village after possession of the property had been delivered to the mortgagee is of an extremely vague and unsatisfactory nature. It certainly was in no way sufficient to overturn the presumption in favour of the legality of the proceedings which is recognized in S. 114, Evidence Act. At one stage of the case the learned counsel for the respondents drew attention to the provisions of the Code of Civil Procedure of 1859, which regulated the course of business in the Courts at the time when these execution proceedings were taken.

He pointed out that the Code did not provide for direct notice being given to the judgment-debtors in cases where execution was being sought by attachment and sale of immovable property. If that is the case, then obviously the plaintiffs cannot be heard to say that any fraud took place in the carrying out of the execution proceedings, for obviously if no notice to the judgment-debtors was necessary, there was no illegality or fraud in their not being given any

notice by the Court. On a review of all the evidence upon this question of fraud, and bearing in mind the law upon the subject, it seems to me that the finding of the Courts below that the execution proceedings were fraudulent cannot be maintained. There is not the slightest evidence on the record to show that Bhagwandin practised any deception upon the Court. He did not conceal any facts; on the contrary it is apparent from the copies which have been produced that he informed the Court that he had already got possession of the mortgaged property under the decree and that he was seeking further relief by asking for sale of the same property for the purpose of realizing the costs which were specified in the decree. If the Court with all the facts stated before it and with the decree in front of it ordered execution to issue, I do not see how any fraud can be imputed to Bhagwandin. I am satisfied therefore that the plaintiffs were not entitled to succeed on any ground of fraud.

There remains however the important question of law as to whether these sale proceedings were valid proceedings; in other words, was the Court acting within its jurisdiction in ordering sale of the property? Some argument was addressed to me at the time of the hearing regarding the principles which have been laid down in cases which have arisen under the provisions of what was formerly S. 99, T. P. Act. It was pointed out that it was settled that sale of property which had taken place in violation of the provisions of S. 99 was not void but only voidable. It is however not necessary to discuss this question, for the present case was not a case under that section. The execution sale at which the mortgagee purchased the property took place long before the Transfer of Property Act was enacted. I have to deal with the question of jurisdiction and after long consideration I have come to the opinion that the sale was void inasmuch as the executing Court had no authority to direct a sale for the realization of costs. I have already mentioned the contents of the decree which was passed on 24th August 1876. It is perfectly clear that the decree did not award the plaintiff Bhagwandin any other relief than that of possession over the mortgaged property; and he was only entitled to that relief in case the

judgment-debtors made default in payment of a certain sum (which was set out in the decree) by the end of the month of Kunwar. It obviously was not the intention of the Judge who passed this decree to allow any execution proceedings to be taken by way of attachment and sale of the judgment-debtors' property for the purpose of awarding costs to Bhagwandin, and this is all the more clear by a reference to the terms of the compromise upon which the decree was based.

The jurisdiction of a Court conducting execution proceedings must be determined with reference to the directions contained in the decree, including any direction which the Court may give regarding the manner in which the relief granted by the decree is to be secured to the person entitled to it. The powers of the executing Court are circumscribed by any such directions set out in the decree and it has no jurisdiction to award relief in any other manner than the decree allows. It has no power to go behind the decree so as to question its legality or correctness. In the present instance the decree was plainly one for possession of immovable property. That was the relief which the executing Court had jurisdiction to secure to the decree-holder. In realizing the costs by sale of the property the Court was not executing the decree as it stood, but was adding a term to the decree which it had no authority to do. In support of this opinion I may refer to a decision of their Lordships of the Privy Council which is to be found in *Kalka Singh v. Parasram* (1). That was a case in which two persons obtained a decree for recovery of a share in a certain taluka. The decree did not contain any order or direction for payment of mesne profits, but notwithstanding this the decree-holders applied in execution for the payment of such profits. The Deputy Commissioner made an order upon this application and awarded mesne profits to the decree-holders. Some years later an application was made for the purpose of giving effect to this order. The District Judge who presided over the executing Court dismissed the application on the ground that there was no decree awarding mesne profits. This decree was affirmed in appeal by the Judicial Commissioner.

It was argued before their Lordships of the Privy Council that both the District Judge and the Judicial Commissioner were bound by the order which the Deputy Commissioner had passed some years earlier and that it was no longer possible to hold that the decree did not award mesne profits. This argument was repelled by their Lordships, who pointed out that the Court which was charged with the execution of the decree had in fact no power to award mesne profits which were not mentioned in the decree. They held that the District Judge and the Judicial Commissioner were right in saying that the order passed by the Deputy Commissioner awarding mesne profits was an order made without jurisdiction; and they pointed out that the want of jurisdiction arose from the fact that the decree which was to be executed gave no directions at all for mesne profits. The Deputy Commissioner in allowing the claim for mesne profits had acted without jurisdiction inasmuch as he had added to the decree a term which was not there. There are indeed authorities to show that an error in construing a decree will not vitiate the proceedings, *Ram Kirpal v. Rup Kuari* (2) and *Beni Ram v. Nanhu Mal* (3), but this is not one of those cases, for it seems to me that no question of interpretation of a decree can possibly arise in respect of language which is not to be found in the decree itself. As I have said the decree of 24th August 1876 merely directed that possession over the mortgaged property should be delivered to Bhagwandin upon the failure of the judgment-debtors to pay the sum of Rupees 1,921 together with costs the amount of which was declared to be Rs. 222-10-0. There was absolutely no direction in the decree for realization of the costs by sale of the property. The judgment-debtors were to pay the costs together with the other sum named in the decree and if they failed to do so, the only liability to which they were subjected was that of losing possession which was to be delivered to the decree-holder.

For these reasons therefore I am satisfied that the sale in execution of the decree for costs was a void sale and cannot be relied upon by the defendant-appel-

lants for the purpose of resisting the present claim for redemption. The decree of the Court below is therefore right though not for the reasons given by the learned District Judge. The appeal fails and is dismissed with costs.

B.V./R.K.

Appeal dismissed.

A. I. R. 1918 Oudh 109

LINDSAY, J. C.

Ghasi Ram—Plaintiff—Appellant.

v.

Dalel Singh and others—Defendants—Respondent.

Second Appeal No. 341 of 1916, Decided on 20th August 1917, from decree of Dist. Judge, Hardoi, D/- 30th June 1916.

Civil P. C. (1908), O. 21, R. 2—Satisfaction not certified or brought to Court's notice—Decree-holder purchasing equity of redemption of J. D.—J. D. suing for redemption without getting sale set aside—Execution sale is nullity as decree-holder had committed fraud in not certifying and hence J. D. can redeem.

During the course of an execution proceeding the decree was satisfied out of Court but the satisfaction was not certified to or brought to the notice of the Court. The decree-holder brought an equity of redemption belonging to the judgment-debtor to sale and purchased it himself. The judgment-debtor then brought a suit for redemption in respect of the property without having got the sale set aside.

Held: that the execution sale was a nullity inasmuch as by failing to certify the satisfaction of the decree to the Court, the decree holder had committed a fraud on the Court, and that therefore the judgment-debtor was entitled to redeem the property. [P 111 C 2]

Gokaran Nath Misra—for Appellant.

Basudeo Lal—for Respondents.

Judgment.—The facts of this case may be stated shortly as follows. The matter in issue between the parties in the right of the plaintiff appellant, Ghasi Ram, to redeem a mortgage which was executed by his father Dalip Singh on 24th June 1872. The first four defendants in the case are the representatives of the mortgagees. A plea was raised to the effect that the plaintiff had no right to redeem because the equity of redemption of the property mortgaged, had vested in another person Bhikham Singh, who was impleaded as defendant 5. Bhikham Singh also resisted the claim for redemption, saying that the right to redeem was with him and not with the plaintiff. The way in which Bhikham Singh came to be interested in this matter is as follows. On 26th October 1900 he got a money decree against the

2. (1884) 6 All 269=11 I A 37 (P C).

3. (1885) 7 All 102=11 I A 181 (P C).

plaintiff Ghasi Ram in the Court of the Munsif of Bilgram. That decree was for a sum of Rs. 150. On 13th April 1904 Ghasi Ram, in order to arrange for the satisfaction of this decree and in order to discharge certain other debts which were owing to him, sold certain property, other than the property mortgaged, to Bhikham Singh for a sum of Rs. 500. It was stated in this sale-deed that Rs. 150 had been set off on account of the money which the vender owed Bhikham Singh under the Munsif's decree above referred to. After this sale-deed had been executed, a dispute arose between Ghasi Ram and Bhikham Singh regarding ex-proprietary rights. Bhikham Singh took up the position that the understanding was at the time of the sale that Ghasi Ram was not to retain any ex-proprietary rights in the land sold.

On the other hand Ghasi Ram's case was that he was entitled by law to have these ex-proprietary rights and that in fact Bhikham Singh could not in any way deprive him of them. The matter was taken before a revenue Court and it was decided that Ghasi Ram was entitled to ex-proprietary rights. After this Bhikham Singh brought a suit in the Court of the Subordinate Judge of Hardoi demanding cancellation of the sale-deed. He got a decree in his favour in that Court on 13th July 1905. Having obtained this decree Bhikham Singh then applied to execute the Munsif's decree for Rs. 150 and made an application for that purpose on 21st June 1906. Meantime Ghasi Ram had filed an appeal against the decree of the Subordinate Judge and on 30th November 1906 the District Judge allowed the appeal and dismissed the suit of Bhikham Singh for cancellation of the sale-deed. This order of the District Judge was upheld in appeal by an order of this Court dated 30th May 1907. Notwithstanding the fact that Bhikham Singh lost his case in appeal before the District Judge of Hardoi he persisted in going on with the execution proceedings and on 20th December 1906 he had Ghasi Ram's property brought to sale and purchased it himself. The property which was brought to sale on this occasion was the property held in mortgage under the deed which had been executed on 24th June 1872; in other words, as a result of this auction sale Bhikham Singh be-

came the purchaser of the equity of redemption of the mortgaged property now in suit. This sale was confirmed by the executing Court on 24th January 1907. Bhikham Singh never applied for any sale-certificate until 24th March 1914. The present suit for redemption was brought on 26th August 1915. The Munsif held that Bhikham Singh took nothing by his purchase of 20th December 1906 inasmuch as he had committed a fraud on the executing Court. He, therefore gave a decree for redemption in favour of the plaintiff-appellant. This decree has been reversed in appeal by the District Judge who was of opinion that the execution-sale was still binding upon Ghasi Ram and that until he succeeded in getting it set aside, he could not maintain the present suit.

In his judgment the learned Judge observes that the decree in execution of which the sale took place, was no doubt satisfied by the sale-deed which Ghasi Ram had executed in favour of Bhikham Singh on 13th April 1904 but he was of opinion that because satisfaction of the decree was never certified to the Court as required by law there was no bar to the execution of the decree. With regard to the argument that Bhikham Singh was not a bona fide purchaser the learned Judge held that this was a matter which could not be considered in the present case. His view was that the sale in execution was not a nullity and that Ghasi Ram should either have applied or sued to have the sale set aside. It may be mentioned here that although Ghasi Ram had won his case in appeal by 30th November 1906 while the execution proceedings were still running their course, he never brought to the notice of the Court that the result of the appeal was that the decree had been satisfied and that there was no occasion for proceeding any further in execution nor does he appear in any way to have offered any resistance to the execution proceedings after he had won his case in appeal.

The question which I have to decide here is whether in the present suit it is open to the plaintiff Ghasi Ram to plead that the execution-sale at which Bhikham Singh purchased was a nullity and does not stand in the way of his claiming redemption or whether he is so bound by the proceedings in execution

as to be debarred from claiming redemption until he has got the sale proceedings set aside by suit. It seems at least doubtful whether any suit for the purpose of having the sale set aside could now be entertained for any remedy of this nature would appear to be time-barred. However I have come to the conclusion that the rights of the case are with the plaintiff and that there is no bar to his seeking redemption and pleading that Bhikham Singh has no title to the property which he acquired at the auction-sale. It is admitted on all hands that the conduct of Bhikham Singh in connexion with these execution proceedings was fraudulent. There can as the lower appellate Court remarks be no doubt that after 30th November 1906 when Ghasi Ram and Bhikham Singh were restored to their original position as it was after the execution of the sale-deed of 13th April 1904 the result was that the decree in favour of Bhikham Singh was fully satisfied. Consequently it was the duty of Bhikham Singh as decree-holder to inform the Court that his decree had been adjusted. This duty was imposed on him by S. 258 of the old Civil P. C. (Act 14 of 1882), which corresponds with O. 21, R. 2, of the present Code. That section also provided that the judgment-debtor might inform the Court of the adjustment and apply for issue of a notice to the decree-holder, but while the judgment-debtor "might" make this application, the decree-holder was by law, and is still by law, bound to certify to the Court. It is true that S. 258 and O. 21, R. 2, provide that a payment or adjustment which has not been certified to the Court, shall not be recognized by any Court executing the decree and the learned District Judge is quite right in saying that in the circumstances attending the execution of the decree which resulted in the sale of the property the Court was not debarred from ordering execution inasmuch as the adjustment had not been certified to it. But it is plain at the same time that if Bhikham Singh had done what the law required of him and had given the Court the information which he was bound to give, the Court would certainly have stopped execution proceedings and prevented the property from being brought to sale. It must therefore be held that by this breach of duty and by withholding the

information which he was bound to give Bhikham Singh committed a fraud upon the Court by means of which he was enabled to purchase the property in execution.

He cannot, in my opinion, be allowed to avail himself of his own fraud and consequently I am satisfied that in the present case he ought not to be allowed to succeed on the plea that he purchased the property and holds the certificate of the Court which confirmed the sale. There is no question of the rights of third parties being affected in any way. If that were so, it might be necessary to consider how far the plaintiff was to blame in standing by and not informing the executing Court that the decree had been adjusted. As between Ghasi Ram and Bhikham Singh no such question can arise. The plain fact remains that Bhikham Singh committed a fraud and acquired the right to redeem the property now in suit, and he cannot be allowed to plead his own fraud and to take any benefit thereby. Fraud as has repeatedly been said, vitiates the most solemn transactions. I find therefore that the appellant has the right to redeem this mortgage and that Bhikham Singh has no such right. The lower appellate Court has disposed of the case on a preliminary point and has not gone into the other matters which are in dispute between the parties regarding the state of the mortgage account. Under O. 41, R. 23, I reverse the decree of the Court below and send the case back for disposal upon the merits. Costs here and hitherto will abide the result.

B.V./R.K. Cause remanded.

A. I. R. 1918 Oudh 111

LINDSAY, J. C.

Beni Madho—Defendant—Applicant.

v.

Kanhaiya Lal — Plaintiff—Opposite Party.

Misc. Appln. No. 42 of 1917, Decided on 19th March 1917, against order of Sub Judge, Bara Banki, D/- 6th August 1916.

Practice — Adjournment — Notice of adjourned hearing given to counsel is sufficient.

Where a counsel filed an application for revision and represented the applicant on the date fixed for hearing, but the application could not be heard on that date, and notice of the adjourned date of hearing was later on given to that counsel, who said at that time that he had no instructions and had returned the papers.

Held : that the notice was sufficient.

[P 112 C 1]

St. C. Thompson—for Applicant.

S. N. Sinha—for Opposite Party.

Judgment.—This is an application of one Beni Madho for restoration of a case of his which was dismissed by my order dated 15th January last. On that date it appears that the applicant's counsel was not in attendance and the application was dismissed for want of prosecution. It is now urged that the failure of the applicant to attend on the date in question was unavoidable inasmuch as he had no notice of the date. It seems from the record of the case that the application for revision was first fixed for 2nd January last. On that date the case could not be taken up for hearing on account of the Court being engaged in other work. The applicant was represented by two counsel on that date.

The next date fixed was 15th January and a notice of this date was given to Mr. Ali Ausat, one of the counsel who appeared on 2nd January. Mr. Ali Ausat endorsed on the Courts' notice a statement to the effect that he had no instructions in the matter and asked that notice should be given to Mr. M. A. Khan, Barrister, who had filed the application for revision. Notice was also given to this gentleman, who said that he had no instructions and that he had returned the papers. With this it appears to me I have got nothing to do. It is sufficient to say that counsel was engaged by this applicant, that notice of the date fixed for hearing was served upon the counsel and according to the Civil Procedure Code and the practice of this Court that notice was sufficient. I refuse to allow the application for restoration. It is rejected with costs.

B.V./R.K. *Application rejected.*

A. I. R. 1918 Oudh 112

STUART AND KANHAIYA LAL, A. J. Cs.

Beni Madho Singh and others—Plaintiffs—Appellants.

v.

Tahsildar of Unao—Defendant—Respondent.

First Appeal No. 163 of 1916, Decided on 23rd March 1917, from decree of Sub-Judge, Unao, D/- 30th November 1916.

(a) Co-operative Societies Act (1912). S. 42—Civil Court cannot entertain suit for

declaration that order of liquidator under S. 42 (2) is ultra vires.

Civil Court cannot in view of S. 42 (6), entertain a suit for a declaration that an order of the liquidator passed under S. 42 (2) is ultra vires and without jurisdiction and cannot be executed. [P 113 C 1]

(b) Oudh Civil Digest (1917), Para. 272—Certificate of fee—Government Pleader appearing for liquidator is bound to file certificate—Co-operative Societies Act (1912), S. 42.

Paragraph 272, is mandatory and a Government Pleader, appearing in a case for a tahsildar, who has been impleaded in his capacity as a liquidator appointed under S. 42 (1), Co-operative Societies Act, is not exempted from filing his fee certificate as required by the paragraph. [P 113 C 1]

Puttoo Lal and Makund Behari Lal—for Appellants.

Ajit Prasad—for Respondent.

Judgment.—Beni Madho Singh, Bijai Singh and Dulam Singh instituted a suit in the Court of the Subordinate Judge of Unao, against the Tahsildar of Unao, as liquidator of the Dewara Bank on the following allegations: The Dewara Bank was a village Bank established in 1917. It was a society deemed to be registered under Act 2 of 1912, although it went into liquidation on 22nd June 1910. The provisions of S. 42, Act 2 of 1912, have application. The tahsildar defendant was appointed as liquidator and he had the powers under S. 42 of the Act from the date that it came into operation. On 8th October 1915 he passed an order under the provisions of S. 42 (b) and (d), by which he directed Sheoratan Lal, Beni Madho Singh and Bijai Singh, members of the society, to contribute Rs. 5,632-8-9 towards the assets. This order was under the provisions of S. 42 (5) enforceable by a civil Court having local jurisdiction in the same manner as a decree of the Court. The three plaintiffs instituted this suit for a declaration that the order in question was ultra vires and without jurisdiction and that it could not be executed. The Subordinate Judge dismissed the suit, partly on merits, but mainly on the ground that under the provisions of S. 42 (6), a civil Court had no jurisdiction in respect of any matter connected with the dissolution of registered society under the Act. The present appeal is preferred.

It is quite clear from reading the order in question that the tahsildar, who was the liquidator under the Act,

has made what on the face of it is a perfectly legal order. He was well within his authority in making this order. It has been argued before us that he had passed this order against the plaintiffs not as members of the society but as officials and that under the provisions of the section he had no right to determine contributions to be made by the officials. This plea would in any circumstances have no effect in the case of persons who are also members. The plaintiffs were officers under the Act, but they were liable to contribute. Other points have been taken in appeal to the effect that the liquidator did not give the benefit of some unspecified rule of limitation to the plaintiffs, and that he has saddled them with a greater liability than that they should justly bear. The appellants have asked the civil Courts to decide in effect whether the order of the Tahsilidar was a fair and just order, based on correct legal principles. This is what the civil Courts are not allowed to decide. The section is perfectly clear. The order of a liquidator cannot be questioned in the civil Court in the ordinary way. The Local Government under S. 43 (t) may make a rule permitting an appeal from the order made by a liquidator to the Court of the District Judge. Up to date no such rule has been made. Thus the order of a liquidator cannot be questioned at present by way of an appeal to the Court of the District Judge, and civil Courts are expressly barred from interfering with such an order. The learned Subordinate Judge rightly decided that he had no jurisdiction to hear the suit.

There is only one point to be added. The appellants attack the order awarding costs on the ground that the Government Pleader of Unao who appeared for the defendant in lower Court did not file a certificate. The rule applicable is R. 272, Oudh Civil Digest. The rule in question is clear upon the point. A legal practitioner appearing for the Crown, or Government, or the Court of Wards, or a local authority need not file a certificate. All other pleaders must file a certificate. If they do not do so the fee cannot be entered as taxed costs. Here the defendant was neither the Crown, the Government, nor the Court of Wards, nor a local authority. The circumstance that the pleader was the Government

Pleader did not remove the necessity of filing a certificate. The rule is mandatory and we have no discretion. It must be applied. We therefore cut out the item for pleader's fee from the decree. But as the appellants have failed on all the main points we direct that they pay their own costs and those of the respondent in this appeal.

R.V.B.K. *Appeal dismissed.*

A. I. R. 1918 Oudh 113

LINDSAY, J. C.

Dori Lal—Plaintiff—Appellant.

Ram Charan Lal—Defendant—Respondent.

Second Rent Appeal No. 55 of 1916. Decided on 12th February 1917.

Agra Tenancy Act (1901), S. 164—Suit for profits against Lambardar—Interest on share can be allowed, if accounts falsified by lambardar.

In a suit by a co-sharer against the lambardar for his share of the profits, the lambardar is liable to pay interest on the amount of profits awarded to the co-sharer, where it is found that the lambardar has falsified the accounts.

[P 114 C 2]

Ramapat Ram—for Appellant.

P. C. Gupta—for Respondent.

Judgment.—This is a second appeal arising out of a rent suit brought by the appellant against the respondent for the recovery of profits alleged to be due for the years 1320 to 1322 fasli. The suit was decreed in part in the Court of first instance. The defendant appealed to the learned District Judge who reduced the amount which the first Court had allowed. The plaintiff now comes in second appeal to this Court and there are three points to be considered. The first point is with regard to the plaintiff's claim in respect of what is called the sawai income of the village. The point taken in this respect is that the amount allowed to the appellant has been miscalculated by the lower appellate Court. I have had some difficulty in following the judgment of the learned District Judge in this matter. In the statement of account filed along with the plaint the plaintiff had put down the sawai income of this village at Rs. 100 a year. The learned Judge in his judgment referring to the evidence of a kanungo, which is on the record, states that the sawai profits were estimated at Rs. 104-14-0 exclusive of naz.

rana and farighkhata. He also refers to a previous suit between the parties in which a rent Court had held that the recurring sawai income was only Rs. 75 a year. He goes on to say that in the present case it was not shown that there was any special occasion during the years in suit on which nazrana was paid or that there was any farighkhata income. The Judge thought that no allowance in respect of these two items should be made and he then records his opinion that the amount of Rs. 104-14-0 is a fair estimate of the sawai income "of the three years." This is a matter in which I cannot follow the learned Judge of the Court below. He seems from what is said in an earlier part of his judgment to have accepted the kanungo's evidence and that evidence was to the effect that the income was Rs. 104 odd per annum, not Rs. 104 odd for the whole three years. It seems to me therefore that there has been some mistake made in the calculation of the learned District Judge. If we take it that the sawai income was Rs. 104 odd a year and if we bear in mind that the plaintiff claimed Rs. 100 a year in this respect the proper amount allowable to him for three years was a sum of Rs. 50, that being the one-sixth share of this income to which he was entitled.

The next point made against the judgment of the learned Judge is that he has made a mistake in connexion with the pay of a sipahi which was allowed to the defendant-respondent. This mistake is admitted by the learned counsel for the respondent here. The Judge has deducted a sum of Rs. 48 from the amount allowed to the plaintiff. It appears that the plaintiff's share of expenses on this account only comes to Rs. 24 and not to Rs. 48. The third point taken is that interest should have been allowed by the learned Judge. The learned Judge refused the claim for interest on the ground that there was no proof that any demand had been made from the defendant who is a lambardar and that it had been decided that in such circumstances interest was not payable. I am not disposed to agree with him in this. Presumably the case which the learned Judge had in his mind was one reported as *Mirza Sadik Husain Khan v. Hafiz-ul-Rahman* (1).

1. (1903) 6 O C 89.

There it was held by Mr. Spankie that interest should not be allowed against a lambardar, unless it was shown that he had wilfully withheld his accounts or had done any act which might make him equitably liable to pay interest. In the present case it seems to me quite clear from the evidence on the record which both Courts have accepted that the lambardar has falsified the accounts. He put his agent in the witness-box to swear that there was no sawai income in the village. There is abundant evidence on the record to show that this statement was a false statement and as I have said the learned Judge himself accepted the evidence of a kanungo in this respect. In these circumstances I do not think the lambardar can be heard to say that he is not liable to pay interest to the plaintiff. I make the account therefore out as follows:

Rs. 176-5-6 due to the plaintiff on account of collections made by the lambardar. Rs. 50 as his share of the sawai income. Total Rs. 226-5-6. From this must be deducted Rs. 24, the plaintiff's share of the cost of entertaining a sipahi. Balance Rs. 202-5-6. Interest will run upon this at the rate allowed by the first Court and at six per cent from the date of this Court's decree. I may mention here that the learned counsel for the appellant raised a new point in argument and asked that a larger sum than Rs. 176-5-6 should be allowed to the plaintiff. This was on the basis of a statement made by one of the patwaris examined in the case. This point was not explicitly taken in the memorandum of appeal and I do not think it can be entertained at the present stage. The result therefore is that the appeal is allowed to the extent above indicated and the appellant is entitled to have his costs both here and in the Courts below from the respondent.

B.V./R.K.

Appeal allowed.

A. I. R. 1918 Oudh 114

LINDSAY, J. C.

Mahadeo Singh and others — Defendants — Appellants.

v.

Bhawani Bhikh Singh and others — Plaintiffs — Respondents.

Second Appeal No. 314 of 1917, Decided on 18th February 1918.

(a) **Hindu Law—Partition—Joint family property transferred by father—Sons suing for partition of said property and questioning validity of transfer as against them—Purchaser or mortgagee under transfer is necessary party—Court can determine in the suit sons' liability under the transfer.**

A purchaser or mortgagee of the whole or a portion of a joint Hindu family property under a transfer effected by the father, is a proper and even necessary party to a suit brought by the sons for partition of the said property in which they question the validity of the transfer as against them; and the Court is quite competent to determine in such suit the extent of the sons' liability under the transfer.

[P 115 C 1]

(b) **Hindu Law—Partition—Object of suit is to determine share of each cosharers—Liabilities of family must be taken account of and debts binding on whole family must be distributed—If debt is personal and not binding on others it must be charged against share of the member who contracted it.**

The object of a suit for partition of a joint family is to determine the share of the joint property which is due to each cosharer, and for that purpose all the liabilities of the family must also be taken into account. If the liabilities bind the whole family, the debts must be distributed at the time of partition. If on the other hand, the debts are contracted by only one member and are personal to him and not binding on the others, they must be charged against his share.

[P 115 C 2; P 116 C 1]

Mohammad Wasim—for Appellants.

Sarju Prasad Misra—for Respondents.

Judgment.—The suit out of which this appeal has arisen was brought by three plaintiffs, the sons of one Beni Prasad, for partition of joint family property. Defendant 1 in the case was the father of the plaintiffs and the other defendants were persons, who, it was alleged, were transferees of portions of the joint family property under deeds executed in their favour by the father. The plaintiffs alleged that these transfers had not been made on account of any legal necessity and were not binding upon them. Consequently they impleaded these defendants for the purpose of having it determined that the shares to be allotted to the plaintiffs at partition were free from any charges created in favour of these defendants. The first Court received evidence as to the circumstances in which the various documents of transfer had been executed. It found that in some respects the transfers were binding upon the plaintiffs and in other respects they were not. Subject to these declarations the Court of first instance ordered partition. Its

decision has been upheld in appeal by the learned District Judge.

The appellants before me are two sets of defendants, namely, defendants 2 to 5 and defendant 10. Defendants 2 to 5 are the sons of one Ajudhia Prasad; defendant 10 is one Har Charan Ahir. Mr. Wasim, who has argued the case on behalf of the appellants, has raised two points only. In the first place, his case is that the Courts below were wrong in determining the extent to which the transfers executed by the father were binding upon the sons. According to his argument it was sufficient for the Court of first instance to find that the deeds were binding, no matter to what extent, and that the extent to which the plaintiffs were bound by the deeds ought not to have been declared. In the second place, his case is that defendant 10, who is a simple mortgagee of some of the family property was not a necessary party to the suit and no decision ought to have been given regarding the transfer executed in his favour. In support of his argument he relied upon certain cases in which it has been held that in a suit for possession brought against his mortgagor by a mortgagee with possession it is not the business of the Court to inquire into the amount of the debt due at the time the suit was brought. All that the Court has to satisfy itself about is that some money is due to the mortgagee, the amount being left to be determined in subsequent redemption proceedings. It seems to me that this argument cannot be applied to a case like the present. The law seems to me to be well-settled and I accept the exposition of it contained in the case reported as *Sadu v. Ram* (1), where it was laid down that a purchaser or a mortgagee of a co-parcener's share in a joint property is a proper and even a necessary party in a suit for partition.

This case was followed in a ruling of this Court reported as *Pandit Ikbāl Narain v. Pandit Suraj Narain* (2). The principle so laid down covers both the case of a mortgagee in possession of a portion of the joint family property and of a mortgagee who holds nothing more than a simple mortgage. The object of a suit for partition of a joint

1. (1882) 16 Bom. 608.

2. (1907) 10 O. C. 33.

family is to determine the share of the joint property which is due to each co-sharer, and for that purpose all the liabilities of the family must also be taken into account. If the liabilities bind the whole family, the debts must be distributed at the time of partition. If, on the other hand, the debts are contracted by only one member and are personal to him and not binding on the others, they must be charged against his share. It cannot therefore I think be said that the Courts below were wrong in deciding in the present suit how far the plaintiffs were liable for the debts contracted in the name of their father, defendant 1.

There was no case of misjoinder of parties. A suit for partition differs entirely from a suit brought by a mortgagee with possession against his mortgagor. In a case of the latter description the parties must have at one time stood in the relation of debtor and creditor, and the only question before the Court is whether that relation has been determined by extinction of the debt. In a case like the present the present the plaintiffs deny that they were ever liable as debtors to the creditors of the father. I have no doubt that the decision of the Courts below is perfectly correct. I think it right however to add that a declaration ought to be put into the decree to the effect that the plaintiffs will not be entitled to get possession of the property held in mortgage with possession by the father's transferees until they bring a suit for redemption by payment of the sums which the Courts below have found to be due from them. I direct that a clause to this effect be inserted in the decree of the Court below. With this modification I dismiss the appeal with costs to the respondents.

B.V./R.K.

*Decree modified.***A. I. R. 1918 Oudh 116**

KANHAIYA LAL, A. J. C.

Bihari Lal—Applicant.

v.

Ram Niranjan Das and another —
Opposite Parties.

Civil Revn. No. 56 of 1917, Decided on 12th July 1917, against order of Addl. Dist. Judge, Lucknow, dated 28th June 1916.

Civil P. C. (1908), S. 115—Plaint returned for presentation to proper Court—Delay in applying for revision—High Court refused to interfere on account of plaintiff's laches.

Where in a suit for damages against an agent the trial Court, without taking any evidence, directed the plaintiff to be returned to the plaintiff for presentation to the proper Court, and the plaintiff applied for revision of the trial Court's order long after the dismissal of his appeal by the lower appellate Court, the High Court refused to interfere in revision on account of the plaintiff's laches. [117 C 1]

Aditya Prasad—for Applicant.

Gokaran Nath Misra—for Opposite Parties.

Judgment.—This is an application for revision of an order passed in a suit in which the plaintiff was directed to be returned for presentation to the proper Court. The allegation of the plaintiff was that there had been some money dealings between his firm which was situated in Bahramghat and the firm of the defendants which was in Calcutta from a long time, that in the course of those dealings the plaintiff ordered the defendants to purchase certain quantities of rice in Calcutta on his behalf and that when he subsequently wrote to them to send the rice to him the latter did not comply with the direction. The plaintiff accordingly sued for Rs. 1,600 on account of damages said to have been suffered by him. The Courts below treated the allegations made in the plaint as making the defendants agents of the plaintiff for the purpose of purchasing the said goods and sending them to him; and without taking any evidence held that the suit was one cognizable in Calcutta where the agent resided and where the goods were to be purchased for despatch to the plaintiff. Whether the matter was one in which it was possible to express a definite opinion as to the place where the suit ought to lie, till the evidence which the parties may have at their disposal was recorded, may well be doubted, because the contention of the plaintiff is that the defendants were not acting as his agents but were carrying out the instructions sent to them in accordance with the previous course of dealings which existed between them. But in the Court below there was no complaint that the Court of first instance had improperly refused to take evidence, and the application for revision was not filed till after the lapse of about two years from the date of the

institution of the original suit and about one year and a half from the date when the order of the Court of first instance, directing the plaint to be returned for presentation to the proper Court, was passed. Even the order of the lower appellate Court was passed nearly ten months before the present application for revision was made. In view of the long delay which the plaintiff has made in seeking his remedy in this Court and the absence of any complaint that evidence was tendered and refused, it is not desirable to place the parties in a position of uncertainty as to the place where the suit ought to be maintainable by ordering further inquiry. The Court at Calcutta has unquestionably jurisdiction to try the suit. The contention of the plaintiff as to the nature of the dealings and the intended place of delivery and payment cannot be accepted unless the evidence which the parties may have to adduced is recorded, and it would not serve the interests of justice that at this distance of time the uncertainty which the order of the Courts below removed long ago should now be restored. The application is therefore dismissed with costs.

B.V./R.K. *Application rejected.*

A. I. R. 1918 Oudh 117

KANHAIYA LAL AND KENDALL, A. J. CS.
Narindra Bahadur Singh and another—Plaintiffs—Appellants.

v.

Ram Singh and another—Defendants—Respondents.

First Appeal No. 20 of 1916. Decided on 14th July 1916, from decree of Sub-Judge, Rae Bareilly, D/- 2nd February 1916.

Specific Relief Act (1877), S. 42—Proviso—Further relief referred to in proviso is relief appropriate to and consequent on right asserted in plaint—Suit by sons for declaration that their share was not liable to attachment and sale—Decree-holder found to be in possession of property under mortgage by father—Suit is not barred having arisen independently of mortgage.

The proviso appended to S. 42, Specific Relief Act, refers to the legal character or right to property which is set up in the plaint. In other words, the further relief, referred to in that proviso, is a relief appropriate to, and consequent on, the right asserted. [P 117 C 2; P 118 C 1]

Where the sons of a Hindu father sued merely for a declaration that their share in the family property was not liable to attachment and sale in execution of a money-decree obtained against their father, and it was found that the decree-

holder defendant was in possession of the property under a mortgage effected by the plaintiff's father:

Held: that the suit was not barred by the proviso to S. 42 inasmuch as it arose quite independently of the mortgage. [P 118 C 1]

St. George Jackson—for Appellants.

Sami Ullah Beg—for Respondents.

Judgment.—The plaintiffs are the sons of Ram Singh and sue for a declaration that they are the owners of a two-thirds share in the disputed property, and that the said two-thirds share was not liable to attachment and sale in execution of the decrees obtained by defendant 2 against their father. Defendant 2 pleaded *inter alia* that he was in possession of the disputed property under a usufructuary mortgage, executed in his favour by Ram Singh on 20th October 1913, and that the plaintiffs were not entitled to a mere declaratory decree. The learned Subordinate Judge accepted that contention and dismissed the suit. It is admitted on behalf of the plaintiffs that they are not in physical possession of the disputed property. They state that they were not aware of the existence of the usufructuary mortgage set up by defendant 2, and that they cannot be compelled in this suit either to impugn or to redeem that mortgage, which was an independent transaction. The right to seek a declaratory relief, asserted by the plaintiffs, arises out of a threatened sale of their share in the disputed property in execution of certain decrees for money directed against that property.

It does not arise out of the usufructuary mortgage under which defendant 2 claims to be in possession. The equity of redemption is still in the possession of the family, and Ram Singh continues to be in constructive possession through his mortgages. The mortgage operates as a bar to a suit for possession, till it can be either displaced or redeemed in a suit properly framed for the purpose. To require the plaintiffs to sue for possession is to ask them to invite the operation of that bar, and to deny to them the relief, if any, to which they might be entitled in connexion with the decrees now under execution, in case they fail to displace that bar. The proviso appended to S. 42, Specific Relief Act (1 of 1877) refers to the legal character or right to property which is set up in the plaint, and as pointed out in *Mohabir*

Pershad Narain Singh v. Gungadhur Pershad Narain Singh (1) and *Kannan v. Krishnan* (2), the further relief, referred to in that proviso, is a relief appropriate to and consequent on the right asserted. We do not consider that the plaintiffs were bound in this case to impugn the usufructuary mortgage under which defendant 2 claims to be in possession, or *qua* the decrees under execution to join a claim for possession in the present suit. The appeal is therefore allowed and the suit remanded to the Court below, under O. 41, R. 23, Civil P. C., with a direction to re-admit it under its original number and to dispose of it in the manner provided by law. The costs of this appeal will abide the result.

B.V./R.K.

Case remanded.

1. (1887) 14 Cal 399.

2. (1890) 13 Mad 324.

A. I. R. 1918 Oudh 118

LINDSAY, J. C.

Amraj Singh—Plaintiff—Appellant.

v.

Sarab Sukh Pande and others—Defendants—Respondents.

Second Appeal No. 59 of 1917, Decided on 8th January 1918, from decrees of Addl. Sub-Judge, Sultanpur, D/- 5th December 1916.

(a) Civil P. C. (1908), S. 9—**Declaratory suit that defendant is not under-proprietor—Civil Court will not exercise discretion until plaintiff exhausts remedy by applying for ejectment to rent Court—It cannot be said that plaintiff has no cause of action until rent Court passes adverse order.**

Where a plaintiff proprietor sues for a declaration that the defendant is not an under-proprietor, the civil Court will not exercise its discretion in granting him the declaratory relief, until it is shown that he has exhausted his remedy by applying to the rent Court for ejectment, but it cannot be said that he has no cause of action for the civil suit unless and until the rent Court, acting on the representations of the defendant to the effect that he is an under-proprietor, passes an adverse order against the said plaintiff in ejectment proceedings. [P 119 C 1]

(b) Civil P. C. (1908), O. 7, R. 1—**Cause of action—Plaint must show accrual of cause of action before suit—He cannot rely on defendant's written statement.**

The plaintiff must show in his plaint that a cause of action accrued to him prior to the institution of the suit, he cannot rely upon the pleas contained in the written statement for the purpose of making out a cause of action. [P 119 C 2]

Zahur Ahmad—for Appellant.*Harkaran Nath Misra*—for Respondents.

Judgment.—This appeal has arisen out of a suit brought by the appellant Amraj Singh and two other plaintiffs who are not parties to this appeal against Sarab Sukh Pande and 14 other defendants in respect of an area of 1 bigha and 14 biswas situated in a village called Chandaaur. The suit as originally framed was a suit for possession of the plots specified and along with this suit there was filed another suit by another co-sharer against the same set of defendants. The two claims were based on similar grounds. It was alleged that a partition of the village had taken place and that certain plots had been assigned to each of these plaintiffs. This partition was made in the year 1902. It was alleged that these defendants had asserted under-proprietary rights with regard to the plots in dispute in both suits and had resisted the taking of possession by these two plaintiffs. Consequently the prayer was that the defendants might be ejected and that possession might be delivered to the plaintiffs over the plots which were in dispute in each of the cases.

The suits for possession were dismissed, the Munsif holding that no such suit could lie in the civil Court. The plaintiffs then went in appeal and it was held by the lower appellate Court that the Munsif's decision was correct. At the same time the Subordinate Judge who dealt with the appeals was of opinion that the plaintiffs should be allowed to amend their plaint and to frame their suits as suits for declaration. Consequently some amendments were made in the plaints and the cases went back to the first Court for disposal. The Munsif dismissed the suit of the present appellant Amraj Singh on the ground that he had no cause of action for a declaratory suit, and this decision has been upheld in appeal by the Subordinate Judge. It has been argued here that the Courts below were wrong in dismissing the suit of the appellant on this ground. The view taken by the Courts below was that inasmuch as the plaintiff-appellant had failed to show that any adverse order had been passed against him by a revenue Court by reason of a claim to under-proprietary right made by these defendants, he had no cause of action for the suit. A number of rulings of this Court were re-

ferred to and it is contended here that it has never been laid down that a plaintiff in circumstances like those of the present case has no cause of action for a declaratory suit, unless and until the revenue Court acting upon the representations of the defendants to the effect that they are under-proprietors has refused the plaintiff relief by way of ejectment. There is, I think, force in the argument of the learned vakil for the appellant. The real principle which underlies the decisions of this Court in cases of this nature appears to me to be that the grant of declaratory relief being a matter within the discretion of a civil Court, that discretion will not be exercised in favour of the plaintiff until it is shown that he has exhausted his remedy by applying to the rent Court for ejectment. However, it is not really necessary for me to discuss this question, for it appears after an examination of the plaint in this case that no cause of action has been disclosed.

According to para. 5 of the plaint the cause of action accrued to the plaintiff on 1st July 1902 "and thereafter." The 1st July 1902 was the date upon which the partition took effect in the village. If there was any assertion of under-proprietary rights by the defendant on the date just mentioned, it is clear that the present suit for declaration is time barred, having been brought beyond the period of six years which is allowed under Art. 120 for declaratory suits. There is nowhere in the plaint any allegation of a subsequent assertion by the defendants of their rights as under-proprietors; and this being so it seems quite clear that the suit was liable to be dismissed on the ground that the plaint disclosed no cause of action. The learned counsel for the appellant referred to certain ejectment proceedings which were taken in the year 1910. It was suggested that in the course of those proceedings these defendants had put forward a claim to under-proprietary rights; but there is not on the record any evidence to which the learned counsel could refer me from which it could be inferred that any claim to under-proprietary rights was put forward by these defendants in respect of any of the plots with which the present suit is concerned. There is a document on the record Ex. A-10, which is a copy of the judgment in the eject-

ment proceedings; but the learned counsel had to admit that there was nothing in this document which would justify the conclusion that the present defendants respondents had put forward any claim as under-proprietors with respect to the plots with which we are now dealing.

It is apparently the fact that some such claim was made in respect of one plot No. 3265/1; but admittedly this plot is not in the share which was allotted to the present appellant Amraj Singh. It was allotted to another co-sharer named Bindu Din, who was the man who brought the other suit with which I am not now concerned. I can find no evidence on the record to prove that any assertion of any adverse under-proprietary title was made by the present defendants against the present plaintiff since the year 1902; and that being so, the suit was liable to be dismissed on the ground that there was no cause of action. It may be true that in their written statement of defence to the present suit the defendants did put forward a claim to under-proprietary right, but it is for the plaintiff to show that there was a denial of his title prior to the institution of the suit. He cannot rely upon the pleas contained in the written statement for the purpose of making out a cause of action. It is not necessary for me to go further into the matter, nor to discuss the reasons for which the lower Courts agreed that the suit should be dismissed. It is sufficient for the purposes of this appeal to say that Amraj Singh's plaint discloses no cause of action for this declaratory suit and that therefore it was properly dismissed. The appeal fails and is dismissed with costs.

B.V./R.K.

Appeal dismissed.

A. I. R. 1918 Cudh 119

STUART AND KANHAIYA LAL, A. J. CS.

Indar Bikram Singh—Judgment-debtor—Appellant.

v.

Chandrika Bakhsh Singh—Decree-holder—Respondent.

Appeal No. 9 of 1917, Decided on 17th September 1917, against execution decree of Sub-Judge, Barabanki, D/- 27th February 1917.

Civil P. C. (1908), Ss. 144 and 35 (3)—Interest on costs can be awarded.

The terms of S. 144 read with S. 35 (3) are wide enough to empower the Court to award a decree-holder interest on costs which the judgment-debtor may be liable to refund to him.

[P 120 C 2]

Gokaran Nath Misra and Tara Shanhar—for Appellant.

Bisheshwar Nath Srivastava—for Respondent.

Judgment.—The question for consideration in this appeal is whether a decree-holder is entitled to claim interest on the costs which the judgment-debtor has been directed to refund to the decree-holder. S. 144, Civil P. C., allows restitution to be made where a decree is varied or reversed so as to place the parties in the position, which they would have occupied but for such decree or such part thereof as has been varied or reversed, and for this purpose it permits the Court to make any orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal. The award of interest on the costs, required to be refunded, is entirely within the discretion of the Court. If the refund of costs is properly consequential on the variation or reversal of the decree, there might be circumstances in which it might properly be consequential to award interest on such costs too. The decree by which the costs were awarded was passed in this case on 25th May 1911. They were recovered by the defendant on 31st October 1911. On 22nd June 1915 the decree passed in his favour was set aside on appeal to the Privy Council. The amount of costs was large and the defendant had the benefit of the money recovered by him for a period of nearly five years.

In *Rodger v. Comptoir D'Escompte de Paris* (1), which was an appeal from Hongkong, their Lordships of the Privy Council allowed restitution of the principal money with interest but refused to allow any interest on the costs ordered to be refunded because they observed:

"It has never been in any proceeding that their Lordships are aware of the habit in ordering the refunding of costs paid under a decree to order that refunding with interest, and there may be obvious reasons applicable to the case of costs, differing from the reasons which applied to gross payment of another description."

1. (1871) 3 P C 465=40 L J P C 1.

But the terms of S. 144 read with S. 35 (3) of the Code are wide enough to empower interest being awarded on costs as on any other portion of the decree, if it be for money, and the decisions in *Kedar Nath Pakrasee v. Doya Moyee Debia* (2); *Ram Sahai v. Bank of Bengal* (3); *Ayyavayyar v. Shastaram Ayyar* (4); *Hardat v. Izzatunnissa* (5) and *Asutosh Goswami v. Upendra Prosad Mitra* (6), show that the award of interest here on costs is not uncommon. In any event the award of interest on costs was a matter within the discretion of the Court, and we do not propose to interfere with the manner in which that discretion has been exercised in this case. The appeal is therefore dismissed with costs.

B.V./R.K.

Appeal dismissed.

2. (1873) 20 W R 49.

3. (1886) 8 All 262.

4. (1886) 9 Mad 506.

5. (1899) 21 All 1.

6. (1917) 38 I C 17.

A. I. R. 1918 Oudh 120j

LINDSAY, J. C.

Jagannath—Plaintiff—Appellant.

v.

Mt. Dhiraja—Defendant—Respondent.

Second Appeal No. 282 of 1917, Decided on 18th February 1918, from decree of Dist. Judge, Rai Bareilly, D/- 19th April 1917.

(a) Evidence Act (1872), S. 67—No particular kind of proof is required to prove execution—It must however be shown to satisfaction of Court that mark denoting execution was actually fixed to document by person professing to execute same.

Although under S. 67, Evidence Act, no particular kind of proof is required for the purpose of establishing the fact of execution, it must nevertheless be shown to the satisfaction of the Court that the mark or signature denoting execution was actually fixed to the document by the person who professed to execute it. [P 121 C 1, 2]

(b) Evidence Act (1872), S. 67—Registration—Court is not bound to treat registration endorsement as conclusive proof of execution—Endorsement cannot be resorted to if circumstances of execution are suspicious.

A Court is not bound to treat the registration endorsement as conclusive proof of the fact of execution. If there are suspicious circumstances attending the execution of the document, such endorsement cannot be resorted to for the purpose of holding that execution has been proved.

[P 121 C 2]

Ali Mohammad—for Appellant.

G. H. Thomas—for Respondent.

Judgment.—This appeal has arisen out of a suit for foreclosure brought by the plaintiff-appellant on the strength of a

mortgage-deed dated 3rd March 1890 and a deed of further charge purporting to have been executed on the same date. The defendant in the case was Mt. Dhiraj whose husband, Bhulai, is said to have executed the two deeds. Both the Courts below have held that the principal deed of mortgage was proved and have given a decree accordingly. With regard to the deed of further charge both Courts have come to the conclusion that execution of this deed by Bhulai was not proved.

The only question in appeal is whether or not upon the evidence led for the plaintiff the Courts below ought to have held that execution of the deed of further charge was proved. The deed was attested and the signature of one of the attesting witnesses was proved to the satisfaction of the Courts below by secondary evidence. But it was held that there was no evidence to prove the further fact of execution by Bhulai. In appeal here it has been argued that the registration endorsement was available to the Courts as evidence of the fact of execution by Bhulai and that the Courts should have admitted that evidence and acted upon it. It is pointed out that in a Bench ruling of this Court reported as *Ayudhia Prasad v. Jagannath Bakhsh Singh* (1) it was held, in circumstances similar to those of the present case, that resort could be had to the registration endorsement for the purpose of proving execution. It seems to me that even if I allow the endorsement to be taken into consideration as evidence in this matter, the execution of the deed is not satisfactorily established. It cannot be pretended that the Court is bound to treat the registration endorsement as conclusive proof of the fact of execution. I find that the two deeds were executed on the same date, that they were drawn up by different scribes, that the executant Bhulai was only able to make a mark on the document and that one of the attesting witnesses to the document was only able to make his mark. It has been pointed out, and I think with reason, that there are suspicious circumstances attending the execution of these documents.

It is not easy to see why two separate documents were executed, namely, a mortgage-deed for Rs. 50 and a deed of

further charge for a sum of Rs. 28. I am not satisfied therefore that I should be justified in accepting the registration endorsement as conclusive proof that it was Bhulai who put his mark to this deed of further charge. While it may be true that under S. 61, Evidence Act, no particular kind of proof is required for the purpose of establishing the fact of execution, it must nevertheless be shown to the satisfaction of the Court that the mark or signature denoting execution was actually fixed to the document by the person who professed to execute it. In this connexion I have been referred to a case reported as *Neel Kanto Pandit v. Juggolundhoo Ghose* (2). There the question was whether a bill of sale was executed by the plaintiff's father. In order to prove execution of this document the defendants called a Qazi, who deposed that the plaintiff's father came before him accompanied by witnesses and acknowledged execution of the deed which was then registered. It was held in the circumstances that there was sufficient proof of execution. In this case however the evidence afforded by the registration endorsement is not nearly so strong as the evidence which their Lordships had to consider in the case I have just referred to. My finding is that, even if the endorsement be taken into account, due execution of this deed of further charge by Bhulai is not established.

The appeal fails and is dismissed with costs.

B.V.R.K.

Appeal dismissed.

2. (1914) 12 B.L.R. App 18.

A. I. R. 1918 Oudh 121

LINDSAY, J.C.

Gobindey—Defendant—Appellant.

v.

Ram Adhin—Plaintiff—Respondent.

Second Appeal No. 307 of 1917, Decided on 7th November 1917, against decree of Dist. Judge, Rai Bareilly, D/- 2nd May 1917.

Hindu Law—Partition—Suit for, between brothers—Wife of plaintiff made to live and mess separately during plaintiff's absence—Defendant is not relieved from proving that property in dispute is separate property.

In a suit for partition between brothers who were members of a joint Hindu family, it was admitted that the wife of the plaintiff during his absence from home which lasted for a considerable time, was on account of her quarrelsome

disposition sent to live in a portion of the family house and to have her meals separately:

Held: that this did not constitute such an admission of separation in estate among the members as would relieve the defendant from proving that the property in dispute was his separate property. [P 122 C 1]

Mohammad Anwar Ali — for Appellant.

Judgment. — This appeal has arisen out of a suit for partition brought by one Ram Adhin against his brother Gobindey, defendant 1, who was the contesting defendant. Another brother was impleaded as defendant but he did not contest the claim. The plaintiff's case was that the parties were members of a joint family, that there was joint family property consisting of three small items of property, that this property had never been divided and that the plaintiff was entitled to his share. Defendant 1 set up a defence that the plaintiff was separate and that the separation had taken place in the joint family 25 years before the suit. In these circumstances and on these pleadings the Courts laid the burden of proving separation on the defendant and both the Courts are agreed that the separation so alleged was not established and consequently the claim of the plaintiff has been decreed.

The main argument of the learned counsel who has appeared here to support the appeal is that the Courts below were wrong in their adjustment of the burden of proof. It is said that in view of certain admissions made by the plaintiff the burden rested on him. I can find nothing in the record to support the argument that the plaintiff made any admission of separation in property. What the Courts below have found is that many years before the suit was brought the plaintiff went off to some other part of India and remained away for a considerable time. He left his wife behind him, who seems to have been of a quarrelsome disposition. She could not agree with the other members of the family and so she was sent to live in a portion of the family house and to have her meals separate. That would not constitute any admission of separation in estate upon which the defendant was entitled to rely and I am satisfied therefore that the burden of proof was rightly laid on the defendant and that the findings of the Courts below are in all respects correct. The evidence has been

carefully examined in both the Courts and the finding is that there never has been any division of the family property. In these circumstances it seems to me that this case cannot go any further. I dismiss this appeal under O. 41, R. 11, Civil P. C.

B. V./R. K.

Appeal dismissed.

A. I. R. 1918 Oudh 122

KANHAIYA LAL, A. J. C.

Sheo Gobind and others — Plaintiffs—Appellants.

v.

Ambika Prasad and others — Defendants—Respondents.

Second Appeal No. 304 of 1917, Decided on 19th June 1918, from decree of Sub-Judge, Unao, D/- 19th June 1917.

Landlord and Tenant—Adverse possession — Position of trespasser—Remedies of owner — Suit for ejectment after 12 years not maintainable.

Although a landlord has an option to treat a person cultivating his land without his permission as a trespasser and to sue him for possession and damages in the civil Court or to treat him as a tenant and to sue him for rent for the occupation of the same at a fair and equitable rate, he cannot exercise that choice with any effect after a hostile title has been acquired by the occupant by reason of his adverse possession for more than 12 years. The effect of the existence of adverse possession for such a period is to extinguish the remedy of the real owner and the proceedings, if any, taken by him in the Revenue Court to eject the occupant by notice, as if he were a tenant-at-will, are without jurisdiction. [P 123 C 1, 2]

Bisheshwar Nath Srivastava—for Appellants.

Gokaran Nath Misra and P. C. Gupta—for Respondents.

Judgment.—The dispute in these appeals relates to plots Nos. 52/2, 52/3 and 65/2 old, corresponding with Nos. 78, 79 and 80 new khasra. The plaintiffs sued for possession of the said plots on the allegation that they were the owners thereof and that the defendants wrongfully got them ejected from the same through the Revenue Court. They further set up a title by adverse possession. The defendants denied the plaintiffs' title and pleaded that the land in dispute had a grove which was cut long ago and that the plaintiffs were estopped from asserting an adverse title.

The Court of first instance found in favour of the plaintiffs and decreed the claim, but the lower appellate Court dismissed it in regard to plots Nos. 52/2 and 52/3 old corresponding with Nos. 71

and 79 new khasra and upheld the remainder of the decree. Both the parties appeal. On behalf of the plaintiffs reliance is placed on what happened in two previous suits, filed by the predecessor-in-title of the defendants against the predecessor-in-title of the plaintiffs in 1885 for the recovery of possession of plot No. 65 old khasra measuring 2 bighas 3½ biswas and plot No. 52 old khasra measuring 5 bighas 15 biswas 8 biswansis respectively. The suits were brought in the Court of the Munsif of Purwa. The allegation on behalf of the plaintiffs in those suits was that the former plot was banjar land, of which the predecessor-in-title of the present plaintiffs had taken wrongful possession and the latter was a grove, of which the trees had fallen down and which the predecessor-in-title of the present plaintiffs had wrongfully brought under cultivation. The predecessors-in-title of the defendants in both those cases set up their proprietary right, alleging that they were mortgagees of both the plots from Prag Kalwar, whose right to redeem the mortgage had become barred by time, and that they had been in adverse possession of the same for more than 12 years. On the date fixed for hearing of those cases, no one appeared for the then plaintiffs. The defendant was present. Both the suits were therefore dismissed for default on 14th December 1886. The Courts below rightly held that the dismissal of the former suit in regard to plot No. 65 old khasra rendered a fresh suit in regard to the same unmaintainable and that it was not open to the defendants after the lapse of nearly 20 years to treat the plaintiffs as tenants and to seek their ejectment through the Revenue Court. Although a landlord has an option to treat a person cultivating his land without his permission as a trespasser and to sue him for possession and damages in the civil Court or to treat him as a tenant and sue him for rent for the occupation of the same at a fair and equitable rate, he cannot exercise that choice with any effect after a hostile title has been acquired by the occupant by reason of his adverse possession for more than 12 years. As pointed out in *Muhammad Taqi v. Muhammad Baqar* (1), the effect of the existence of adverse possession for such a period is to ex-

tinguish the remedy of the real owner and the proceedings taken by the defendants in the Revenue Court to eject the plaintiffs by notice, as if they were tenants-at-will, were without jurisdiction.

In regard to plots Nos. 52/2 and 52/3 old khasra the lower appellate Court however observes that as they contained a grove which was mortgaged with the predecessor-in-title of the present plaintiffs, a suit for the resumption of the land after the grove was cut could have been instituted only in the Court of the District Judge and the institution of a suit in the Court of the Munsif of Purwa for the possession of the land in 1886 had therefore no effect. But the fact that the defendants held possession under the assertion of an adverse right since 1886 cannot be ignored. According to the predecessor-in-title of the defendants the land had ceased to retain the character of a grove prior to 1886 and had been brought under cultivation by the predecessor-in-title of the present plaintiffs. A suit to eject him as a trespasser was dismissed for default. The suit as then brought was entertainable in the Court in which it was brought and the right of the present defendants to resume the land is now barred by time. It is pointed out that plot No. 80 new khasra includes No. 52/4 old khasra. But it cannot be said that plot No. 52/4 old khasra was not included in the former suit which related to the entire plot No. 52 old khasra, measuring 5 bighas 15 biswas 8 biswansis. The appeal filed by plaintiffs No. 304 of 1917 is therefore allowed and that filed by defendants No. 334 of 1917 dismissed, the claim of the plaintiffs being decreed with costs here and hitherto. The defendants will bear their own costs throughout.

B.V./R.K.

*Appeal allowed.***A. I. R. 1918 Oudh 123**

LINDSAY, J. C.

Nadir Singh and others—Plaintiffs—Appellants.

v.

Indar Sen Singh—Defendant—Respondent.

Second Appeal No. 193 of 1917, Decided on 27th May 1918, from decree of Dist. Judge, Fyzabad, D/- 27th February 1917.

(a) Oudh Rent Act (1886), S. 107 (g)—Person declared tenant by revenue Court under S. 107 (g)—Suit for declaration that he is under-proprietor is maintainable in civil Court.

A civil Court has jurisdiction to try a suit filed by a person who has been held by the revenue Court to be a tenant under S. 107-G, for the purpose of obtaining a declaration that he is an under-proprietor and not a tenant.

[P 124 C 1, 2]

(b) Oudh Laws Act (1876), S. 25—"Transferred"—Meaning of, explained.

The word "transferred," as used in S. 25 is of general import and its meaning cannot be restricted to cases in which the transfer has been made under orders of the Court: *Selected Decision No. 7 of 1903, Diss from.* [P 125 C 1]

A. P. Sen—for Appellants.

Gokaran Nath Misra and Harkaran Nath Misra—for Respondent.

Judgment.—The plaintiffs-appellants brought a suit out of which this appeal has arisen for the purpose of obtaining a declaration that they were under-proprietors (pukhtadars) of certain plots in a village called Benipore described in the plaint. It appears that recently the defendant talukdar took proceedings under Chap. 7-A, Oudh Rent Act, against the plaintiffs and obtained an order of the revenue Court under S. 107-G. The revenue Court held that the lands now in suit were in possession of the plaintiffs as rent-free lands and were liable to be assessed to rent. The rent was assessed and the Court declared that the plaintiffs were tenants of the defendant.

The plaintiffs now come to the civil Court for the purpose of claiming a decree for declaration that they are not tenants, but under-proprietors of the lands in question. The suit was contested on a variety of grounds. Amongst other pleas one was taken to the effect that the civil Court had no jurisdiction to entertain the suit. The Court of first instance accepted this plea and dismissed the plaintiffs' claim, though it is proper to observe that the case was also decided on the merits. I only mention the question of jurisdiction here because it was not debated in the lower appellate Court; and the learned counsel for the respondent in this Court has informed me that he is not in a position to support the opinion of the Court of first instance. It is clear that the civil Court had jurisdiction to entertain this suit. The Judge of the first Court relied upon a ruling reported as *Rup Narain v. Badri*

Prasad (1). This ruling was afterwards doubted in another case to be found reported as *Matai Singh v. Ajudhya Singh* (2) and it was finally overruled by a Bench decision to be found reported as *Shankar Sahai v. Gajadhar Prasad* (3). There is no doubt therefore that the suit was cognizable by a civil Court.

To come to the merits of the case, it is admitted that in the year 1893 the property in suit was mortgaged to one Bhaiya Kamta Prasad by a deed of conditional sale. The mortgagee brought a suit for foreclosure and obtained a decree on 22nd December 1893. Eventually the decree was made final and possession was delivered to the mortgagee. After this the defendant talukdar brought a suit for pre-emption on the basis of this foreclosure and obtained a decree on 15th August 1896. It is said that in execution of the pre-emption decree the talukdar obtained formal possession, but never succeeded in obtaining actual possession of the property now in question. No rent appears to have been paid by these plaintiffs until the talukdar succeeded in obtaining from the revenue Court the order under S. 107-G, Oudh Rent Act, to which I have referred above. The lower appellate Court has dismissed the claim of the plaintiffs. It applied the provisions of S. 25, Oudh Laws Act (Act 18 of 1876) and held that the result of the foreclosure was to deprive the plaintiffs of all proprietary or under-proprietary interest in the lands which were comprised in the mortgage and to leave them only with a right of occupancy as ex-proprietary tenants in such lands as they held as *sir* at the time foreclosure took place. It was of opinion that on the evidence it was shown that the lands now in question were the lands which the plaintiffs held as *sir* at that time, and consequently it was of opinion that they could not set up any rights as under-proprietors. All they could claim to be was that they were occupancy tenants.

It has been argued here in the first place that the learned Judge was wrong in applying S. 25, Oudh Laws Act, to the case. That section has been repealed, but it was in operation at the

1. (1909) 12 O C 225=3 I C 667.

2. A I R 1914 Oudh 273=17 O C 56=24 I C 223.

3. (1917) 20 O C 171=40 I C 200.

time the foreclosure proceedings took place. I agree with the learned Judge that S. 25 did apply to the facts of this case. The argument here is that the word "transferred," as used in S. 25, is not applicable to cases in which the transfer has been made by way of foreclosure and in support of this argument a decision of the Board of Revenue *Saraj Bakhsh v. Bhagwan Din* (4), has been relied upon. I am unable to accept the opinion of the learned members of the Board. It seems to me that the word "transferred" as used in S. 25, is of general import and that its meaning cannot be restricted as has been argued to cases to which the transfer has been made under orders of the Court. Even if that argument were to be accepted, it seems to me sufficiently obvious that in the present case the transfer of the mortgagor's rights to the mortgagee was certainly effected by an order of the Court for it is common ground that the property was transferred in the first instance under a foreclosure decree and was subsequently transferred by a decree of Court in favour of the defendant talukdar.

It is true that after this transfer took place no proceedings were taken by the Deputy Commissioner, as provided by the section for the purpose of determining the extent of the lands which the ex-proprietors were to hold as occupancy tenants nor was anything done to determine the rent of the lands which were to be so held. All the same I cannot accept the contention for the appellants that because these proceedings were not taken by the Deputy Commissioner, it necessarily follows that the ex-mortgagors remained in adverse possession of the plots which were then in their occupation. If the plots now in dispute were in the actual cultivating occupancy of the plaintiffs at the time foreclosure took place it follows that the highest right they can set up in respect of these lands is that of occupancy tenants. The Deputy Commissioner, if he had taken proceedings under the section might have allowed them occupancy rights in all these plots. He certainly could not have allowed them any higher rights and he might have allowed them less by confining their rights to a portion only of the lands which they then

held. On the other hand, I am not satisfied that it is shown on the evidence that the lands now in dispute were in the actual cultivating occupancy of the plaintiffs at the time when foreclosure was made and before I can come to a proper decision in the case it appears to me to be necessary that this matter should be investigated. The fact that the plaintiffs describe these lands as their *ser* lands does not necessarily lead to the conclusion that at the time of foreclosure they must have been in their "actual cultivating occupancy," to use the words of S. 25. I remit the following issue to the lower appellate Court for determination. Were the lands now in suit, or any of them in the cultivating occupancy of the plaintiffs at the time of the foreclosure of the mortgage?

The learned Judge will take such evidence on this issue as the parties may desire to produce and he will return his finding to this Court within two months from the date of this order of remand. 15 days to run from the date of the lower Court's finding will be allowed to the parties to file objections if they are so minded.

R.V. R.K.

Issue remitted.

A. I. R. 1918 Oudh 125

LINDSAY, J. C. AND KANHAIYA

LAL, A. J. C.

Mt. Balraj Kuar—Defendant—Appellant.

v.

Mahadeo Pat Singh and others—Plaintiffs and Defendants—Respondents.

First Appeals Nos. 101 and 114 of 1914
Decided on 29th June 1917, against
decree of Sub-Judge, Partabgarh, D/- 2nd
May 1914.

(a) Oudh Estates Act (1869), S. 15 — Scope.

Section 15 is a declaratory section, operating both prospectively and retrospectively.

[P 129 C 1]

(b) Oudh Estates Act (1869), Ss. 15, 22 and 23—Estate entered in List 2 and held under primogeniture sanad — Bequest in favour of person not talukdar or grantee and outside scope of succession — Rule in sanad as to succession is inapplicable.

Where a person whose estate was entered in List 2 died before the Oudh Estates Act came into force, bequeathing his estate to his son-in-law, who was neither a talukdar nor a grantee, nor a person who would have succeeded to the estate, had the testator died intestate:

Held: Per Lindsay, J. C., that the effect of S. 15 was to put the sanad out of consideration altogether, and that the succession to the estate

(4) Selected Decisions No. 7 of 1903.

on the death of such a legatee would be governed by the rules which would have governed the succession if the legatee had bought the estate from a person, not being a talukdar or grantee, or in other words, by the ordinary law, irrespective of the rule of succession contained in the sanad. [P 129 C 1]

(Per *Kankhya Lal, A. J. C.*), that the effect of the section was to relieve such a legatee from the disability imposed by the Oudh Estates Act on talukdars and grantees in the matters of transfer and succession, and not from any rules which might be applicable independently of the Act, and that the succession to such legatee would be governed by the rule of succession laid down in the sanad as restricting or qualifying the personal law. [P 140 C 2]

Per *Curiam*, that the rule of succession contained in the sanad was inapplicable to a person who got the estate otherwise than by inheritance. [P 129 C 1]

(c) **Hindu Law—Will — Document sent to prepare compilation of talukdars held amounted to will.**

A document sent by a person, containing the relevant particulars relating to the history of his estate and a declaration as to who is to be his successor, in pursuance of an advertisement appearing in a paper announcing the intention of the advertiser to prepare a compilation showing the family history of the talukdars of Oudh, can for the purposes of Hindu law be treated as a testamentary declaration by the writer of his intention with respect to his property, which he desires to be carried into effect after his death. [P 134 C 2; P 138 C 1]

B. E. O'Connor, G. H. Thomas and Ajodhya Das—for Appellant.

Wazir Hasan, J. N. Chak, Ali Mohamad, Ramapat Ram, Gokaran Nath Misra, Mahabir Prasad, Gokul Prasad, Samiullah Beg and Awadh Behari Lal—for Respondents.

Lindsay, J. C. — These two appeals have sprung out of a suit brought by the plaintiff-respondent, Mahadeo Pal Singh, for recovery of possession of a taluka known as the Dandi Kanch estate, which is situated in the Partabgarh District. Plaintiff 2 in the suit, Seth Kanhaiya Lal, is a person to whom Mahadeo Pal Singh has sold a portion of his claim for the purpose of raising funds to prosecute the suit. The three principal defendants in the case were Babu Adya Bakhsh Singh (defendant 1), Mt. Sukhpal Kuar (defendant 2) and Mt. Balraj Kuar (defendant 3). The remaining defendants in the case were impleaded as persons who had taken transfers of portions of the estate in suit from defendant 1, Adya Bakhsh Singh. Before proceeding to set out the matters which were in issue at the trial in the Court below, it is advisable to say a few words relating to the history of this property.

It is admitted that a grant of this estate was made after the annexation to Babu Sripat Singh, who was a Sombansi Thakur. It is also admitted now, though the fact was in dispute in the Court below, that this grant was made to Babu Sripat Singh under a primogeniture sanad. Babu Sripat Singh died in the month of November 1861, long before the Oudh Estates Act (1 of 1869) came into force. It is admitted that on the death of Babu Sripat Singh the estate passed into the possession of Babu Dan Bahadur Pal Singh, who was Sripat Singh's son-in-law. Sripat Singh had no son and it is admitted that Dan Bahadur Pal Singh took the estate under a will executed in his favour by Sripat Singh a few days before his death. Babu Dan Bahadur Pal Singh died on 14th March 1906. He left a widow Mt. Sukhpal Kuar, who is defendant 2 in this suit. He also left a daughter Mt. Balraj Kuar, who is defendant 3, and a grandson (daughter's son) Adya Bakhsh Singh, defendant 1. Adya Bakhsh Singh is the son of defendant 3 Mt. Balraj Kuar. The plaintiff, Mahadeo Pal Singh, is a step-brother of the deceased Dan Bahadur Pal Singh and he based his claim to the estate on the ground of inheritance. In para. 7 of the plaint it was alleged that at the death of Dan Bahadur Pal Singh the plaintiff Mahadeo Pal Singh became the rightful owner of the estate, (1) in accordance with the conditions of the sanad under which the estate had been granted, and (2) in accordance with the provisions of S. 22, Cl. (5), Oudh Estates Act (1 of 1869) and the custom prevailing in the family of Dan Bahadur Pal Singh. It was also claimed that if the inheritance to this property, were regulated by the Hindu law, then defendants 1, 2 and 3 were excluded from inheritance by virtue of the custom just referred to.

In para. 8 of the plaint it was specifically stated that according to the conditions prescribed in the sanad and according to the law and custom, neither defendant 1 as daughter's son, nor defendant 2 as widow, nor defendant 3 as daughter of Dan Bahadur Pal Singh, had any right whatever in the estate of the deceased. Attached to the plaint there were exhibited certain lists of property the subject-matter of the claim. List A contains the names of villages included

in the taluka proper; List B sets forth certain items of property which are described as accretions to the taluka; while List C contains particulars of certain house property which it was alleged belonged to the taluka. Coupled with this claim for possession there was a claim for mesne profits to the extent of over Rs. 70,000 and in Cl. (d), para. 17 of the plaint (that is, the paragraph in which the relief was sought) it was prayed that if the Court considered that the plaintiff Mahadeo Pal Singh was not entitled to immediate possession, he might be given a decree declaring such rights as the Court considered him to possess with reference to his claim to succeed to the estate in suit. The principal defences to be considered are those made by defendants 1, 2 and 3. Leaving out of account the plea which was taken to the effect that the estate was not held by a primogeniture sanad (a matter which is no longer in dispute), the first point to be noticed is that Adya Bakhsh Singh, defendant 1, claimed to be entitled to the property by virtue of a will alleged to have been executed by Dan Bahadur Pal Singh on 22nd November 1899.

It was next pleaded that the succession to this estate was not governed by the Oudh Estates Act (1 of 1869). By way of alternative it was asserted that even if the Act applied and if it were found that Dan Bahadur Pal Singh died intestate, defendant 1 was still entitled to the property in accordance with the provisions of Cl. (4), S. 22, Act 1 of 1869, inasmuch as he was the daughter's son of Dan Bahadur Pal Singh and had been treated in every way by Dan Bahadur Pal Singh as his own son. The next point taken by way of defence was that in case it were found that the estate was held under a primogeniture sanad, the rule of inheritance laid down in the sanad did not apply inasmuch as Dan Bahadur Pal Singh was a legatee of Sri-pat Singh and belonged to a different family. Another plea in this connexion was that even according to the sanad the defendant Adya Bakhsh Singh would be entitled to take the estate as being the nearest male heir according to the rule of primogeniture. By way of further defence the custom alleged in the plaint was denied and it was asserted that defendants 1 and 3 were not in any way

excluded from inheriting the property left by Dan Bahadur Pal Singh. It was also alleged by way of defence that the plaintiff Mahadeo Pal Singh was no heir of Dan Bahadur Pal Singh under the Hindu law. And lastly the plea was taken that neither the sanad nor Act 1 of 1869 could in any way affect the rule of succession relating to property which did not form part of the estate which was granted by the British Government to Bahu Sripot Singh.

The pleas to which I have referred were all raised in the common written statement filed by defendant 1 Adya Bakhsh Singh and by his grandmother Mt. Sukhpal Kuar. Defendant 3, Balraj Kuar, who is the mother of Adya Bakhsh Singh, filed a separate written statement, but her case as set out in that statement contained no new ground of defence; in fact she made common cause with her son defendant 1, Adya Bakhsh Singh. Before the issues were struck certain admissions were made by the counsel for the parties; one of these was that the succession to the estate in suit was not governed by S. 22, Oudh Estates Act (Act 1 of 1869). This fact is obvious, when it is considered that Dan Bahadur Pal Singh came into possession of the property as a legatee long before the Oudh Estates Act came into force; in other words, Dan Bahadur Pal Singh was not a legatee within the meaning of the Act. With regard to the custom referred to in the plaint the learned Subordinate Judge thought it proper to call for a statement of the particulars of the custom alleged. It was finally stated by the plaintiff's counsel that the custom upon which he relied did not exclude from inheritance the widow of Dan Bahadur Pal Singh in case it should be found that the Hindu law applied. A pedigree of the family to which Dan Bahadur Pal Singh belonged was put in and it was expressly stated that the custom upon which the plaintiff relied was a family custom prevailing in this family, a family descended from one Karan Pal Singh.

Three issues were framed by the Subordinate Judge. Issue 1 related to the will alleged to have been executed by Dan Bahadur Pal Singh on 22nd November 1899. Issue 2 was split up into four parts (a), (b), (c) and (d). Part (a) of the issue related to the question of

the terms of the sanad under which the estate was held. Part (b) raised the question as to whether the rule of succession to be applied to the property was the rule contained in the sanad or the rule to be found in the ordinary Hindu law. Part (c) of the issue related to the application of the rule of primogeniture. The question was put whether the plaintiff Mahadeo Pal Singh would according to this rule succeed to the property both talukdari and non-talukdari, in preference to defendant 1, the daughter's son of Dan Bahadur Pal Singh. Part (d) of the issue related to the question of custom and to the right of the plaintiff to obtain a declaration in case any such custom was proved.

Issue 3 was concerned with the question of mesne profits. With regard to issue 1 relating to the will, the finding of the Subordinate Judge is that Dan Bahadur Pal Singh actually wrote the document which defendant 1 set up as the will upon which he relied, but it was held that this document did not amount to a testamentary disposition of the estate. With regard to issue 2 it was found on the first part (2 'a') that the estate was held under a primogeniture sanad. On the second part of the issue the finding of the Court below was that the rule of succession contained in the sanad applied to the case, inasmuch as Dan Bahadur Pal Singh, was "successor" of Sripat Singh in the sense in which that expression is used in the sanad. It was also held that the plaintiff Mahadeo Pal Singh was the nearest male heir according to the terms of the sanad and it was also ruled that the ordinary Hindu law did not apply to the case. The Subordinate Judge was further of opinion that both kinds of property specified in the lists attached to plaint, that is the taluka proper and its accretions, were governed by the same rule of succession. By his decree however he reserved certain houses specified in list C for the accommodation of the first three defendants. In view of the findings arrived at upon these issues the Subordinate Judge recorded no finding on the question of custom raised in part (d) of issue 2.

He found on issue 3 that the plaintiff was entitled to mesne profits to the extent of Rs. 67,000 odd and he gave a decree accordingly with directions for

the payment of profits accrued subsequent to the date of the suit. Two appeals have been filed against the lower Court's decree, one by Mt. Balraj Kuar, defendant 3, (First Civil Appeal No. 101 of 1904), and the other by defendant 1, Adya Bakhsh Singh, (First Civil Appeal No. 114 of 1914); and the following points arise for determination: (1) What is the rule of succession applicable to the estate left by Babu Dan Bahadur Pal Singh? (2) Did Dan Bahadur Pal Singh, as alleged by defendant 1, execute a will in the latter's favour on 22nd November 1899? (3) Is the plaintiff Mahadeo Pal Singh entitled to a decree for possession of the property which is described in list B as being an accretion to the taluka? and (4) Has the plaintiff Mahadeo Pal Singh succeeded in proving the family custom set up in the Court below by which daughters and their sons are in this family excluded from inheritance?

The only other point raised in the grounds of appeal in these two cases relates to the question of the terms of the matter, as I have already observed, is no longer in dispute. It has been admitted before us that the estate was held under a primogeniture sanad.

It is I think expedient to deal in the first place with the question of the rule of succession which is to be applied for the purpose of discovering who is the person rightfully entitled as heir to the estate left by Dan Bahadur Pal Singh. The estate, it may be mentioned here, is a List 2 estate. Sripat Singh's name was entered in Lists 1 and 2 although, as has already been noticed, he died long before the passing of Act I of 1869. We start with the proposition that the law of succession as laid down in S. 22, Oudh Estates Act, does not apply to the case (there is no question, of course, of the application of S. 23). It follows therefore that the rule of succession must be sought in the ordinary law which was applicable to property held in the family of Dan Bahadur Pal Singh, and in this connexion the question at once arises whether that ordinary law embraces the terms of the sanad by which the property was conferred upon Sripat Singh. The Subordinate Judge has held that the terms of the sanad govern the succession; and acting on these provisions he has found that the plaintiff Mahadeo Pal

Singh is entitled to Dan Bahadur Pal Singh's estate. I may say at once that in my opinion this decision of the Subordinate Judge is erroneous. My finding is that the rule of succession laid down in the sanad has no application in the present case.

This opinion is founded upon the provisions of S. 15, Act 1 of 1869, the terms of which it is now necessary for me to consider. I may mention here that the learned counsel on either side were not able to refer me to any judgment of their Lordships of the Privy Council containing an exposition of the provisions of this particular section. There is on the other hand at least one ruling of a Bench of this Court in which the terms of this section have been considered and to which I shall presently refer. I think it advisable in the first place to state at once the interpretation which I put upon the language of this section. S. 15 is a declaratory section and operates both retrospectively and prospectively. It purports to lay down the rule which governs the transfer of and succession to an estate or part of an estate which had been transferred or bequeathed before, or which might be transferred or bequeathed after the passing of the Act, to a person who was not a talukdar or grantee and a person who would not have succeeded if the transferor or testator had died without having made the transfer and intestate. The rule laid down in the section is that the transfer of and succession to the property so transferred or bequeathed is to be regulated by the rules which would have governed the transfer and succession to the property, if the transferee or legatee had "bought" the same from a person "not being a talukdar or grantee." Applying this section to the facts of the present case we have it (1) that Sripat Singh was a talukdar; (2) that he bequeathed his estate before the passing of the Act to his son-in-law Dan Bahadur Pal Singh; (3) that Dan Bahadur Pal Singh was neither a talukdar nor a grantee; (4) and was not a person who would have succeeded Sripat Singh if the latter had died without having made the bequest.

It seems to me therefore that in accordance with the provisions of this section the question of the succession to this estate, which was taken by Dan

Bahadur Pal Singh under the will made by Sripat Singh, is to be decided on two assumptions, namely: (1) that Dan Bahadur Pal Singh brought the estate from Sripat Singh, and (2) that Sripat Singh was for the purposes of that transaction of transfer to be regarded neither as a talukdar nor as a grantee. This appears to me to be the plain meaning of this section, and if my interpretation is correct it seems to follow necessarily that the terms of the sanad cannot be referred to in dealing with the question as to who is to succeed to the estate left by Dan Bahadur Pal Singh, assuming for the moment that Dan Bahadur Pal Singh died intestate. If, for the purpose of this case, we must, as the section says, hold that Sripat Singh was neither a talukdar nor a grantee, then he cannot be treated as having held this estate under any special title, that is to say, under a sanad granted by the British Government. The argument for the plaintiff-respondent, so far as I have been able to understand it, is this.

It is said that the only result arising from the enactment of S. 15 is that the rule of succession laid down in S. 22 of the Act ceases to be applicable to the property transferred or bequeathed in the circumstances mentioned in S. 15, and that consequently succession must be determined with reference to the personal law of the holder of the property, a law which, it is argued, would in the case given include the conditions laid down in the sanad. This argument is supported by a reference to what was laid down by their Lordships of the Privy Council in the case of *Debi Bakhsh Singh v. Chandrabhan Singh* (1). That was a case of succession ab intestato and their Lordships were called upon to construe the language of Cl. 11, S. 22, Act 1 of 1869. This clause declares that in default of the persons specified in the preceding ten clauses, succession shall be: "to such persons as would have been entitled to succeed to the estate under the ordinary law to which persons of the religion and tribe of such talukdar or grantee, heir or legatee, are subject."

It was ruled by their Lordships that the ordinary law referred to in this clause would include the declarations and conditions of the sanad being part of the original title to the property.

1. (1910) 32 All 599=37 I A 168=13 O C 316
=7 I C 724 (P C).

Looking at the language of Cl. 11 just referred to, as also at the similar language which is adopted in S. 23, it will appear that the ordinary law which is there referred to is the law applicable to the tribe and religion of the intestate talukdar, grantee, or his heir or legatee within the meaning of the Act. In other words, the property which is to be governed by the rules laid down in Cl. 11 and S. 23 is property which up till the time succession opened belonged to the talukdar, grantee, or his heir or legatee. The case with which we are now dealing is admittedly not one of this kind. Dan Bahadur Pal Singh was neither a talukdar nor a grantee; nor was he the heir or legatee of a talukdar or grantee within the meaning of the Act. On the contrary his position, according to the language of S. 15, was that of a person who had bought from another person who was neither a talukdar nor a grantee. In these circumstances it is difficult to conceive how it can be argued that the terms and conditions of the sanad are to control in any way the succession to the estate which has been left by Dan Bahadur Pal Singh. On the face of it the sanad or any of the declarations or conditions contained in it constituted no part of Dan Bahadur Pal Singh's title to this property, for according to S. 15 Dan Bahadur Pal Singh's title was a title by purchase.

He "bought the estate" from a person who was neither a talukdar nor a grantee. It has been contended that the words "a person not being a talukdar" in S. 15 indicate merely a person whose name is not entered in list 1 and that for the purposes of this section such a person ought to be deemed to possess all the other attributes of a talukdar, including that of being a holder of property under a special grant or sanad; and so, it is said, in spite of the language of S. 15 the terms of the sanad must be taken into account. I do not think it is possible to argue in this way. S. 15 deals not merely with persons who are styled talukdars or grantees. It deals with such persons in relation to their property (estate), and for the purpose of interpreting S. 15 the talukdar cannot be dissociated from the property or taluka from which he derives his title of talukdar. A talukdar must be a person who owns a taluka or estate and no person

is to be found in list 1 who had not a taluka or estate, for every talukdar in list 1 is mentioned in lists 2, 3 and 4 as the possessor of an estate.

When S. 15 lays down that the person from whom the property therein referred to has been bought is neither a talukdar nor a grantee, it seems to me to follow necessarily that such a person must be taken to be a person who held under no special title, that being one of the necessary attributes of a talukdar or grantee. My opinion therefore is that the ruling in *Debi Bakhsh Singh's* case (1) does not affect the question now under consideration and does not make the terms and conditions of the sanad any part of the ordinary law which governed Dan Bahadur Pal Singh's family.

Then again it has been argued that if the interpretation which I place upon the language of S. 15 be adopted, it involves the conclusion that Act 1 of 1869 operates to divest a title already vested. It is said that if the words "neither a talukdar nor a grantee" are to be taken to mean a person without a sanad, it follows that the transferee or legatee takes nothing because in that case the testator or transferor mentioned in S. 15 had nothing to bequeath or transfer. Obviously this cannot be the effect of S. 15, which lays down rules for the transfer of and succession to property which has been transferred or bequeathed. It is assumed that the transferee or legatee has a good title to the property, a title by purchase. It could never have been the intention of the legislature to render void transfers which were made before the passing of the Act and it is impossible therefore to hold that the section lays down that the transferee or legatee has taken no estate at all. My attention has been drawn to a decision of a Bench of this Court which is to be found reported in 18 *Oudh Cases* at p. 188, the *Maniarpur* case, *Ghulam Abbas Khan v. Bibi Ummatul Fatima* (2), a decision which I understand is now under appeal before their Lordships of the Privy Council. It is pointed out that at p. 211 (of 18 *Oudh Cases*) of the report Mr. Stuart, the First Additional Judicial Commissioner, has adopted an interpretation of the language of S. 15 which differs from mine. After referring to the provisions of S. 3, Crown

Grants Act (15 of 1895), Mr. Stuart observes that

"if the terms of the primogeniture sanad govern succession to the property, succession to property transferred to a person who would not have succeeded according to the provisions of the Act might not be governed by the law that would apply if the transferee or legatee had bought the same property from a person not being a talukdar, but might be governed by the terms of the sanad."

Mr. Stuart then refers to certain observations which were made by their Lordships of the Privy Council in the *Mahewa* case : *Sheo Singh v. Raghudass Kunwar* (3). It appears to me that this argument rests upon the assumption that the sanad does apply in cases where the property has been transferred or bequeathed in the circumstances mentioned in S. 15. But before we reach that stage it is necessary to determine whether the sanad applies at all. My learned colleague in the present case who was a party to the decision just referred to seems also to have been of opinion, and for the same reasons, that the Crown Grants Act operated so as to render it necessary to apply the sanad in spite of the provisions of S. 15, Act 1 of 1869. I regret I am unable to concur in this view. With all possible respect it seems to me that the provisions of the Crown Grants Act do not affect this question. This latter Act was introduced to explain the provisions of the Transfer of Property Act 1882, in so far as they relate to grants from the Crown and to remove certain doubts as to the power of the Crown in relation to such grants. The preamble declares that the intention of the Act is to remove any doubts which might have arisen as to the power of the Crown to impose limitations and restrictions upon grants and other transfers of land made by it or under its authority. S. 2 of the Act excludes the application of the Transfer of Property Act to Crown Grants and S. 3 lays down that all previous restrictions, conditions and limitations over contained in any grant or transfer by the Crown shall be valid and take effect according to their tenor any rule of law, statute or enactment of the legislature to the contrary notwithstanding.

I take this third section of the Crown Grants Act to mean that in spite of anything contained in any rule of law, Statute or enactment of the legislature, it is to be understood that

3. (1905) 27 All 634=32 I A 203=S O C 317 (P C).

the Crown has full power to make any provisions, restrictions, conditions and limitations over in granting or transferring lands and that all such provisions, restrictions, conditions, and limitations over are to be valid and to take effect according to their tenor but S. 15, Act 1 of 1869, does not in any way purport to affect or question the power of the Crown to make such provisions, limitations, etc. To my mind it simply declares that in a given set of circumstances property acquired by a person from one who held it by a Crown grant is to be treated as not having been held by a Crown grant at all. The title is to be treated as one by purchase. The property is to be deemed to have been acquired from a person who did not hold as a Crown grantee. This being so there can in my opinion arise no question of applying the law as laid down in S. 3, Crown Grants Act, for the simple reason that when S. 15, Act 1 of 1869, is reached there is no Crown grant to be construed. The *Mahewa* case cannot, I think, be appealed to as an authority for the view that the Crown Grants Act in any way controls the operation of S. 15, Act 1 of 1869. The argument which was taken before their Lordships in that case was that in or after 1861, at the time when the sanad was granted to Girwar Singh, no executive act of the Government could have created an estate descending by any rule of inheritance other than that laid down by the law—the Hindu law in the case then under consideration. Their Lordships held that such a contention was not maintainable in view of these provisions of the Crown Grants Act. There is in the present case no question of the power of the Crown to create estates descending by a peculiar law of inheritance. The effect of S. 15, in my opinion, is to put the sanad out of consideration altogether.

As my learned colleague will probably not agree with the opinion I have expressed regarding the interpretation of S. 15, Oudh Estates Act (1 of 1869), I proceed to consider what the rule of succession would be on the assumption that the terms and conditions of the sanad applied to the case now before us. Fortunately on this point my colleague and myself are of the same opinion. We both think that if the terms of the sanad are to be taken into consideration, the

rule of succession by primogeniture does not apply to the estate which was left by Dan Bahadur Pal Singh. The principal words to be considered in this connexion are those contained in the penultimate clause of the primogeniture sanad, the form of which is given at p. 386, Appendix E of Sykes' Compendium of the Oudh Talukdari Law. Those words are as follows:

"It is another condition of this grant that in the event of your dying intestate or of any of your successors dying intestate, the estate shall descend to the nearest male heir according to the rule of primogeniture, but you and all your successors shall have full power to alienate the estate either in whole or in part by sale, mortgage, gift, bequest, or adoption to whomsoever you please."

The discussion centres round the meaning of the word "successors" contained in this clause. According to the view taken by the Subordinate Judge, "successor" means a person who takes as an heir on an intestacy or who takes under a will as a devisee. He came to this opinion on the authority of certain definitions and rulings which were quoted before him and to which he has referred in his judgment. He also relies for his interpretation upon the language which was used in the correspondence between the Chief Commissioner of Oudh and the Government of India relating to the conditions which should be imposed in the sanads which were granted subsequent to the date of Lord Canning's Proclamation. Referring to the language of the clause we have just mentioned the Subordinate Judge was of opinion that it contemplates two clauses or transfers, namely: (1) transfers inter vivos and (2) transfers to take effect after death. For these reasons he held that the term "successors" must include all who take otherwise than as transferees by a deed executed inter vivos. It was contended before him that according to the language of the sanad transfers might be made in favour of all sorts and conditions of men and the case was put to him of a bequest made by a talukdar in favour of a village menial. It was asked whether in such a case the descent of the property in the hands of the menial would be regulated by the rule of primogeniture. The learned Judge is of opinion that the menial in these circumstances would not come within the category of "succe-

sors," though why he should be excluded if he took under a will is difficult to see, regard being had to the opinion expressed by the Subordinate Judge that "successors" included persons who took otherwise than as transferees by a deed inter vivos. The learned counsel for the plaintiff-respondent has not attempted to support the reasoning given for his opinion by the learned Subordinate Judge. The question of the meaning of this word "successors" has been the subject of discussion in the decision of a Bench of this Court to which a reference has already been made: *Ghulam Abbas Khan v. Bibi Ummatul Fatima* (2). The two learned Judges who constituted the Bench in that case differed in opinion regarding the meaning of this expression.

The Court of first instance had held in that case that the word "successors" meant only heirs, that is, persons who succeeded to the estate ab intestato. Mr. Stuart discussed at great length the meaning to be attributed to the word "successors." He went into the history of the events which led up to the grant of the sanads and he also read the sanad in the light of the phraseology of the English law of real property. In his judgment he admits that the word "successor" is capable of being interpreted in many different senses and that its true meaning ought in all cases to be ascertained by reference to the context. He eventually came to the conclusion that there was nothing in the context of the sanad which was repugnant to the sense which he attributed to the word, namely, that of including both an heir and a devisee. He was unable to accept the opinion of the Subordinate Judge that the word "successors" meant only heirs. Mr. Stuart's opinion therefore was that the word "successor" means successor on death and excludes only persons who have taken by a transfer inter vivos. According to Mr. Stuart's interpretation therefore the word "successors" would include the village menial in whose favour a will had been made by a talukdar. The Second Additional Judicial Commissioner, who is my colleague in the present case, was of a different opinion. After pointing out that the word "heirs" occurs at four places in the sanad, he went on to say that in his opinion "successors" means persons suc-

cessively inheriting the estate under the sanad. He too held that the meaning of the word was to be determined in the sense of the context. He laid great stress on the portion of the clause quoted above which is introduced by the words "but you and all your successors." He pointed out that the powers of transfer conferred upon the talukdar by the sanad might be exercised by will, mortgage, gift, bequest or adoption, so that a person who took by devise would be just as much a transferee as a person who has taken by sale.

He referred also, as Mr. Stuart had done to the language of the correspondence between the Chief Commissioner of Oudh and the Government of India for the purpose of interpreting the meaning of this clause, and he was led by this language as well as by the language of the sanad to the conclusion that "successors" must mean only persons who take on an intestacy. So far as the language of this correspondence is concerned, there is perhaps a good deal to be said on both sides but viewing it generally it appears to me that it supports the conclusion arrived at by Pandit Kanhaiya Lal rather than the one which found favour with Mr. Stuart. It can hardly be doubted both in view of the language of the correspondence just referred to and of the language of the sanad itself, that it was the intention of the Government to confer upon the talukdars to whom this sanad was given the fullest power of alienation. In the first place we have this power conferred by the words used in the first clause of the sanad :

"I... confer on you the full proprietary right, title and possession of the estate of..."

In the penultimate clause of the sanad we have a similar declaration made in the following words :

"But you and all your successors shall have full power to alienate the estate either in whole or in part by sale, mortgage, gift, bequest or adoption to whomsoever you please."

Particular stress should, I think, be laid upon the word "alienate" in the clause just referred to. In the setting in which it is used the word "alienate" appears to me to point to the disposal of property in favour of an alien or stranger, that is to say, a person outside the family. The preceding words of the clause lay down the rule relating to succession. The estate is to descend

to the nearest male heir according to the rule of primogeniture. Then follow the words I have just quoted, conferring the fullest possible powers of alienation. It appears to me therefore that the intention to be gathered from the language of the clause is that the rule of succession by primogeniture is to govern the devolution of the property so long as it continues in the family of the talukdar. But if the talukdar chooses to exercise the ample powers of alienation conferred upon him by the succeeding words, then the rule of succession by primogeniture is to cease to apply, the reason being that the property has passed to a stranger, that is, a person outside the talukdar's family. In this connexion I might refer to a passage in a judgment of the Judicial Committee in the case of *Balraj Kunwar v. Jagatpal Singh* (4). In the course of their judgment their Lordships made certain observations regarding the interpretation of Ss. 14 and 15 of the Act. Finally in dealing with the meaning which ought to be put upon the terms of S. 22 of the Act they observe at the bottom of p. 405 of the report as follows:

"But if the prescribed line of succession is broken by a transfer or bequest of the entailed estate to a person outside the prescribed line, it seems not unreasonable that the letter of the entail such as it is should no longer apply to the estate."

These words appear to me to entirely support the interpretation we place upon the language of the last clause but one of the sanad. The learned counsel for the plaintiff-respondent in his argument regarding the meaning of the word "successors," after contending that the expression referred to one who takes after death and not by transfer inter vivos, stated that the rule would apply only where the devisee "takes the place of the talukdar." After referring to the case of a bequest in favour of a village menial, the learned counsel admitted that the menial would not be treated as a successor because he does not or was not "intended to take the estate." I find it difficult to follow this argument because on the terms of the sanad what the talukdar is empowered to alienate is his "estate" either in whole or in part. The menial would I think under a bequest take the estate or whatever

part of it was bequeathed to him by the talukdar. The learned counsel referred to the cases in which talukdars were called upon to declare their successors and probably the meaning of the argument is that only those persons who take by will can be deemed to be "successors" within the meaning of the sanad in whose cases the talukdar has expressed some intention that they should in some way or other be invested with the status which he enjoyed himself, namely, the status of a talukdar.

But status in this sense is the creature of the law and it would not be possible for a talukdar merely by expressing an intention to that effect in a will to confer upon his devisee a status which the law does not sanction. After a careful consideration of the language of the sanad it seems to me to be impossible to arrive at any other conclusion than that the word "successors" must mean persons who take as heirs on intestacy. The distinction drawn is between such persons and other persons who have taken by any of the various forms of transfer referred to in the clause; any other method of division or classification must lead to difficulty. Even if it could be assumed for the sake of argument that "successors" in this clause includes a person who takes under a will, I fail to see how Dan Bahadur Pal Singh could be a "successor" according to his interpretation, when S. 15 of the Act clearly lays down that Dan Bahadur Pal Singh must be taken to have "bought" the estate; in other words Dan Bahadur Pal Singh is to be deemed to have taken by a transfer made inter vivos. I am satisfied therefore that the rule of primogeniture cannot be applied for the purpose of ascertaining the person who is entitled to the estate left by Dan Bahadur Pal Singh.

The next matter to be considered is the document which was put forward by defendant 1, Adya Bakhsh Singh, as a will alleged to have been written by Dan Bahadur Pal Singh on 22nd November 1899. The story of defendant 1 with regard to this part of the case may be summarized as follows: It appears that for some years prior to the year 1899 a newspaper used to be published in Lucknow which was called the "Akhbar Anjuman Hind." This paper was edited by a man named Bishun Lal

and was under the patronage of the British Indian Association (Anjuman Hind), which is recognized, as the official body representing the talukdars of Oudh. It is proved that the brother of this man Bishun Lal, one Kishun Lal, was employed in the office of the British Indian Association as a clerk (sarishtadar). In the month of November 1899 an advertisement appeared in this paper announcing the intention of Kishun Lal to prepare a compilation showing the family history of the talukdars of Oudh. There had it seems been a previous publication of this kind known by the name of Manual of Oudh Titles. Kishun Lal announced that the book he intended to publish was to be an improved edition of this Manual of Oudh Titles and was to contain fuller and more accurate information. It was also announced that this publication was being made with the approval of His Honour the Lieutenant Governor. A copy of the advertisement has been filed in the case and is marked defendant 1's Ex. 4. The editor invited the talukdars to apply him with particulars of their family history and also to declare in their narrative the names of the persons who were to succeed them in possession of their estates.

It is said that this advertisement having attracted the attention of Dan Bahadur Pal Singh, he gave orders for the preparation of the history of his own taluka. A document containing the relevant particulars was prepared and was sent to Kishun Lal, and it is admitted that shortly after this, that is to say, about the beginning of the year 1900, the book was prepared and published. A copy of it is on the record and is referred to as Ex. D-3 of defendant 1. The story goes that at the time when this narrative was prepared for the purpose of publication a copy of it was made under the direction of Dan Bahadur Pal Singh and was kept along with the other papers in Dan Bahadur Pal Singh's office. It is this copy marked Ex. D 1 which is put forward in proof of the will relied upon by Adya Bakhsh Singh. The original narrative as supplied to Kishun Lal was called for, but the evidence shows that it was destroyed some time after the book was published in the year 1900. Adya Bakhsh Singh therefore relies upon this document,

Ex. D-1, as secondary evidence of the document which was supplied for the purpose of publication and we have now to examine the evidence which was put forward on behalf of defendant 1 in order to prove that such a document was as a matter of fact prepared at the instance of Dan Bahadur Pal Singh. (The learned Judicial Commissioner, after discussing the evidence, held that Ex. D-1 fulfilled the conditions of S. 63, Cls. 3 and 5 of the Evidence Act—Ed.)

The next matter to be dealt with is whether or not this document, which is found to be a genuine document, can be treated as the will of Dan Bahadur Pal Singh. On this part of the case the learned Subordinate Judge was of opinion that the document could not be treated as a will. He was led to this conclusion by finding, as he says, that there was no evidence worth the name that Dan Bahadur Pal Singh intended that the document should take effect as a will. Before commencing my examination of this question it is necessary to refer to certain other evidence in the case which has to my mind a double bearing. This evidence the substance of which I shall presently mention, renders probable in the first place the fact that Dan Bahadur Pal did prepare a narrative corresponding to what is to be found in Ex. D-1 and might have been used in support of the conclusion already arrived at touching the genuineness of Ex. D-1. I have not thought it necessary to refer to it in this connexion, for the direct evidence which has already been discussed appears to me to be sufficient to justify the opinion which has been formed. The second bearing of the evidence is a matter of serious importance in considering the interpretation which is to be put upon this document. There is a good deal of oral evidence in the case, which establishes beyond all doubt that Dan Bahadur Pal Singh was much attached to the boy Adya Bakhsh Singh and that he treated him in all respects as his own child. The evidence on this point is not confined to the statements of witnesses who were examined in the interests of the defence. There is abundant evidence in the shape of admissions made by the plaintiff's own witnesses to the effect that Dan Bahadur Pal Singh treated Adya Bakhsh Singh as his own son. It

has been conceded by one of the learned counsel who has argued the case on behalf of the respondents that this evidence relating to treatment must be accepted as correct, although of course it is not admitted that the statements of all the witnesses who deposed to this treatment are true. We need not, I think, concern ourselves with the statements of many of the witnesses who deposed to the relations between Dan Bahadur Pal Singh and Adya Bakhsh Singh.

It will be sufficient, I think, to mention the evidence of four witnesses, namely, the Hon'ble Mr. Baillie, Mr. R. L. H. Clarke, Mr. E. P. Fawcett and Assistant Surgeon Sarju Kumar Mukerji. From the statements of these witnesses whose testimony cannot be impeached, it is clear that Dan Bahadur Pal Singh used to take Adya Bakhsh Singh about with him, used to introduce him to officials and used to treat him in every way as the person who was marked out as his successor in the possession of the Dandi Kanch taluka. Mr. Baillie (now Sir Duncan Baillie), Mr. Clarke and Mr. Fawcett were all at one time or another employed in the Partabgarh District and they all had opportunities of meeting Dan Bahadur Pal Singh; each of them has given expression to his opinion based upon observation of the relation between Dan Bahadur Pal Singh and defendant 1, and they all say that they understood from the treatment of the boy by Dan Bahadur Pal Singh that Dan Bahadur Pal Singh intended Adya Bakhsh Singh to have the estate after his death. The evidence of Assistant Surgeon Sarju Kumar Mukerji is of special importance in this connexion, for it is clear that he was on terms of greater intimacy with Dan Bahadur Pal Singh than any of the other witnesses just mentioned. Sarju Kumar swears that he was medical attendant to Dan Bahadur Pal Singh for many years, that he had frequent opportunities of seeing him and that even after he had left the Partabgarh District he was called in on more than one occasion to give Dan Bahadur Pal Singh medical advice. In the course of his deposition Babu Sarju Kumar made the following statement:

"He (that is, Dan Bahadur Pal Singh) had the boy Lallan at his house who used to be always with him. I knew him to be his son at

first (that is, I supposed him to be his son at first), but subsequently I came to learn that he was his daughter's son and heir-apparent to his gaddi and that his name was Adya Bakhsh Singh. He used to be very affectionate to him (Adya Bakhsh Singh) and he frequently in the course of conversation used to tell me that he had no one else but Lallan as his janashin (that is successor). On one occasion he also told me that he had sent a communication to the British Indian Association at Lucknow to say that Lallan was his heir and successor to the taluka."

Dr. Mukerji's evidence is the strongest possible evidence there could be regarding the treatment which Dan Bahadur Pal Singh exhibited towards Adya Bakhsh Singh, and we think, that the statements regarding the position which Dan Bahadur Pal Singh intended Adya Bakhsh Singh to occupy after his death are admissible in evidence under the provisions of S. 8, Evidence Act. These statements are statements accompanying and explaining the acts of Dan Bahadur Pal Singh with reference to Adya Bakhsh Singh and they seem therefore to fall within the definition of the word "conduct" as used in Expl. 1, S. 8, Evidence Act. If the statements which are proved by the testimony of Dr. Mukerji are, as we think, admissible in evidence, then it might well be argued that the case of Adya Bakhsh Singh was established independently of the document Ex. D-1; but we prefer to rely upon this gentleman's evidence more for the purpose of showing the disposition of Dan Bahadur Pal Singh towards Adya Bakhsh Singh and for the purpose of interpreting in that light the meaning which should be placed upon the language of the document Ex. D-1. We have it then that the counsel for the respondent is not in a position to explain away all this evidence regarding treatment. But an ingenious attempt has been made by him to put another complexion upon it.

He refers to Cl. 4, S. 21, Oudh Estates Act (1 of 1869), a clause which, as is now well known, was introduced into the Act at the express instance of Raja Man Singh, the former talukdar of the Ajudhia Estate. This clause places the daughter's son of a talukdar who has been treated in all respects as his own son in a very prominent position in the line of inheritance. It is said that all this treatment which was meted out to Adya Bakhsh Singh by Dan Bahadur Pal Singh was adopted with the express purpose of placing Adya Bakhsh Singh in

the line of succession. In other words it is argued that it was Dan Bahadur Pal Singh's intention that in case he died without issue, Adya Bakhsh Singh was to succeed to the estate under the provisions of Cl. 4, S. 22 of the Act. It is argued again that for this reason Dan Bahadur Pal Singh never entertained any notion of making a will in favour of Adya Bakhsh Singh, being in the belief that Adya Bakhsh Singh would succeed him under the provisions of the Act. It is pointed out that as Dan Bahadur Pal Singh himself had succeeded under a will executed in his favour by his father-in-law Sripat Singh he would have been alive to the importance of executing a formal testamentary document in case he desired Adya Bakhsh Singh to take the estate as his devisee. Dan Bahadur Pal Singh, it is said, did not succeed to the taluka after Sripat Singh's death without a great deal of opposition on the part of Sripat Singh's own relations and so it is argued that he would at least have taken the precaution to execute a formal will so as to secure the position of Adya Bakhsh Singh.

Of course if Dan Bahadur Pal Singh did entertain the notion that succession to the estate after his death would be governed by the rules laid down in S. 22, Act 1 of 1869, he was labouring under a mistake of law. Although he had taken as legatee of Babu Sripat Singh, he was not a legatee within the meaning of that expression as defined in S. 2 of the Act, for the will which was executed in his favour had taken effect long before Act 1 of 1869 came into force. Can it be maintained therefore that because Dan Bahadur Pal Singh had this erroneous impression, any declarations of his intention regarding the succession to his estate contained in the document Ex. D-1 are to go for nothing merely because his conception of his own legal status was a wrong one? Is the document Ex. D-1 not to be given effect to merely because it may be said that it was only a step in a course of treatment, the object of which was to secure succession to Adya Bakhsh Singh? We think an argument of this kind cannot be allowed to prevail. We ought to give full legal effect if we can to any expressions of intention to be found in the document. It is well understood that in the case of a testa-

mentary disposition made by a Hindu to which the rules of the ordinary Hindu law apply, there is no need to establish the execution of any document of a formal nature. It is hardly necessary to refer to the numerous cases which were cited before us in this connexion. It has been pointed out to us that a statement made before a revenue official, an unsigned will, a draft will, a petition to a revenue Court, an entry in a wajibulara, a statement contained in a power of attorney and other statements of like character have been treated by the Courts as testamentary documents in the case of a Hindu. There has been more than one case from Oudh in which it has been necessary to consider the legal effect of documents containing expressions of the wishes of talukdars in the matter of succession to their estate. I would refer here to a well-known case from Oudh: *Harpershad v. Shree Dyal* (5), which was decided by their Lordships of the Privy Council in the year 1870. Their Lordships there, in referring to certain documents which were written by Raja Gouri Shankar, agreed with what was said by the Judicial Commissioner who delivered the judgment of this Court. The following dictum of the Judicial Commissioner was mentioned with approval by their Lordships of the Privy Council of the Judicial Committee:

"In ordinary cases this could hardly be construed as a will for there is no direct allusion to the death of the executor nor can it be said that there is a distinct direction as to the devolution of his property after his death. But in Oudh it is a matter of notoriety that the letters to which these documents are answers were expressly intended to elicit and register the wishes of each talukdar as to the descent of his landed estate after his death, and the replies are to this day spoken of by talukdars as their will when no other has been made. Its force is immaterial as it was made prior to the passing of Act I of 1869, and the power of Hindus to make even non-occupatory wills has been decided in repeated judgments submitted by the Lords of the Privy Council. I find that this document correctly describes the intention of the Raja in respect of the devolution of his taluka after his death and that it is correctly described as a will."

The Judicial Commissioner was, of course, here referring to the instances in which talukdars, in answer to inquiries which were made by District Officers in Oudh under the direction of the Chief Commissioner, had sent in letters describing the manner in which they desired their estates to descend after their

death. There can be no reason founded upon principle for drawing a distinction between such document and the document which we have got to consider in the present instance. Of course it may be justly observed that a letter sent by a talukdar in reply to an official inquiry would be treated as a more solemn and formal document than one sent in response to an invitation such as was held out to Dan Bahadur Pal Singh in the present case. At the same time we think it may fairly be argued that there was a certain amount of analogy between the situation in which Dan Bahadur Pal Singh found himself at the end of 1899 and that of talukdars who years before had been invited by the Deputy Commissioners of their districts to declare their intentions as to the succession to their estates. The invitation to Dan Bahadur Pal Singh to give the history of his estate and to mention the name of his successor was contained in what may be described as the official organ of the British Indian Association of which Dan Bahadur Pal Singh as a talukdar was a member. It was also stated in the advertisement containing the invitation that the preparation of this manual of history was being undertaken with the sanction of the Lieutenant-Governor of the Provinces. Kishun Lal in his deposition has stated that before the work was undertaken he had sent a letter to the Lieutenant Governor in the name of his brother Bishun Lal asking for permission to publish a Manual of Titles in Oudh, and that such permission was accorded to him.

I have no reason to suppose that this statement of Kishun Lal is in any way contrary to the truth. It may easily be understood then that when Dan Bahadur Pal Singh's attention was drawn to this advertisement, as it undoubtedly was, he was probably under the impression that the declaration which he was being called upon to make was more or less a declaration which was being demanded under official authority and was intended to be given publicity to in a book which was being compiled under the patronage of the official body representing the talukdars of Oudh. It appears to me, therefore, that we may well treat this document as standing on a similar footing to those other documents which have been referred to and which in numerous

instances have been treated as wills. It may be, as argued, that at the time he ordered the preparation of this narrative Dan Bahadur Pal Singh may not have understood that he was making a will in the strict sense of the term. The fact, however, remains that we have abundant proof of Dan Bahadur Pal Singh's intention that Adya Bakhsh Singh should succeed him in the taluka. The way in which he treated Adya Bakhsh Singh is not susceptible of any other interpretation.

When we find, therefore, in this document, prepared in the circumstances just mentioned, that Dan Bahadur Pal Singh declared that his successor was Adya Bakhsh Singh, and that no one, but Adya Bakhsh Singh was to take the estate, we must, I think, come to the conclusion that this document can properly be relied on as a legal declaration of Dan Bahadur Pal Singh's intention with respect to his property which he desired to be carried into effect after his death. The document contains a reference to the estate and the necessary conclusion is that it was this property which Dan Bahadur Pal Singh desired to pass to Adya Bakhsh Singh after his death. My finding therefore on this part of the case is that the document Ex. D-1 is a genuine document and that it constitutes a valid and sufficient proof of the fact that a will was made by Dan Bahadur Pal Singh according to which Adya Bakhsh Singh was entitled at his death to the taluka of Dandi Kanch. (The learned Judicial Commissioner after discussing the evidence on the question of custom found that the custom set up by the plaintiff was not established.—*Ed.*)

The only other matter which it is necessary to deal with is the question of the various items of immovable property described in Lists B and C attached to the plaint. These items were alleged by the plaintiff to constitute accretions or accessions to the taluka. The case for the defence was that these properties were non-talukdari property. No evidence was given by either party to the manner in which these various items of property came to be acquired. As regards List B it is to be noted that the claim to item 8, a house situated in Mac-Andrewganj, was abandoned. As regards

the other items it is admitted that with one exception (item 5) they all consist of small shares or portions of land comprised in villages belonging to the taluka. It may fairly be assumed that the acquisition of these fragments was made with the intention that they should become incorporated in the estate and we think the proper finding is that all the items in List B, except item 5, are to be deemed a part of the Dandi Kanch taluka. Similarly with regard to the houses mentioned in List C: so far as we can ascertain these buildings all appertain to the estate. They are either residential houses or buildings used for purposes of the estate office. We have no doubt that these items also should be deemed to be talukdari property. As regards item 5 in List B in the absence of any evidence to the contrary we must hold that it does not constitute any part of the estate.

To sum up therefore my findings are: (1) that the succession to the Dandi Kanch taluka is not regulated either by Act 1 of 1869 or by the terms of the sanad, but is regulated by the ordinary Hindu law; (2) that no custom affecting the rules of the Hindu law and excluding the daughter and her sons from inheritance has been proved; (3) that Dan Bahadur Pal Singh did make a will on 22nd November 1899 by virtue of which the estate has come to the defendant Adya Bakhsh Singh as devisee; and (4) that the plaintiff is entitled to no relief declaratory or otherwise. On these findings I am of opinion that the appeals should be allowed, the decree of the Subordinate Judge set aside and the suit of the plaintiffs dismissed with one set of costs to the answering defendants in the Court below. The plaintiffs-respondents will pay the appellants' costs of both the appeals in this Court.

Kanhaiya Lal, A. J. C.—I generally agree with the conclusions at which my learned colleague has arrived, except in regard to the effect of S. 15, Act 1 of 1869 on the rule of succession laid down in the sanad, about which I entertain some doubt. The dispute in these appeals relates to the Dandi Kanch estate, which belonged to Sripat Singh, a Som-bansi Thakur, whose name was entered at No. 260 in List No. 1 and at No. 120 in List No. 2, appended to Act 1 of 1869. Sripat Singh died on 17th November

1861 before Act 1 of 1869 was passed. On 11th November 1861 Sripat Singh made an application in response to a circular issued by the Chief Commissioner of Oudh on 18th January 1860, stating that as he had till then no son, he desired that if no son was born to him, Dan Bahadur Pal Singh, his son-in-law, should succeed to his estate after his death. Dan Bahadur Pal Singh, accordingly succeeded to his estate on his death and was the proprietor of the estate when Act 1 of 1869 came into force. His name was not however entered in the lists appended to that Act, and he was not therefore a talukdar or grantee or the heir or legatee of such a talukdar or grantee within the meaning of S. 15 or S. 22, Act 1 of 1869, as it stood before it was amended by U. P. Act 3 of 1910. S. 21 of the latter Act gave the amendments made by it in the definitions of the words "heir" and "legatee," contained in Act 1 of 1869, a retrospective operation, provided such retrospective operation did not have the effect of divesting an estate or part of an estate from a person, in whom it had already vested before the amending Act was passed. As the estate in the present instance had already been vested in Dan Bahadur Pal Singh, and the effect of applying the amended definitions would have been to divest him and his successors, it is common ground that the special rules of succession laid down in Act 1 of 1869 do not apply to the estate in suit.

Dan Bahadur Pal Singh died on 14th March 1906, leaving a widow Mt. Sukhpal Kuar, a daughter Mt. Balraj Kuar, and a step-brother by the same father, Mahadeo Pal Singh, who is the plaintiff in the suit from which these appeals have arisen. Mt. Balraj Kuar is married to Sant Bakhsh Singh, by whom she has a son, Adya Bakhsh Singh. Mahadeo Pal Singh claimed the estate to the exclusion of Adya Bakhsh Singh and the widow and daughter of Dan Bahadur Pal Singh. Adya Bakhsh Singh claimed the estate under a bequest said to have been made by Dan Bahadur Pal Singh, his maternal grandfather. Mt. Sukhpal Kuar and Mt. Balraj Kuar claimed their respective interests under the Hindu law. It is not here disputed that Sripat Singh got the estate under a primogeniture sanad, which declared that, in the event

of his dying intestate or any of his successors dying intestate, the estate shall descend to the nearest male heir according to the rule of primogeniture.

The main questions for consideration in these appeals are whether the devolution of the estate in the hands of Dan Bahadur Pal Singh was governed by the rule of succession laid down in the sanad or by the personal law applicable to the religion or tribe to which he belonged, whether Dan Bahadur Pal Singh bequeathed the estate in his lifetime to Adya Bakhsh Singh and whether Mt. Balraj Kuar and her son, Adya Bakhsh Singh, were excluded from inheritance by the sanad or by a custom prevailing in the family of Dan Bahadur Pal Singh. It is conceded that if the devolution is governed by the personal law, Mt. Sukhpal Kuar would be entitled to the estate and would be succeeded on her death by Mt. Balraj Kuar and her son, Adya Bakhsh Singh, in succession, if they survived her, provided they were not excluded by family custom. It is also conceded that if the devolution is governed by the rule of succession laid down in the sanad, Mt. Sukhpal Kuar and Mt. Balraj Kuar would be excluded from succession, but it is disputed whether Adya Bakhsh Singh, as the solitary male heir under the personal law, would be so excluded.

In 1899 Kishun Lal, a clerk in the office of the British Indian Association, Lucknow, issued a notice, which was published in the British Indian Association Gazette, called the Akhbar-i-Anjuman Hind, inviting the talukdars to supply him with particulars of their family estates and also to declare the names of the persons who were to succeed them in possession of their estates, with a view to the publication of a consolidated history of the Oudh talukdars. In response to that notice a document was sent by Dan Bahadur Pal Singh to Kishun Lal, containing necessary particulars and stating that he had no children except one daughter, who had a son, named Lal Adya Bakhsh Singh, that Adya Bakhsh Singh was his heir and successor, and that no other person than that boy was to be his heir under any law. He kept a copy of this document with himself. Kishun Lal published the document in his book, altering the narrative from the first person to the

third person. The evidence, adduced on the point, has been discussed in detail by my learned colleague and need not be recapitulated here. I agree with him that the narrative, as published by Kishun Lal and contained in the copy, found among the papers of Dan Bahadur Pal Singh, accurately represents the wishes communicated by Dan Bahadur Pal Singh, as to the person whom he wanted to succeed him on his death, and that it constitutes a valid testamentary disposition, which the legatee is entitled to enforce. Under the Hindu law, a will may be oral, and any statement made by a person expressing or manifesting an intention as to the posthumous disposition of his property can operate as his will. As pointed out in *Maulvie Mohamed Shumsool Hooda v. Sherukram* (6), *Kalian Singh v. Sanwal Singh* (7), *Mathura Das v. Bhikhan Mal* (8) and *Janki v. Kallu Mal* (9), petitions addressed to officials, and papers drawn up in accordance with the intentions of a testator, though not signed by him, might constitute a valid testamentary disposition of property under the Hindu law. Replies to official inquiries have been held by their Lordships of the Privy Council in *Harpershad v. Sheo Dyal* (5), *Haider Ali v. Tasadduk Rasul Khan* (10) and *Balbhaddar Singh v. Sheo Narain Singh* (11) to operate as wills. Testamentary statements made in *wajihul arz* or powers-of-attorney have similarly been held to operate as wills. Assuming however that the statement made in the aforesaid document does not operate as a valid testamentary disposition, the question arises whether the devolution of the estate in the hands of Dan Bahadur Pal Singh was governed by the personal law or by the rule of succession laid down in the sanad, as modifying that law. S. 15, Act 1 of 1869, as it existed before its amendment by U. P. Act 3 of 1910, lays down that if any talukdar or grantee shall heretofore have transferred or bequeathed to any person not being a talukdar or grantee the whole or any portion of his estate, and such person would not have succeeded according to the provisions of that Act to the

estate or to a portion thereof, if the transferor or testator had died without having made the transfer and intestate, the transfer of and succession to the property, so transferred or bequeathed, shall be regulated by the rules which would have governed the transfer of, and succession to, such property, if the transferee or legatee had bought the same from a person, not being a talukdar or grantee. The bequest in favour of Dan Bahadur Pal Singh in the present case was made and came into operation before the Act was passed, and as Dan Bahadur Pal Singh was not a person who would have succeeded to the estate according to the provisions of the Act, but for that bequest, the effect of S. 15 is to render the rules as to transfer and succession laid down in the Act inapplicable to the estate in his hands. It is contended that the effect of S. 15 is to render not only the rules of transfer and succession laid down in the Act, but also the rule of succession, laid down in the sanad, inapplicable to the estate in the hands of such a legatee. But it seems to me that the intention of this section was to exclude the estate in such a contingency from the disability imposed by the Act on talukdars and grantees in the matters of transfer and succession and not from any rules which might be applicable independently of the Act.

The rules which would have governed the transfer of or succession to such estates before Act 1 of 1869 was passed might have been either the personal law, as modified by custom, or the rules of succession as laid down in the sanad to which legal effect was given by the Crown Grants Act (15 of 1895). That Act provided that whereas doubts had arisen as to the power of the Crown to impose limitations and restrictions upon grants and other transfers of land made by it and it was expedient to remove those doubts, it was enacted that all provisions, restrictions, and limitations over contained in any such grant or transfer shall be valid, and take effect according to their tenor, any rule of law, statute or enactment of the legislature to the contrary notwithstanding. The rule of succession laid down in the sanad, being a condition of the grant, thus superseded or modified the personal law, so far as it went, and, if the rules for transfer and succession, laid

6. (1874-75) 2 I A 7=22 W R 409 (P C).

7. (1885) 7 All 163.

8. (1897) 12 All 16.

9. (1909) 31 All 236=2 I C 213.

10. (1891) 18 Cal 1=17 I A 82 (P C).

11. (1900) 27 Cal 344=26 I A 194 (P C).

down in Act 1 of 1869, could not apply to the estate by the reason of the bequest, made by Sripat Singh in favour of Dan Bahadur Pal Singh, the transfer of and succession to the estate in the hands of Dan Bahadur Pal Singh would be governed by the rules which would have governed the transfer of or succession to the estate if the transferee or legatee had bought the same from a person not being a talukdar or grantee, that is, as if the rules relating to transfer and succession in the matter of talukdars and grantees had not been applicable. Those rules would have been, in the case of an estate granted by means of a primogeniture sanad, the rules laid down in the sanad itself, which was the root of the title, and subject to those rules, the ordinary law of the religion and tribe applicable to the persons to whom the sanad was granted. In other words, to use the language of Lord Shaw in *Debi Bakhsh Singh v. Chandrabhan Singh* (1), the section prescribes nothing else than the relegation of the transferee or legatee in the matter of transfer and succession to the situation in which he would have been found apart from the statute. The purchaser of an ordinary estate is governed in the matter of succession by his own personal law and not by that applicable to the transferor, and all that S. 15 seems to me to lay down is that in the contingency there contemplated, a law relating to transfer and succession shall be the law applicable to the transferee or legatee, and the estate shall be free from the fetters imposed by Act 1 of 1869 on talukdars and grantees in regard to those matters.

It does not seem to me to be probable that it was intended by S. 15 to cut fetters not imposed by the Act or fetters which existed independently of it; and the statement that the transferee or legatee in such a case would be deemed to have bought from a person, not being a talukdar or grantee, merely implies a release for certain purposes from the clutches of the Act and not from those imposed by any other law. The object of the section is not to wipe out the sanad, but to wipe out the disabilities imposed in certain matters on the sanad-holders by Act 1 of 1869. Had the intention been to relegate the transferee or legatee in the contingency mentioned to the situation apart from the

statute and apart from the sanad, the section would have said so in clearer and more unambiguous terms, and the reference in S. 11 of the Act to talukdars and grantees being competent to transfer the whole or any portion of the estate, subject to all the conditions under which the estate was conferred by the Government, would have been out of place. Where the special rules of succession laid down in Act 1 of 1869 apply, such conditions would no doubt be, as observed by their Lordships of the Privy Council in *Brj Lall Bahadur Singh v. Ramee Janki Koor* (12), only those relating to loyalty, coal services and the like, for the rule of succession laid down in the sanad has been superseded thereby. But where the special rules of succession, laid down in S. 22, do not apply, as in this case, all the conditions laid down in the sanad continue in force, so long as the estate remains in the hands of the grantee or his "successors." The matter is not free from difficulty, and the language used in S. 15 is far from clear.

But, on a careful consideration of the provisions of the Act, I am inclined to think that S. 15 operates to take an estate for purposes of transfer and succession in the contingency therein mentioned outside the Act and relegates the transferee and legatee to the situation in which he would have been, if those rules had not been enacted or had not been applicable to the estate. In *Ghulam Abbas Khan v. Bibi Ummatul Fatima* (2) the rule of succession laid down in the sanad was not deemed to be excluded under similar circumstances. In *Sital Singh v. Sital Bakhsh Singh* (13) the circumstances were somewhat different, for the amendment made by U. P. Act 3 of 1910 was held in that case to be capable of retrospective operation without disturbing any vested rights. The former case was similar to the present in so far as the estate, with which it was concerned, did not come under the Act for the purpose of succession and had therefore continued to be governed by the sanad, while in the latter case the estate was governed by the Act for all purposes and the main question was whether in view of the Amending Act 3 of 1910 the sanad applied when the

12. (1877-78) 5 I A 1=1 C L R 318 (P C)

13. (1917) 40 I C 469.

estate went out of it for purpose of succession under S. 15.

The application of the rule of succession laid down in the sanad would not however make any difference in this case, because, as my learned colleague had pointed out, the rule of succession laid down therein is confined in its operation to the grantees and their successors, implying thereby their successors by inheritance. The official correspondence, which preceded or accompanied the grant of primogeniture sanads, was summarized by me in my judgment in *Gulam Abbas Khan v. Bibi Ummatul Fatima* (2), where the whole matter was discussed in detail. It seems to me that it was not the intention of the sanad to make the rule of primogeniture applicable to persons, to whom the estate might pass, outside the line of inheritance laid down therein by any of the methods mentioned in the sanad; and as held in *Sital Singh v. Sitala Bakhsh Singh* (13) that rule would not apply to such legatees or transferees. On the questions of custom and accretion, I have nothing to add to what my learned colleague has said. I concur therefore in allowing the appeals, setting aside the decree of the learned Subordinate Judge and dismissing the suit, with one set of costs to the answering defendants in the Court below. The plaintiffs-respondents will pay the appellants' costs of both the appeals in this Court.

B.V./R.K. *Appeals allowed.*

A. I. R. 1918 Oudh 142

LINDSAY, J. C.

Gur Bakhsh Tewari — Accused — Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 2 of 1918, Decided on 14th March 1918, against order of Dist. Magistrate, Gonda, D/- 18th October 1917.

Criminal P. C. (1898), Ss. 537 and 540 — Prosecution evidence recorded after defence evidence closed with full opportunity to cross-examine—High Court should not interfere.

In a criminal trial after the evidence for the defence had closed, the Magistrate examined certain witnesses for the prosecution giving at the same time full liberty to the accused to cross-examine them:

Held: that in revision it was not proper for the High Court, having regard to Ss. 537 and 540, Criminal P. C., to interfere with the Magistrate's order on this ground. [P 142 C 2]

S. P. Kain—for Applicant.

Government Pleader—for the Crown.

Judgment.—This application has already been before me, and on the last occasion on which the learned counsel was heard on behalf of the applicant, I adjourned the case for the purpose of inquiring into certain circumstances which were brought to my notice in the course of argument. It was complained on behalf of the applicant that witnesses for the prosecution were allowed to be called after the defence evidence had closed. The fact is apparent from the order of the Magistrate who tried the case. I thought it desirable however to instruct the Government Pleader to ascertain, if he could, the reasons which led to this somewhat unusual procedure on the part of the Magistrate. The Magistrate has sent up an explanation disclosing the circumstances in which he thought it necessary to allow this further evidence to be called, and he points out that the accused had been given a full opportunity of cross-examining the witnesses who were produced at this late stage. He refers in his explanation to a ruling of the Calcutta High Court which is reported as *Queen v. Felinos* (1). I have also been referred to a somewhat similar case which is referred to as *Ananda Chunder Singh v. Basu Mudh* (2). There it was held that a Magistrate was strictly within his right under S. 540, Criminal P. C., in receiving fresh evidence, after evidence on both sides had been taken and the case had been adjourned for judgment. As their Lordships pointed out in that case, S. 540, Criminal P. C., gives very wide powers. In any case it seems to me that under the provisions of S. 537 it is not proper for me to interfere with the order on this ground, as I am unable to hold that the accused was in any way prejudiced.

As regards the rest of the case, there appears to be plenty of evidence upon the record upon which it was open to the Courts below to find that the applicant was liable to be bound over to give security. The application is dismissed.

B.V. R.K. *Application dismissed.*

1. (1873) 20 W R Cr 61=12 B L R 242.
2. (1897) 24 Cal 167.

A. I. R. 1918 Oudh 143

STUART AND KANHAIYA LAL, A. J. CS.
Bharath Singh and others—Plaintiffs
 —Appellants.

v.

Prag Singh and others—Defendants—
 Respondents.

First Appeal No. 117 of 1916, Decided
 on 13th September 1917, against decree
 of Sub-Judge, Hardoi, D/- 16th June
 1916.

**Hindu Law — Debts — Father — Decree
 against — Son's share in property is not
 liable to sale in enforcement of pious obliga-
 tion.**

During the lifetime of a Hindu father against
 whom a personal decree has been obtained, the
 creditor cannot bring to sale the shares of the
 sons in enforcement of the pious obligation of
 the sons to pay a debt due by their father if not
 tainted with immorality. [P 145 C 1, 2]

Basdeo Lal and M. Muzoffar Hussain
 —for Appellants.

Gokaran Nath Misra — for Respon-
 dents.

Judgment. — This appeal arises out of
 a suit brought by the sons, brothers and
 nephews of Prag Singh for a declaration
 that the property in dispute was not
 liable to attachment and sale in execu-
 tion of a decree, obtained by defendants
 2 and 3 against Prag Singh. The alle-
 gation of the plaintiffs was that they
 were living jointly with Prag Singh, that
 the property in dispute was their joint
 ancestral property in which Prag Singh
 had no definite share, and that the debt
 in question was incurred by Prag Singh
 for improper personal purposes. It was
 admitted in the Court below that the
 plaintiffs were living jointly with Prag
 Singh.

There was no suggestion on behalf of
 defendants 2 and 3 that the debt in
 question was incurred for the family
 benefit. In fact Prag Singh had mort-
 gaged the disputed property with defen-
 dants 2 and 3 in lieu of Rs. 5,000 on
 20th March 1905. When defendants 2
 and 3 brought a suit on foot of that
 mortgage, impleading Prag Singh, his
 son, Rajendra Singh, and some other
 members of the family as parties to the
 suit, Rajendra Singh and the other mem-
 bers of the family objected that they
 were not bound by the mortgage made
 by Prag Singh, inasmuch as it was not
 made for the family benefit. The finding
 of the Court, which tried that suit, was
 that the present defendants 2 and 3 had
 failed to prove that the said mortgage

was made for the family benefit; and a
 simple decree for money was accordingly
 passed against Prag Singh alone. In
 execution of that decree, the property
 then released from the mortgage has now
 been attached to the extent of the one-
 fifth share, belonging to Prag Singh and
 his sons.

The learned Subordinate Judge dis-
 missed the claim, holding that the entire
 share of Prag Singh and his sons was
 liable to sale as the debt in question was
 not shown to have been incurred for im-
 moral or unlawful purposes. Prag Singh
 is alive, and the main question for consi-
 deration in this appeal is whether during
 his lifetime a creditor can bring to sale
 the shares of his sons in enforcement of
 the pious obligation, resting on the sons,
 to pay a debt due by their father if not
 tainted with immorality. The learned
 counsel for the defendants-respondents
 relies on the decisions of this Court in
Lal Bahadur Singh v. Matadin Singh
 (1), *Badri Pershad v. Ram Rattan* (2)
 and *Maharaj Bakhsh Singh v. Raja Ka-
 zim Hussain Khan* (3) in support of his
 contention that the pious obligation on
 the sons to pay the debts due by their
 father, if not contracted for illegal or
 immoral purposes, could be enforced in
 the lifetime of their father against the
 entire family property possessed by them
 all. That was unquestionably the law
 as understood and enforced in India till
 the recent decision of their Lordships of
 the Privy Council in *Sahu Ram Chan-
 dra v. Bhup Singh* (4), though the ori-
 ginal authorities on Hindu law were op-
 posed to that view. Manu merely says
 that a father throws his debt on his son
 and through him obtains immortality
 (Manu 9 of 107), referring possibly to
 both religious and temporal debts, but
 Vishnu is more explicit and says:

"If he who contracted the debt should die or
 become a religious ascetic, or remain abroad for
 20 years, that debt shall be discharged by his
 sons or grandsons, but not by remoter descen-
 dants against their will: Sacred Books of the
 East, Vol. 7, p. 44."

So says Narad:

"The father being dead, it is incumbent on
 the sons to pay his debt, each according to his
 share, in case they are divided in interests; or, if
 they are not divided in interests the debt must be
 discharged by that son who becomes manager of

1. (1898) 1 O C 112.

2. (1898) 1 O C 169.

3. (1901) 4 O C 178.

4. A I R 1917 P C 61=29 AII 437=39 I C 280
 =44 I A 126 (P C).

the family estate. The father, uncle, or eldest brother having gone abroad, the son is not bound to pay his debt before the lapse of 20 years: Sacred Books of the East, Vol. 33, pp. 41 and 46."

Yagnyavalkya similarly says:

"Where a debt has been incurred for the purpose of the family by undivided members, their successors should pay the same, if the head of the family be dead or gone abroad. A woman need not pay the debts of her husband or son; nor the father, those of his son; nor the husband, those of his wife, unless contracted on account of those of the family. Similarly the son shall not pay here what has been incurred by the father for wine, lust, or gambling or what remains unpaid of a fine or toll or what is idly promised. The debts incurred by the wives of herdsmen, distillers, dancers, washermen and hunters have to be paid by their husbands because their livelihood depends on the co-operation of their wives. A woman has to pay a debt agreed to or incurred by her personally or taken by her jointly with her husband, and no other. When the father is gone abroad or is dead, or is subdued by calamity, his debt shall be paid by the sons and grandsons. If unknown, it must be proved by witnesses: Yagnyavalkya, 2, 45 to 50."

Commenting on the last passage, the author of the Mitakshara observes:

"If the father dies or has gone to a remote country without paying the debt due by him or is suffering from incurable disease and the like, then the debt incurred by him on being demanded shall be paid by his sons or grandsons. They have to pay by reason of their being sons and grandsons, even if the father has left no assets. The order thereof is that in the absence of the father, the son, and in the absence of the son, the grandson has to pay it. If the sons or grandsons dispute the debt, only that much is to be paid by the sons and grandsons which the creditor establishes by means of witnesses and the like. Here it has been said 'on the father having gone abroad, etc.' The specification of time is given by Narad and may be referred to: 'Where a father is gone abroad, the son shall not pay the debt before the expiry of 20 years, so also a debt incurred by the uncle or the elder brother too.' Even if the father be dead, the debt should not be paid till the age of capacity for business is reached. When the age of capacity for business is reached, it should be paid."

The Viramitrodaya and Vyavahara Mayukha take the same view. After quoting the text of Vrihaspati:

"The sons should pay the debts of their father; as if it were their own; the debt of grandfather should be paid without interest, but the sons of grandsons need not pay."

and those of Narada and Katyayana enjoining that if the father has gone abroad, the debt should be paid after 20 years, the Vyavahara Mayukha goes on to say that the word "proshit" (gone abroad) was illustrative of one dead and that even where the father had become a religious anchorite, his debt was, as

stated by Vishnu, to be paid by his sons and grandsons (Mandlik's Vyavahara Mayukha, p. 112). It is clear therefore that so long as the father was alive or was physically capable of paying his debts, or had not gone abroad to a distant country and been absent for 20 years, it was not intended that the pious obligation to pay the debts due by the father should be enforced against his sons. Summarizing the views of the Hindu lawgivers on this point Mayne says:

"The liability of the son is stated by the old writers to arise, not only after the actual death of the father, but after his civil death, as when he has become an anchorite, or when he has been 20 years abroad, in which case his death may be presumed; or when he is wholly immersed in vice, which is explained by Jagannatha as indicating a state of combined insolvency and insouciance, in which the father, being devoted to sensual gratifications, gives up all attempts to satisfy his creditors, and sets them in defiance. And so when the father is suffering from some incurable disease, or is mad, or is extremely aged: Mayne's Hindu law, Edn. 8, p. 401."

He then goes on to observe:

"This limitation of the son's liability has, however, ceased to be of any importance, in view of the recent decisions which enable a creditor during the life of the father to enforce his claims by decree and execution against the entire family property: (Ibid., 402)."

He refers to the decisions in *Khalilul Rahman v. Gobind Pershad* (5), *Ramasami Nadan v. Ulaganatha Goundan* (6) and *Badri Prasad v. Madan Lal* (7), but they were cases of mortgages which would no longer be enforceable except in the circumstances mentioned in *Sahu Ram Chandra v. Bhup Singh* (4) and *Lachhman Prasad v. Sarnam Singh* (8). He also refers to *Ramasami Nadan v. Ulaganatha Goundan* (6) and *Govind Krishna Gujar v. Sakharan Narayan* (9), where the pious obligation of a son to pay the debt due by his father was held to exist, whether the father was dead or alive, but those decisions proceeded principally on the reasoning in *Girdharee Lal v. Kantoo Lal* (10), which was however a case where property had already passed out of the family and the rights of third

5. (1893) 20 Cal 328.

6. (1899) 22 Mad 49.

7. (1893) 15 All 75.

8. A I R 1917 P C 41=39 All 500=40 I A 284 =44 I A 163 (PC).

9. (1904) 28 Bom 383.

10. (1874) 22 W R 56=1 I A 321 (PC).

persons had been brought into existence. In *Suraj Bansi Koer v. Sheo Persad Singh* (11) their Lordships of the Privy Council took care to point out that where joint ancestral property had passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons by reason of their duty to pay their father's debts could not recover that property, unless they showed that the debts were contracted for immoral purposes and that the purchasers had notice that they were so contracted for the purchasers at an execution sale, being strangers to the suit, if they had no notice that they were so contracted were not bound to make inquiry beyond what appeared on the face of the proceedings. In *Naraini Babu v. Motlan Mohan* (12) to which the learned counsel for the plaintiffs-respondents has referred, the property had similarly passed out of the family by a sale held in execution of a decree, and the debt in satisfaction of which the sale was effected was besides found to have been a joint family debt.

Where a sale has been held and the terms of the sale justify it, the entire disposing power of the seller or of the person whose rights have been sold may be taken into consideration before the purchaser is deprived of the benefit of his purchase, but no such equity arises, where no sale has been effected or where an objection is made to an attempted sale in enforcement of a pious obligation which does not, however, exist if the father is alive and is in a position to meet his liabilities. In *Sahu Ram Chandra v. Bhup Singh* (1) their Lordships of the Privy Council remarked that too little weight was attached to the consideration that so far as the joint family estate was concerned, the law had been invoked for the protection of third parties whose rights in or with regard to it had been acquired in good faith and not for the protection of creditors. "While the father remains in life," they observed:

"the attempt to affect the sons' and grandsons' shares in the property in respect merely of their

pious obligation to pay off their father's debts, and not in respect of the debt having been truly incurred for the interest of the estate itself, which they with their father jointly own, must fail; and the simplest of all reasons may be assigned for this, namely, that before the father's death he may pay off the debt, or after his death there may be ample personal estate belonging to the father himself, out of which the debt may be discharged."

It is true that their Lordships were then dealing with the case of a mortgage, but if a mortgage cannot be justified on the ground that the debt which it represented was one, which it was the pious obligation of the sons to pay, an attempted sale in satisfaction of such a debt can be still less so. The Court below was not therefore justified in directing the sale of the entire family property for a debt for which the father alone was personally responsible.

The appeal is accordingly allowed and the claim of the plaintiffs decreed for a declaration that so long as the father is alive, nothing more than the father's personal share in the property attached will be liable to sale in execution of the decree against him. The plaintiffs will get two-thirds of their costs here and below from respondents 2 and 3, who will get one-third of their costs from the plaintiffs throughout. As the appeal has been allowed, the cross-objections filed by respondents 2 and 3 will be dismissed with costs.

H.C. R.R.

Appeal allowed.

* A. I. R. 1918 Oudh 145

LINDSAY, J. C.

Raj Bahadur Lal and others—Plaintiffs—Appellants.

v.

Bindeshri and others—Defendants—Respondents.

First Appeal No. 130 of 1916, Decided on 20th November 1917, from decree of Sub-Judge, Sultanpur, D/- 14th July 1916.

(a) *Hindu Law—Alienation—Widow—Delay in challenging alienation—Necessity will be presumed from circumstances.*

Persons holding under deeds of transfer executed by a Hindu female long before they are challenged, cannot be held to any very strict proof of legal necessity. The Court can assume its existence from circumstantial evidence.

[P 147 C 1]

(b) *Hindu Law—Alienation—Necessity—Recital in deed not essential.*

Where money is advanced for legal necessity, it is not essential that the deed evidencing the transaction should recite that fact. [P 150 C 1]

11. (1880) 5 Cal 148=6 I A 88 (PC).

12. (1896) 13 Cal 21=13 I A 1 (PC).

(c) Evidence Act (1 of 1872), S. 65—Production of original physically impossible—Certified copy is admissible.

Where a person is unable to bring the original of a document before the Court in spite of all reasonable efforts made in that direction, the Court is competent to admit secondary evidence for the purpose of having the contents of the original document proved. [P 147 C 2]

* (d) Evidence Act (1872), S. 90—Production of original impossible—Presumption under S. 90 arises even on production of certified copy.

Where the production of the original document is a physical impossibility, the Court is entitled to raise a presumption under S. 90, Evidence Act, regarding the same on the production of a certified copy. [P 148 C 1]

Haider Husain and Ganpat Sahi—for Appellants.

Mohammad Wasim for A. P. Sen and H. K. Ghosh—for Respondents.

Judgment.—This is the appeal of Raj Bahadur Lal and others, plaintiffs, who brought a suit in the Court of the Subordinate Judge of Sultanpur for the purpose of obtaining possession of certain property specified in the plaint. A large number of defendants were arrayed and the case for the plaintiffs was that these people were in possession of certain items of the property in suit under transfers made by a lady named Bishun Kuar. It seems that this property once belonged to a man named Ramgopal, who died in the year 1863. After Ramgopal died he was succeeded by his son Bindeshri Prasad, who himself died a few months afterwards. Mt. Bishun Kuar who then got possession of the property was the mother of Bindeshri Prasad and she died in the month of January 1906. The first and second plaintiffs, namely, Raj Bahadur Lal and Sampat Rai together with defendant 21, Bankey Behari Lal, are said to be the reversioners of Bindeshri Prasad, and this point is no longer in dispute. As regards Bankey Behari Lal it seems that he has disposed of his interest in the property to certain of the defendants and for this reason he was unable to join in the suit as plaintiff.

The plaintiffs alleged that Mt. Bishun Kuar had executed an invalid deed of gift in favour of Raghubar Lal who was arrayed as defendant 20 in the case, and that the other defendants had taken transfers from Raghubar Lal. Raghubar Lal having died during the pendency of the suit is now represented by one Nakhed. Plaintiff 1 also al-

leged that he was entitled as against his brothers to a jethansi share and he set up a custom which however he failed to prove. Plaintiff 3 is admittedly a transferee of a portion of the interest of plaintiff 1 and 2. It is not disputed now that the plaintiffs and defendant 21 are in fact the reversioners of Bindeshri Prasad, and I am only concerned in this appeal with the orders which the learned Subordinate Judge passed with respect to the property said to be in possession of certain of the defendants. The first case with which I have to deal is the case of one Abdul Ghafur, who is arrayed as defendant 5 in the suit. Abdul Ghafur's defence was this. He stated that originally there had been a mortgage by Ramgopal, Shitab Rai and Mahtab Rai in favour of two persons Karim Bakhsh and Sarbdawan Singh. From the pedigree which was filed it appears that these three persons, whom I have named as mortgagors, were closely related to each other and were the descendants of a common ancestor, one Dip Chand. Abdul Ghafur went on to say that at the time of the first Regular Settlement a suit for redemption of the mortgage just referred to was brought by three persons, namely Kalwant Rai who is the son of Mahtab Rai, Kailash Kuar, the widow of Shitab Rai, and Mt. Bishun Kuar, the mother of Bindeshri Prasad.

A decree for redemption was passed and it is said that in order to raise funds to satisfy this decree these three last named parties executed a mortgage in favour of the second defendant Debi Prasad for a sum of Rupees 2,389.7-6. According to the findings of the Court below this mortgage debt was distributed between the three persons who had brought the suit for redemption, and the learned Judge has found that the share of the mortgage debt owing from Mt. Bishun Kuar came to Rs. 1,101. After Bishun Kuar had made a transfer of her interest by gift to Raghubar Lal, the latter redeemed this mortgage by executing a fresh mortgage for a sum of Rs. 2,573 odd. Afterwards in a suit brought by one Malangi Khan, Debi Prasad's interest as a mortgagee was put to sale by public auction and his rights were purchased by the present defendant 3, Abdul Ghafur. The property in Abdul Ghafur's possession is

situated in a village called Kanpur. The Subordinate Judge has found that the plaintiffs are not entitled to recover possession of this particular property without paying a sum of Rs. 1,101 to defendant 5, that being the amount which, in the opinion of the learned Subordinate Judge, was incurred by way of a debt for legal necessity by Mt. Bishun Kuar.

The documentary evidence to be considered in this connexion consists particularly of two documents, Exs. E-1 and E-2. Ex. E-1 is a copy of the judgment of the Settlement Court passed in the redemption suit to which I have referred in the earlier part of the judgment. I am bound to say that this judgment leaves the matter in some doubt, for it is very difficult to extract from it when the mortgage which was being considered had been made and who were the parties who were seeking redemption. However there is certain circumstantial evidence on the record which led the Judge of the Court below to hold that the document of mortgage of which Ex. E-2 is a certified copy must have been executed by Bishun Kuar and the two others in order to satisfy the mortgage decree. Certain other evidence too has also been relied on which led the Subordinate Judge to the conclusion that the mortgage of which redemption was ordered by the Settlement Court must have been executed not by Bishun Kuar herself, but by her husband Ramgopal. I have already mentioned that Ramgopal died in the year 1863.

With regard to this portion of the case, I find myself in agreement with the opinion which is expressed by the learned Subordinate Judge. It is of course very difficult after the lapse of such a long period to establish a case of legal necessity, and I have the authority of their Lordships of the Privy Council for holding that transferees in cases like this cannot be held to any very strict proof of a legal necessity which, if ever existed, must have existed many years before the transfers are challenged.

Now it was proved before the learned Subordinate Judge that this document was executed on 15th July 1869 in favour of Debi Prasad and there was an exhibit on the record, namely, Ex. E-3, which proved that in the month of July

1869, Mt. Bishun Kuar did deposit certain money in Court in connexion with the satisfaction of the decree for redemption which had been passed on 26th November 1868. Looking to the date of the execution of Ex. E-2 and the date of this payment and also the judgment passed by the settlement officer, I think, the Subordinate Judge had sufficient justification for assuming that the making of the mortgage evidenced by Ex. E-2 was connected with the redemption proceedings in the Court of the settlement officer.

Another argument which has been relied upon by the plaintiffs-appellants here is that execution of the original document represented by Ex. E-2 was not proved. The first part of the argument is that the Court below was wrong in allowing secondary evidence to be called for the purpose of proving the contents of the original of this document. Here I think the case for the appellants cannot succeed. It was pointed out by the learned counsel for respondent 5 that his client was an auction-purchaser of the interest of Debi Prasad and that, consequently, it did not follow that all the documents relating to this mortgage transaction would necessarily be in his client's possession. It is proved that Abdul Ghafur issued summonses to three persons to produce the original of this document, Ex. E-2. One of these was Nakehd who is the representative of Raghubar Lal, another was Debi Prasad and there was also a third man whose name it is not necessary to mention. Clearly Abdul Ghafur did all he could to bring the original of this document before the Court. He was unable to do so and in the circumstances I have no doubt that Ex. E-2 was properly admitted for the purpose of proving the contents of the original.

Then it is contended that the production of a certified copy did not prove the execution of the original. With regard to this I observe that the Subordinate Judge made the presumption which is permitted by S. 90, Evidence Act, and held that he was entitled to presume that the original of Ex. E-2 was a genuine document and had been executed by the parties by whom it purported to have been executed. This question of presumption is one of some difficulty, for on the face of it, it is difficult to understand

how a presumption can be made by a Court regarding a document which is not actually before it. S. 90 lays down that where a document purporting or proved to be 30 years old is produced from any custody which the Court in a particular case considers proper, the Court may presume that the signature and every other part of such document which purports to be in the handwriting of any particular person is in that person's handwriting. How any presumption can be made from the mere production of a copy that the writing on the original is the writing of any particular person is a matter which is difficult to understand. However, there is authority for the proposition that in a case like this the Court is entitled to raise a presumption regarding the original document even if it is not produced in Court. I may refer to the ruling reported as *Khetter Chander Mookenjee v. Khetter Paul Streeter and Co* (1) which has been followed in other cases, and notably by the Allahabad High Court, in *Ishri Prasad Singh v. Lalli Jas Kunwar* (2) where however it was admitted that the question was one of some difficulty. The Bombay Court and the Madras Court have also followed the opinion of Sir Arthur Wilson in the Calcutta case just cited and it seems to me that I ought to take the same line.

Section 67, Evidence Act, is the section which declares that execution of a document must be proved, that is to say, it must be established that the signature of the person who has executed the document is in his handwriting. But if, as in the present case, the production of the original document is a physical impossibility how, it may be asked, is it possible to comply with the law as laid down in the section? It is obvious for the reasons just mentioned that the signature on an original document could not be proved by the production of a certified copy taken from the registration records. It seems to me that if S. 67 is construed literally and be held to be of universal application, it would render impossible the proof of execution of any document which has been lost. It was, I think, upon considerations of this nature that it was held in the Calcutta case above mentioned that the words "produced from any custody," which are

to be found in S. 90, were not to be interpreted to mean that it is necessary that the document itself should be before the Court. The process seems to be that if secondary evidence is admissible then it may be taken that there was an original document which corresponded in all respects with the certified copy which is given in evidence, and then the Courts go further and hold that, if that original document was produced, the presumption would be that it was a genuine document and had been executed by the party who professed to execute it. I am unable therefore to entertain the argument that the lower Court was wrong in raising this presumption with regard to the original of Ex. E-2.

Then we come to another point. The document was not executed by the lady Bishun Kuar herself but was executed by one Shankar Lal who purported to act on her behalf. It is true, as argued by the learned counsel for the appellants, that S. 90 does not authorize the raising of any presumption as to the authority of any person to act for another in the matter of executing a document. On the other hand, it will be admitted that it would be very difficult at the present day to find any reliable evidence of this authority vested in Shankar Lal. There is however some evidence which, I think, can successfully be appealed to for the purpose of showing that Shankar Lal was acting as agent of Mt. Bishun Kuar. The registration endorsement on Ex. E-2 shows that it was Bishun Kuar herself who came to the registration office and presented the document for registration, asking that it might be delivered over to the agent of the mortgagee. That, as the learned advocate for respondent 5 contends, is a very substantial piece of evidence for the purpose of showing that Shankar Lal was not a stranger to the transaction, but was really acting on behalf of Mt. Bishun Kuar. I hold therefore that it is established that the original document of which Ex. E-2 is a certified copy was executed by Mt. Bishun Kuar.

There remains the question as to whether it was executed for legal necessity. As to this, if we accept the reasoning of the learned Subordinate Judge which I have already accepted, it must, I think, be held that to the extent of the sum of Rs. 1,101 there was legal necessity for

1. (1880) 5 Cal 586.

2. (1900) 22 All 294.

the transaction. If Mt. Bishun Kuar's husband mortgaged this property and if by means of this transaction his share of the mortgage debt was discharged by Bishun Kuar herself, it necessarily followed that she was acting for a necessary purpose and it is not open to the plaintiffs now, who desire to have this property, to plead that they are entitled to recover the property without refunding the money. This brings me to another stage of the argument relating to this document.

It has been said that Raghubar Lal, the donee from Mt. Bishun Kuar, discharged this mortgage (the original of Ex. E-2) by executing a later mortgage which is on record. That is quite true but I do not see how it affects the question under consideration. If Raghubar Lal discharged the share of the debt which was owing by Mt. Bishun Kuar, then it seems to me that he was paying up money which was a charge upon the estate originally belonging to Ramgopal—money which would be payable by the legal representatives of Ramgopal or his son Bindeshri Prasad. If the plaintiffs claim to be the legal representatives, then I fail to see how they can escape the payment of this sum. The fact remains that Rs. 1,101 have been paid by the predecessor-in-interest of Abdul Ghafur to discharge this property from an encumbrance which was validly created on it and if the plaintiffs want this property or a share in it, they must reimburse the persons who spent the money. This settles the appeal so far as the case of defendant 5, Abdul Ghafur, is concerned.

I have now to deal with the case of defendant 14, a man named Bhawani Bakhsh. Bhawani Bakhsh set up a number of transfers in his own favour, but in this appeal I am concerned with only three of these, which are evidenced by three documents: Exs. N-1, N-2 and N-3. Ex. N-1 is a mortgage with possession dated 5th June 1882 and was executed by Mt. Bishun Kuar alone. She mortgaged 16 bighas odd in the village of Pakhrauli to secure a debt of Rs. 345. Ex. N-2 is a document of 3rd July 1883 which purports to have been executed by Hanwant Rai and Mt. Bishun Kuar, the former being a relative of Bishun Kuar's husband. This effected a mortgage of three bighas odd in the same

village of Pakhrauli. The amount borrowed was Rs. 87-8-0. Bishun Kuar's share of this debt was Rs. 50. Ex. N-3 was executed on 28th May 1889 to secure a debt of Rs. 250. The mortgage was of property in the same village. The judgment of the learned Subordinate Judge regarding these transactions is to be found in his findings upon issue No. 7. I understand the Judge to find that Exs. N-1 and N-2 were executed for legal necessity and were binding upon all the three plaintiffs. As regards Ex. N-3, his finding is that it was only binding on plaintiff, and not upon plaintiff 2 or plaintiff 3 who, as I have mentioned, is a transferee from plaintiffs 1 and 2. The first question which has been argued in connexion with these documents, is whether they were executed for legal necessity. As regards their execution the learned Judge availed himself of the provisions of S. 90, Evidence Act, to presume the genuineness of Exs. N-1 and N-2. In the case of Ex. N-3, that presumption was not possible because the document is not yet 30 years old.

The defendant Bhawani Bakhsh, in whose favour these documents have been executed, went into the witness-box and deposed that these sums had been advanced to Bishun Kuar in order to enable her to pay arrears of land revenue. There is admittedly no direct evidence but this deposition of Bhawani Bakhsh to support the case of legal necessity. Bhawani Bakhsh stated that the lady was the lambardar of the village at the time, that process had been issued by the revenue authorities to enforce the payment of revenue and that the peons from the tahsil had come to her house for the purpose of realizing the money. In these circumstances he said that the money had been advanced to the lady. There is nothing to contradict this evidence of Bhawani Bakhsh and I agree with the view taken by the Court below, namely, that there is no sufficient reason for rejecting Bhawani Bakhsh's statement. Here again we have the case of a number of transfers between 25 and 30 years old being challenged in a suit of this kind, and it would be unreasonable to expect any very direct evidence of legal necessity in such cases. I am satisfied therefore with the statement of Bhawani Bakhsh that he advanced these

sums for the payment of land revenue and if that be so, the legal necessity is established. It is the fact, as pointed out by the learned counsel for the appellants, that the deeds do not recite the purpose for which the money was given. That however is a matter which I do not consider essential. If I accept the statement of Bhawani Bakhsh that is sufficient.

There was some question raised with regard to the proof of execution of Ex. N-1, the learned counsel referring to S. 68, Evidence Act. It was forgotten however that the document Ex. N-1 was executed before the Transfer of Property Act came into force and therefore it did not, under the law, require attestation. Consequently no argument could be maintained for the purpose of showing that due proof of this document was not given; and in any case it seems to me that if a presumption is made under S. 90, that presumption extends also to attestation of documents of which attestation is required.

Then we come to another point in connexion with Ex. N-1. It is shown that Ex. N-1 was executed by Raghubar Lal on behalf of Bishun Kuar and it is argued that there is no proof of Raghubar Lal's authority. There is a statement however of Bhawani Bakhsh to the effect that Raghubar Lal was acting with the lady's authority. Bhawani Bakhsh was present when the deed was executed and his statement may be believed. There is also other evidence of an indirect character to show that plaintiff 1 and his brother defendant 21 in subsequent dealings with this property recognized the validity of the transaction embodied in Ex. N-1. With regard to Ex. N-2 the argument is much the same. It is true that this document having been executed after the introduction of the Transfer of Property Act, required attestation and no attesting witnesses were called. Whether they were available or not I do not know. However the answer to this argument is to be found in S. 90, which enables the Court to presume attestation as it did in this case. With regard to the legal necessity we have, as in the previous instance, the statement of Bhawani Bakhsh and there is also the statement of another witness Ram Nidha. Legal necessity is, I think, sufficiently

established in connexion with this document.

Lastly, we have Ex. N-3. According to the deposition of Bhawani Bakhsh this document was attested by two men who are now dead. Bhawani Bakhsh was present at the time when the deed was executed. It is somewhat unfortunate that the record does not show very clearly whether Ex. N-3 was actually shown to Bhawani Bakhsh when he was in the witness-box. But from the general tenor of evidence I think I must take it that it was shown to him and that his statement is a sufficient proof not only of execution but of attestation. It would have been better if the Subordinate Judge had put on record clearly that the document was put into the hands of the witness and that he pointed out the signatures to which it was necessary for him to refer. But I am entitled to presume that this was done, and I also note here that the learned counsel for the appellants made no special points with reference to this particular matter. I have only to notice one further point in connexion with these documents. It appears that defendant 21, who is the brother of plaintiffs 1 and 2, has sold his share in certain properties affected by these deeds to defendant 14. The Subordinate Judge has found that the plaintiffs, whatever their rights may be with respect to these properties, are not entitled to eject defendant 14 from them, because he has become a cosharer under the sale-deed executed by defendant 21. The learned counsel seems to think that his clients have not been treated justly, but this argument is based on misunderstanding. I take it that the Subordinate Judge means that the plaintiffs are entitled to joint possession with defendant 14, a possession which he himself declares will entitle them to a share in the profits till the time of partition. What the Subordinate Judge meant was that the plaintiffs were not entitled to eject defendant 14 and obtain for themselves exclusive possession. That point is sufficiently clear.

I have now to deal with a transfer made in favour of one Ram Sarup, who is represented on the record by defendants 17 to 20. This part of the case is dealt with by the learned Judge of the Court below in his finding on issue 8.

The evidence shows that a mortgage was made in favour of Ram Sarup on 23rd June 1888. This mortgage was executed by Mt. Bishun Kuar and was attested by the witness Ram Nidh. The document is Ex. S-1. Another witness Baij Nath also gives evidence relating to the execution. Baij Nath was the scribe of the document. Both of these witnesses deposed on oath that the money was required by the lady for the payment of revenue and this evidence has been accepted by the Court below. It seems to me therefore that so far as legal necessity is concerned it is proved that this document was executed for a necessity and binding purpose. The appellants therefore have no case with respect to this transfer.

Then the learned counsel for the appellants has objections to make with regard to the decisions of his claim as against defendants 29 to 31. These persons set up two mortgage deeds. The execution of these deeds has not been challenged. In fact Mr. Haider Husain informed me that all he wanted me to make clear in connexion with this part of the case was that the plaintiffs were entitled to get joint possession with the defendants, so as to enable them to collect or enjoy a share of the rents. I have no doubt that this is what is meant by the Subordinate Judge. I am sure that the Subordinate Judge did not intend to say that the plaintiffs were not entitled to possession. As in the case of defendant 14 which I have just referred to, all he meant was that the plaintiffs were not entitled to exclusive possession.

Another matter argued by the learned counsel was with respect to defendant 4 in the case. According to the judgment of the Subordinate Judge, the plaintiffs had no cause of action against this defendant 4. I can find no definite order dismissing the suit against defendant 4, but if there was any such order, I am satisfied that it was wrong. Issue 16 deals with this matter. The learned Subordinate Judge says after referring to two exhibits that it is proved that defendant 4 is in possession of the property which had been in the possession of defendant 5. He describes defendant 4 as being a lessee and goes on to say that in his opinion that fact would not make him liable to the plaintiffs, because a lessee is like a tenant. I am unable to

agree with this view of the law. It seems to me that if the plaintiffs' case was that defendant 5 was in possession as a trespasser, then they were entitled to implead and bring on the record defendant 4 who is in possession by virtue of a transfer made in his favour by defendant 5. However this matter is really of no importance because I have already decided that defendant 5 is not in possession without title. In fact it has been ordered that he is entitled to full possession until he is paid the sum of Rs. 1,100 odd by the plaintiffs.

Then it is said that the Court below was wrong in holding that there was no cause of action against defendant 43, a man named Bishunath Singh. This man is the son of defendant 11. It was proved before the Subordinate Judge that this defendant 43 was in possession of a portion of the property in suit under a mortgage executed in his favour by the plaintiffs themselves. The Judge found that Bishunath Singh was not in possession of any property under any transfer made by Mt. Bishun Kuar and therefore was not liable to the plaintiffs. I think that is a correct view of the situation. There was some argument advanced that the reason why Bishunath Singh was impleaded was because plaintiff 1 had set up a claim to haq jethansi which, if established, would have made out that Bishunath Singh was in possession of more land than he was entitled to. This question need not trouble me any further for no argument as to the custom of haq jethansi has been put forward.

Lastly, a point has been raised in connexion, with the claim for mesne profits. It is claimed that no mesne profits were allowed against defendant 1 Bindeshri in the case. The Subordinate Judge has dealt with this question in issues 4 and 15. According to the findings of the Subordinate Judge defendant 1 is not liable to pay anything to the plaintiffs on account of mesne profits. The Judge says that there is nothing on the record to show that property was transferred to him by Bishun Kuar and for what period he was in possession of it. According to what has been stated in argument here, defendant 1 came into possession on 7th August 1912 and this suit was brought on 23rd October 1913. The whole question has been dealt with at length by the learned Judge in his find-

ing on issue 4. The plaintiffs pleaded that defendant 1 was in possession of a share in Masrauli which had been mortgaged to him by Bishun Kuar. The defendant denied this allegation and he put forward a title to the property in his possession under three deeds. One was a deed of sale executed in his favour by defendant 21 on 19th June 1909 and another was a deed of mortgage executed by plaintiff 2, dated 14th August 1912, and the third document was a certificate of sale from which it appears that plaintiff 1's share in Masrauli was sold by a public auction on 24th June 1911. These documents are all proved and therefore we must take it that defendant 1 is lawfully in possession of eight annas share of Mauza Masrauli by virtue of the transactions just referred to. What the Subordinate Judge held is that there was no evidence on the record to show that he has been in possession of any other share of Masrauli or that he holds under any transfer made in his favour by Mt. Bishun Kuar. If that be so, the finding on the subject of mesne profits is obviously right because in this view defendant 1 is not a trespasser at all.

I have dealt now with all the points which have been raised. I am satisfied that the appellants are not entitled to succeed and I dismiss the appeal with costs to the contesting respondent.

B.V./R.K. *Appeal dismissed.*

A. I. R. 1918 Oudh 152

KANHAIYA LAL, A. J. C.

Mubarak Ali and others — Defendants — Appellants.

v.

Gopi Nath — Plaintiff — Respondent.

First Appeal No. 127 of 1916, Decided on 19th July 1917, from decrees of Sub. Judge, Lucknow, D/- 30th June 1916.

(a) Limitation Act (1908), Ss. 20 and 21 — Payment of interest by co-mortgagor is not binding on other co-mortgagors unless latter authorizes such payment.

Where payment of interest as such is made by one of several co-mortgagors, such payment cannot, in view of S. 21, save limitation under S. 20 except as against that co-mortgagor, unless it is shown that the other co-mortgagors authorized the payment. [P 154 C 1]

(b) Transfer of Property Act (1882), S. 60 — Mortgage deed providing for payment in 12 years — But in default of payment of interest regularly mortgagee entitled to sue for entire money before expiry of period fixed for

redemption — It is open to mortgagee to waive benefit of acceleration.

A contract which gives the mortgagee one of two options does not bind him to either of them if he chooses to stick to the other; in other words, it is open to him to waive the benefit of an acceleration if the contract leaves him such an option and that option cannot be taken away by statute unless there is anything to show that the grant of such an option is illegal or forbidden by law. [P 154 C 1]

Where a mortgage deed provided for the repayment of the principal with interest in 12 years and further stipulated that if the mortgagors failed to pay interest regularly every year the mortgagee would be at liberty to sue for the recovery of the entire money due on the said deed before the expiry of the period fixed for redemption:

Held: that the mortgagee was at liberty to waive the default in the payment of interest and to wait for the expiry of the period fixed for redemption before bringing his action.

[P 154 C 2]

Gokaran Nath Misra and Puttoo Lal — for Appellants.

Wazir Hasan — for Respondent.

Judgment. — This appeal arises out of a suit brought by the plaintiff-respondent for the recovery of money due on a mortgage effected by Mubarak Ali and Waris Ali in lieu of Rs. 1,000 on 26th April 1895, and a deed of further charge executed by the same persons for Rs. 300 on the same date. Waris Ali died and is represented by defendants 2 to 4. The deeds aforesaid provided for the repayment of the principal sums secured thereby with interest at 11 annas per cent per mensem compoundable yearly, within 13 years and one of the covenants in both the deeds was that if the mortgagors failed to pay the interest regularly every year or to fulfil the conditions comprised in the deeds of mortgage and further charged or transferred the mortgaged property or if the title of the mortgagors was disputed by any claimant or was found defective by reason of the existence of any prior incumbrance on the mortgaged property, the mortgagee shall be at liberty (*ibhtiar hai*) to sue for the recovery of the entire money due on the said deeds before the expiry of the period fixed for redemption. Mubarak Ali, one of the mortgagors, paid Rs. 250 on 14th December 1899 about the deed of mortgage and Rs. 41 on 25th March 1901 about the deed of further charge towards interest as such. These payments are not disputed. The mortgagee alleged that Mubarak Ali also paid on behalf of

himself and the heirs of Waris Ali Rs 30 on account of interest on the deed of mortgage and Rs. 20 on account of interest on the deed of further charge on 26th May 1907. The defendants deny having made any such payments. The Court below found against them and held that the claim was in any event within time from the date of those payments of interest as such.

The evidence adduced in support of the payments consists of the statements of Lachhman Das, the son of the plaintiff, Kunjan, a servant of his and Narayan Das, one of his former servants. Their statements are corroborated by the account-books filed by the plaintiff. In the account-books Rs. 50 are entered as having been paid by Mubarak Ali on behalf of himself and Waris Ali on 26th May 1907 about the two deeds in suit. The account-books do not say that the said payment was made towards the interest as such but Mubarak Ali admits in his evidence that he did not pay anything towards the principal money due on the deeds in suit. The irresistible inference, therefore, is apart from anything which Narayan Das says on the point that the payment in question was made towards the interest due on the said deeds. That payment cannot however save limitation except as against Mubarak Ali if the claim was otherwise barred by time, because there is no satisfactory evidence to show that the heirs of Waris Ali authorised the said payment. The decisions in *Krishna Chandra Saha v. Bhairab Chandra Saha* (1), *Domi Lal Sahu v. Roshan Debay* (2) and *Velayudom Pillai v. Vaithyalin-gam Pillai* (3) do not apply, because the mortgages in those cases were made by single individuals and the persons against whom the payments were sought to be proved as saving limitation were persons who had derived their title from the mortgagor. S. 20, Lim. Act (9 of 1908) allows a fresh period of limitation to be computed from the time when the interest due on a debt or legacy is paid as such before the expiration of the prescribed period by the person liable to pay such debt or legacy. Where such debt or legacy is payable by several persons either as joint contractors, partners

or executors, S. 21 declares that nothing in the preceding section shall render one of such persons chargeable only by reason of the payment made by or by the agent of any other or others of them.

The suit was filed within 12 years from the date of the expiry of the period fixed for the redemption of the mortgage and further charge and as regards the heirs of Waris Ali, the important question for consideration arises whether the plaintiff was at liberty to waive the default in the payment of interest and to wait for the expiry of the period fixed for redemption before bringing his action. Art. 132, Lim. Act, allows a period of 12 years from the date when the money sued for becomes due. But no money can become due, where there are covenants of an alternative nature by reason of the failure of one of them if the mortgagor chooses to waive its benefit. In *Kishori Mohun Roy v. Ganga Bahu Dahi* (4), where a mortgage by conditional sale provided that on repayment of the principal but with interest in three years from the date of the mortgage the land should be re-conveyed to the mortgagor and contained a further covenant, that upon default in payment of interest half-yearly the whole principal and interest should become due it was held by their Lordships of the Privy Council that the period fixed for redemption of the mortgage was not affected or altered by the covenant in the deed of mortgage making without reference to redemption the whole principal becomes due upon failure to pay interest at a certain time.

The learned counsel for the defendants-appellants relies on the decision in *Gaya Din v. Jhunan Lal* (5), which follows the decision in *Reeces v. Butcher* (6). The latter decision however rested on the terms of a contract which were of a peculiar nature. The contract there provided that the lender shall not call in the principal sum for a period of five years if the borrower should so long live and should duly and regularly pay the interest. The binding character of that covenant depended on the borrower not dying earlier and making no default in the payment of the interest due on the happening of either of those events.

1. (1905) 32 Cal 1077.

2. (1906) 33 Cal 1278.

3. (1912) 17 I C 619.

4. (1896) 23 Cal 228=22 I A 183 (P C).

5. (1917) 37 All 400=28 I C 910 (FB).

6. (1891) 2 Q B D 509.

that covenant became automatically annulled and the further provision contained in the deed authorizing the borrower to call in his money, if default was made in the payment of any quarterly interest, came into operation as if the former covenant had not been in existence. The decision in *Hemp v. Garland* (7) arose out of an instalment bond to which Art. 75, Lim. Act, is applicable in India. The provisions of that article have no bearing on cases governed by Art. 132. A contract which gives the mortgagee one of two options does not bind him to either of them, if he chooses to stick to the other, for, as pointed out in *Maharaja of Denares v. Nand Ram* (8), to tie up the creditor to a covenant inserted for his benefit, regardless of that to which he agreed for the benefit of the borrower,

"would be to punish a creditor for forbearance shown to his debtor and compel him to press his demands at the earliest opportunity and insist upon speedy and full satisfaction of his claim."

Section 63, Contract Act (9 of 1872), authorizes every promisee either to dispense with or remit wholly or in part the performance of the promise made to him. It is not, it is true, open to him to stop the running of the period of limitation, if it has once started. But if the contract gives him an authority to dispense with or remit the performance of a promise at a specified time or in a specified manner, or an option to refuse to avoid a contract, because a certain promise has not been performed at a specified time or in a specified manner, the limitation would not start running till the contract which he has refused to avoid is not broken; in other words, it is open to him to waive the benefit of an acceleration if the contract leaves him such an option; and, as observed in *Ram Parshad v. Qadri* (9), that option cannot be taken away by Statute, unless there is anything to show that the grant of such an option is illegal or forbidden by law, except by a clear and unequivocal declaration of an intent, such as the first portion of Art. 75 embodies. In *Juneswar Dass v. Mahabier Singh* (10), where a person engaged to pay the amount borrowed with interest on the day named and hypothecated certain land by way

of security, with a condition that in the event of the said land being sold in execution of a decree before the date fixed for redemption, the mortgagee shall be at liberty to sue at once for the recovery of the debt, and before the term fixed for repayment expired, the mortgaged land was sold in execution of a decree obtained by another creditor on a subsequent mortgage, their Lordships of the Privy Council in repelling the plea of limitation observed:

"Their Lordships must not be supposed, in coming to this decision, to give any countenance to the argument of Mr. Arathoon that this suit would have been barred, if the limitation of six years under Cl. 16 had been applicable to it. They think, upon the construction of this bond, there would be good reason for holding that the cause of action arose within six years before the commencement of the suit."

Their Lordships were inclined to consider that limitation would begin to run from the date fixed for payment and that the cause of action arose, that is to say, the money became payable, on that date and not on the date on which the hypothecated property was sold in execution. It is true that their Lordships did not consider it necessary to decide that point in the view they took of the period of limitation applicable to the case before them; but as pointed out by Banerji, J., in *Gaya Din v. Jhuma Lal* (5), an expression of opinion by their Lordships on a matter of that kind is entitled to great weight. In *Sitab Chand Nahar v. Hyder Malla* (11), where a mortgage deed provided for the payment of the mortgage money by four instalments, the plaintiff to be at liberty in case of any default to sue either for the amount of that instalment or for the whole amount due on the bond, Banerji and Ram-pini, JJ., observed (p. 285) that the right to enforce immediate payment on the happening of the first default was optional with the creditor and might be waived, if he chose to do so. In *Netta-karuppa Goundan v. Kumarasami Goundan* (12) effect was given to the privilege of the obligee not to exercise the option of payment before the specified date, if the interest was not regularly paid. In *Narna v. Ammani Amma* (13) it was held that a hypothecatee was not bound to take advantage of a clause in his bond which entitled him to demand

7. (1843) 62 R R 423.

8. (1907) 29 All 431.

9. (1917) 20 O C 132=40 I C 232.

10. (1875-76) 1 Cal 163=3 I A 1 (P C).

11. (1897) 24 Cal 281.

12. (1899) 22 Mad. 20.

13. (1916) 29 Mad. 981=35 I C 418.

the principal money in case the default was made in payment of interest before its due date, and that a suit restricted to a claim to recover the principal and interest at the rate originally agreed upon was not barred by time, if brought within 12 years from the date fixed for the repayment of the principal, but beyond 12 years from the date of the first default in the payment of interest.

The learned counsel for the defendants-appellants relies on the decision in *Tulshi Ram Shukla v. Muhammad Hadi* (13), but the circumstances of that case were similar to those of *Duarka Prasad v. Raja Ram* (15), for the suit in each case was, on the true interpretation of the bond, beyond time even from the date fixed for the payment of the mortgage money. That was the plea raised by the debtor in either of those cases and though the decision in the former of those cases went further than the defence, it made no difference, because on the decision of the question how the period fixed for payment of the mortgage money was to be calculated the suit in either event would have been barred by time. It is also contended that the principle of waiver recognized by Art. 75, Lim. Act, cannot be extended to Article 132. But the question is not one of extending the principle of that article but of applying Art. 132 in the light of the terms of each contract.

Article 132 cannot supersede or disregard a waiver authorized by contract, where it is made. A person is presumed to act for his own benefit, and the subsequent acceptance of part of the interest by the mortgagee, coupled with the admission of Mubarak Ali that when he made the payment the mortgagee told him that it was not necessary for him to have made the payment and that he could apply the money to his other and more urgent purposes, shows that the mortgagee had deliberately exercised his option and chosen to wait till the time fixed for the payment of the mortgage money had expired. This is the cause of action on which he relied in the plaint and the claim was therefore within time. The appeal fails and is dismissed with costs.

H.V./R.K.

Appeal dismissed.

14. (1916) 32 I C 551.

15. (1915) 29 I C 980.

A. I. R. 1918 Oudh 155

KANHAIA LAL, A. J. C.

Khadim Husain and others—Plaintiffs—Appellants.

Mt. Jamil Bibi—Defendant—Respondent.

Second Appeal No. 73 of 1917, Decided on 10th July 1917, from decree of Sub-Judge, Sultanpur, D. 15th December 1916.

Oudh Rent Act (1886), S. 108 (10)—Person claiming as under-proprietor ejected by revenue Court—His remedy under S. 108 (1) found barred by time by revenue Court—Suit in civil Court for possession and damages by him is not barred.

At the time of the first regular settlement in 1773 a suit was brought by certain persons claiming to be under-proprietors of an entire village. The settlement Court dismissed the suit on the ground that each under-proprietor should bring a separate suit for the air plots in his possession. One of those persons then brought a separate suit for a declaration of his rights to certain air plots, impleading the superior proprietors as defendants in his suit. His allegation was that he was one of the old proprietors of the village and had been in possession of the plots in dispute in proprietary right on payment of a certain amount of annual rent to the superior proprietors. Some of the superior proprietors admitted the claim. The suit was, however, dismissed otherwise than on merits, and it was left open to the said person to sue for his rights after the bar to the trial of the suit was removed. No such suit was thereafter filed by that person or his successors-in-interest. But, in 1852, the then superior proprietor issued a notice of ejectment against that person, who contested it and succeeded in getting it cancelled on the ground that he was a zamindar and that his right as such had been admitted by the persons from whom the then superior proprietor derived his title. In 1902 the superior proprietors sought to eject the successors-in-interest of the said person, i. e. the present plaintiffs, from the said plots, by notice through the revenue Court. The plaintiffs contested the notice on the ground that they were under-proprietors, but the finding of the revenue Court was against them and they were ejected in 1903. Then they brought a suit for possession of the plots in the civil Court, alleging that they were under-proprietors and had been wrongfully ejected by the revenue Court but their suit was dismissed on the ground that they should first seek their remedy under S. 108 (10), Oudh Rent Act. They accordingly went to the revenue Court, but that Court dismissed their suit on the point of limitation. Then followed the present suit for possession and damages filed in the civil Court in 1915, similar to the previous suit dismissed by that Court.

Held: (1) that under the above circumstances the plaintiffs' under proprietary title was satisfactorily established. [P 157 C 1]

(2) that the present suit in the civil Court was not barred by reason of the fact that the plaintiffs' remedy under S. 108 (10), Oudh Rent Act, had been found by the revenue Court to be bar-

red by time: 16 O C 105; 12 O C 90; 13 O C 188 and 20 O C 8. (P C), Cons. [P 157 C 2]

Bisheshwar Nath Srivastava—for Appellants.

Gokaran Nath Misra — for Respondents.

Judgment.—The dispute in this case relates to six plots of land, of which the plaintiffs claim to be the under-proprietors. The defendants are the superior proprietors of the village, in which the said plots stand. They sought to eject the plaintiffs through the revenue Court under S. 54, Oudh Rent Act (23 of 1886). The present plaintiffs contested that notice on the ground that they were under-proprietors, but the finding of the revenue Court was against them, and they were accordingly ejected on 5th June 1903. They then brought a suit for possession of the said plots in the civil Court alleging that they were under-proprietors and had been wrongfully ejected by the revenue Court; but their suit was dismissed on the ground that they should first seek their remedy under S. 108, Cl. (10), Oudh Rent Act. The decision of this Court in that case is contained in *Khadim Husain v. Jamil Bibi* (1). They then went to the revenue Court and sued for the recovery of the occupancy of the land from which they had been dispossessed, alleging that they were under-proprietors of the same. But that suit was dismissed by the revenue Court on the ground that it was not brought within one year from the date of dispossession, as required by S. 129, Oudh Rent Act. The present suit then followed, in which a claim was made for possession and damages. It was filed on 14th May 1915 within 12 years from the date when the dispossession originally took place.

The Courts below dismissed the suit on the ground that the plaintiffs had failed to establish that they were under proprietors or had acquired under proprietary rights by adverse possession. The lower appellate Court further held that the suit was not maintainable, inasmuch as the remedy of the plaintiffs under S. 108, Cl. (10), Oudh Rent Act, was found to be barred by time. In regard to the under-proprietary right set up by the plaintiffs, it is not disputed that in 1877 a suit was brought by certain persons claiming to be under-proprietors of

the entire Chak Satar, in which the plots in dispute are situated. The settlement Court dismissed the suit on the ground that each under-proprietor should bring a separate suit for the *sir* plots in his possession. Mohammad Husain, who was one of the claimants before the settlement Court and is the predecessor-in-interest of the present plaintiffs, then brought a separate suit for a declaration of his rights to certain *sir* plots, including those now in dispute, impleading the superior proprietors, Har Prasad, Hanoman Prasad and Sarju Prasad, as defendants in his suit. His allegation was that he was one of the old proprietors (*zemindar kadim*) of the village, and had been in possession of the plots in dispute in proprietary rights on payment of a rental of Rs. 33 per year to the superior proprietors. Har Prasad appeared in person and admitted the claim, stating that Mohammad Husain was entitled to a decree by virtue of his *zamindari* right. The statement made by Har Prasad appears to have been supported by Sarju Prasad also, whose signature it purports to bear, though his name is not mentioned in the body of the statement. The Assistant Commissioner, who was trying the case, found that the entire village was held *kham* by the Deputy Commissioner who was no party to the suit, and that so long as the village was held *kham*, the plaintiff could not sue for his rights. He therefore dismissed the suit leaving it open to the plaintiff to sue for his rights after the village was released.

No suit appears to have been there-after filed by Mohammad Husain or his successors-in-interest; but it is significant that in 1882 Sheo Charan Lal, the then superior proprietor, issued a notice of ejectment against Mohammad Husain who contested it and succeeded in getting it cancelled on the ground that he was a *zamindar* and that his right as such had been admitted by the persons from whom the then superior proprietor had derived his title (Ex. 7). This order was passed on 8th June 1882 and covered all the plots now in dispute except Nos. 71, 2 and 71/3 *khasra*. The Courts below do not treat the admission made by Har Prasad in 1878 as binding on his co-sharers or as evidencing the under-proprietary title claimed by Mohammad Husain. They also treat the order cancelling the notice as insufficient to invest

Mohammad Husain or his successors-in-interest with an under-proprietary title by adverse possession. But as pointed out in *Raja Bhagwan Bakhsh Singh v. Mazhar Husain* (2), an acknowledgment by the talukdar may be sufficient proof of an under-proprietary title, particularly when it is made in a suit in which the plots in question were claimed as having been held by the claimant as his *sir* by virtue of his being an old zamindar. The finding of the revenue Court in the suit filed by Mohammad Husain to contest the notice of ejectment issued by Shoa Charan Lal also supports the same conclusion. The plaint filed by Mohammad Husain is not available, but the fact that such an adverse order was passed against the predecessor-in-interest of the present superior proprietors was enough to set litigation running as against him and as held in *Harsandan v. Raja Bhup Indar Bikram Singh* (3) and *Har Dyal v. Gudi Narain Singh* (4), the right of Mohammad Husain and his successors-in-interest as under-proprietors, even if it did not originally exist, has been perfected in respect of the land comprised in the notice of ejectment by adverse possession since 1862. In the lower appellate Court defendant 2, one of the superior proprietors, admitted the under proprietary title of the plaintiffs in the plots in dispute to the extent of her half share of the superior proprietary interest. As against defendant 1, owning the remaining half, the plaintiffs' under-proprietary title is satisfactorily established.

The next question for consideration is whether the present suit of the plaintiffs is barred by reason of the dismissal of the previous suit filed by them in the revenue Court for the occupancy of the land in dispute under S. 108, Cl. (10), Oudh Rent Act. S. 108 gives to the revenue Court exclusive jurisdiction over suits for the recovery of the occupancy of any land which has been treated by the landlord as abandoned or from which an under-proprietor or a tenant has been illegally ejected by the landlord. It does not however give to the revenue Court exclusive jurisdiction to decide questions of under-proprietary title or the right to under proprietary possession. When an

under-proprietor is ejected by his landlord from the land in his occupation, he cannot, as pointed out in *Chandrika Bakhsh Singh v. Haghannash Kunwar* (5), get back the occupancy or physical possession of that land, unless he files a suit against the landlord for the said purpose within the period of one year allowed by S. 130, Oudh Rent Act. But if he does not file such a suit, his under-proprietary right is not thereby annulled or lost, for all that he loses is his summary remedy to be restored to actual occupation of the land on the strength of his previous possession, which the revenue Court is exclusively competent to grant.

In *Ram Pargash v. Raja Adiga Dat Lalai Parsh Singh* (6), which was followed in *Khadim Husain v. Jamil Dast* (1), it was held that if a person who claims to be an under-proprietor, was illegally ejected by the superior proprietor by means of the machinery provided by the Oudh Rent Act or in any other manner, he should in the first instance sue under S. 108, Cl. (10) of that Act, and if his suit be thrown out by the revenue Court, he could then sue the landlord for possession in the civil Court and ask for a declaration of his rights. It may be doubted whether S. 108, Cl. (10), was intended to cover cases of ejectment by the process of law. But anyhow the remedy given by that section, so far as it extends, does not oust the jurisdiction of the civil Courts, to decide whether or not a person in possession of land holds a proprietary or under-proprietary right therein, and, as pointed out by their Lordships of the Privy Council in *Mohammad Abul Hasan Khan v. Prag* (7), the decision of the revenue Court on a question of that character is not final or conclusive. It was open therefore to the plaintiffs, after they had been unsuccessful in getting back the occupancy of the land of which they had been deprived, to sue in the civil Court for a declaration of their under-proprietary title or for possession of their under-proprietary right. The dismissal of their suit under S. 108, Cl. (10), had no other effect than that of depriving them of the benefit of the summary remedy provided

2. (1906) 9 O C 167.

3. (1901) 4 O C 207.

4. (1905) 8 O C 30.

5. (1913) 16 O C 105=18 I C 284.

6. (1909) 12 O C 90=2 I C 269.

7. A I R 1916 P C 150=20 O C 8=38 I C 814 (P C).

by that section and obtaining back the physical occupation of the land on the strength of their previous occupation; and the present suit for possession of the under-proprietary right as such, as distinct from the tilling right, is maintainable. The object of S. 108, Cl. (10), in providing a summary remedy enforceable within a limited period evidently was to obviate the tilling right being kept under suspense for any length of time. In the case of a tenancy the remedy so provided is exclusive, but it has no effect in determining proprietary or under-proprietary rights, where they exist.

The appeal is therefore allowed and the plaintiffs' claim decreed for under-proprietary possession of the plots in dispute with costs throughout. The contesting defendant will bear her own costs in all the Courts.

B.V./R.K.

Appeal allowed.

A. I. R. 1918 Oudh 158

LINDSAY, J. C.

Kayamuddin—Applicant.

v.

Dwarka and another—Opposite Parties.

Criminal Revn. No. 128 of 1917, Decided on 22nd August 1917, against order of Dist. Magistrate, Bara Banki, D-29th June 1917.

(a) **Criminal P. C. (1898), S. 7 (2)**—Notification declaring boundary line between district—Intention of notification is not to define boundary between two districts.

A notification issued under S. 7 (2), declared that for the purposes of criminal jurisdiction the deep stream of a river running between two contiguous districts was to be considered the boundary between those districts:

Held: that the intention of the notification was not to define the boundary between the two districts as on the date of the notification, but to declare that until a further notification was made, the boundary line between the two districts was to be the deep stream of the river as found at any particular time. [P 159 C 1]

(b) **Criminal P. C. (1898), S. 526**—Scope.

There is no authority which enables one District Magistrate to transfer a case for trial to another District Magistrate. [P 159 C 1]

Jogai Narain Mulla and Ajit Prasad—for Applicant.

H. C. Dutt—for Opposite Parties.

Judgment.—These two applications in revision are directed against two orders, one passed by the District Magistrate of Bara Banki and the other by the District Magistrate of Gonda. The facts of the

case may be briefly stated as follows: It is said that on 5th June last a raiyat took place between persons connected with two estates, namely, the estate of Ramnagar in the Bara Banki district and the Kamiar estate, which is situated in the Gonda district. These two estates are divided by the river Gogra. The applicants in the two cases now before me are the persons who belong to the Ramnagar party. The raiyat is said to have taken place on a piece of alluvial land situated in the bed of the river Gogra. The Ramnagar party, some of whom, it is said, sustained grievous hurts, reported the occurrence at the Thana of Ramnagar. The police of this Thana investigated into the complaint and the result was that the other party belonging to the Kamiar estate was sent up for trial. Meantime the Kamiar party had made a complaint to the Gonda police, who investigated their case and ordered the Ramnagar party to be sent up for trial in the Gonda district on a charge of raiyat. When the case of the present applicants was brought before the Subdivisional Magistrate in Bara Banki, a plea was raised that he had no jurisdiction to deal with it inasmuch as the offence had been committed within the boundaries of the Gonda district. This plea was based upon the fact that a notification had been issued by the Local Government under S. 7 (2), Criminal P. C., on 1st December 1914. By this notification it was declared that for the purposes of criminal jurisdiction the deep stream of the river Gogra is to be considered the boundary between the districts of Gonda and Bara Banki.

It was represented to the Magistrate that the spot where this raiyat had been committed was to the north of the deep stream of the river Gogra and this fact indeed seems to have been admitted by both parties. The learned counsel who has argued the case before me on behalf of the applicants has told me that he does not dispute this proposition. The Subdivisional Magistrate then addressed a sort of demi-official note to the District Magistrate, pointing out that he had no jurisdiction to deal with the case and suggesting that the case should be transferred to the Gonda district. Upon this note the District Magistrate recorded a remark to the effect that the case would be transferred. After this the Subdivi-

sional Magistrate had an order recorded on the order-sheet declaring that he had no jurisdiction to deal with the case. The police papers then seem to have been forwarded to the District Magistrate of Gonda. The latter officer having the papers before him refused to proceed any further with the matter on the ground that the offence having been committed in the Gonda district, the Bara Banki Police had no jurisdiction to make an investigation into the offence. He therefore directed the papers to be deposited and told the Ramnagar party that if they wished to proceed they should file their complaint before a competent Magistrate in the Gonda District. The proceedings throughout seem to have been somewhat irregular. I do not know of any authority which enables one District Magistrate to transfer a case for trial to another District Magistrate. As for the order passed by the District Magistrate, Gonda, it has been argued that S. 156, Criminal P. C., lays down that the District Magistrate of Gonda had no jurisdiction to call in question the propriety of the proceedings taken by the Bara Banki Police, although it turned out that those proceedings had, as a matter of law, been taken without jurisdiction. I think in the circumstances the proper course for the District Magistrate of Gonda, after he had received the police papers, was to take cognizance of the offence and direct the trial of the persons against whom the police had made a report.

So far as the notification, which I have referred to above, is concerned, it has been argued before me on the authority of a ruling of the Calcutta High Court reported as *Punardeo Narain Singh v. Ram Sarup Roy* (1) that the notification only defines the boundary between the two districts as on the date of the notification. But although the Calcutta Court favours this view I am unable to accept it. It appears to me that the intention of the notification was to declare that until a further notification was made the boundary line between the two districts for purposes of criminal jurisdiction was to be the deep stream of the river Gogra. I have no doubt therefore on the facts as they have been admitted that this riot did take place within the

limits of the Gonda district. Again it was argued that in view of the provisions of S. 179, Criminal P. C., the case against the Kamiar people was cognizable in the Bara Banki district, and stress has been laid in particular upon *illus. (b)* appended to this section. It is said that because some of the Ramnagar people sustained grievous hurts, the consequence of the offence ensued in the Bara Banki district within the meaning of S. 179. I am very doubtful whether this argument can be entertained, for *illus. (b)* appears to me to refer to the causing of that particular kind of grievous hurt which is mentioned as the eighth kind of grievous hurt in S. 320, I. P. C. I am informed that the grievous injuries committed in the course of this riot on some of the Ramnagar people amounted at once to grievous hurt and do not belong to that particular class of grievous hurt which is only established after it is proved that the person who has suffered the injuries has been unable for a period of more than 20 days to follow his ordinary pursuits. I think the correct view is that the offence under investigation was committed in the Gonda district and ought ordinarily to be tried there.

It has however been represented to me by the learned counsel for the applicants that in any case it is advisable that this Court should make an order of transfer to another district and should give directions that both parties should be put on their trial. There is a great deal, I think, to be said in favour of this argument. It is obvious that if the Ramnagar party follow the direction given by the District Magistrate of Gonda and lodge a complaint in that district, it will occasion some difficulty if the complaint is referred to the Gonda Police for investigation. As things stand, the police of this latter district are committed to the theory that the party in fault was the Ramnagar and not the Kamiar party. After a careful consideration of the facts I am satisfied that it will be in the interests of justice for me to make an order transferring both cases for trial to the district of Bahraich. The District Magistrate will make the cases over for trial to a competent Court. Both parties should be put on their trial in accordance with the result of the investigations made by the Gonda and

1. (1898) 25 Cal 858.

Bara Banki police respectively. I order accordingly.

B.V./R.K.

Forum changed.

A. I. R. 1918 Oudh 160

STUART AND KANHAIYA LAL, A. J. CS.

Bajoo—Defendant—Appellant.

v.

Mt. Tulsha and another—Plaintiff and Defendants—Respondents.

Civil Revns. Nos. 55 and 120 of 1917, Decided on 13th September 1917, against decree of Dist. Judge, Sitapur, D. 26th March 1917.

(a) Civil P. C. (1908), S. 24 (4)—Small Causes Court.

Section 24, Cl. (4) is not limited in its application to the Courts constituted under the Provincial Small Causes Courts Act. [P 160 C 2]

(b) Civil P. C. (1908), S. 24 (4)—District Judge has no power to transfer suit of Small Cause nature to Court not competent to try it as such.

A District Judge cannot transfer a suit of Small Cause Court nature to a Subordinate Court not invested with the powers of a Small Cause Court, that is, not competent to try it as such, as long as a Small Cause Court capable of trying it is in existence. [P 161 C 1]

(c) Civil P. C. (1908), S. 24—Transfer of suit of Small Cause nature to Court of Munsif with no such powers—Suit dismissed—Suit decreed on appeal by District Judge—Transfer held not warranted by law and trial was illegal.

A suit of the nature cognizable by a Court of Small Causes was filed in the Court of a Munsif who had the jurisdiction of a Small Cause Court Judge. The suit was subsequently transferred for hearing by the District Judge under the provisions of S. 24, Civil P. C., to the Court of a Probationary Munsif who had no such powers. The latter dismissed the suit. An appeal was filed to the Court of the District Judge, who decreed the suit. The defendant-appellant applied in revision on the ground that the District Judge had no jurisdiction to hear the appeal.

Held: that the transfer of the suit to the Court of the Probationary Munsif was not warranted by law and that therefore the trial of the suit by the latter was illegal. [P 161 C 2; P 162 C 1]

Ishri Prasad—for Appellant.

H. C. Dutt—for Respondents.

Kanhaiya Lal, A. J. C.—The question for consideration in these cases is whether an appeal lay from the decrees passed by a Probationary Munsif, to whom certain suits were transferred for trial from the Court of Small Causes, constituted under S. 24, Act 13 of 1879. In one of these suits, an appeal was filed in the Court of the District Judge and was allowed by him. In the other, an appeal was filed in the Court of the Subordinate Judge and was dismissed by him on the ground that the decision of

the Probationary Munsif was final. It is not disputed that the Court of Small Causes, from which the suits were transferred, had continued to exist after the transfer of those suits, and that but for the transfer, it would have been exclusively competent by reason of S. 16, Provincial Small Cause Courts Act (9 of 1887) to try those suits on the date on which they were decided by the Probationary Munsif. If the order of transfer was justified by S. 24, Civil P. C., the decrees passed in those suits by the Probationary Munsif would be final, because Cl. 4 of that section lays down that the Court, trying any suit transferred or withdrawn under that section from a Court of Small Causes, shall for the purposes of such suit be deemed to be a Court of Small Causes. In *Ramchandra v. Ganesh* (1) it was laid down that the expression "a Court of Small Causes" in the last clause of that section meant a Court properly and strictly so-called and did not include a Court invested with the jurisdiction of a Court of Small Causes. But the distinction drawn in that case between a Court of Small Causes "properly and strictly so-called" and a Court invested with the jurisdiction of a Court of Small Causes is not recognised by Ss. 17 and 32, Act 9 of 1887. The procedure applicable to both the Courts is the same, and the distinctive reference to the Courts constituted under the Provincial Small Cause Courts Act of 1887 and to the Courts exercising jurisdiction of a Court of Small Causes under that Act, contained in S. 7 and O. 50, R. 1, Civil P. C., finds no place in S. 24, Cl. (4), Civil P. C. There can be no doubt therefore that the latter is not limited in its application to the Courts constituted under Act 9 of 1887.

It may however be doubted whether the District Judge had any power under S. 24, Civil P. C., to transfer a suit pending in a Small Cause Court to a Court not competent to try it, that is to say, where a Court competent to try it is in existence. S. 16, Act 9 of 1887, gives to Small Cause Courts, where they exist, exclusive jurisdiction to try suits of a Small Cause Court nature, and that section is not controlled by any provision of the Code of Civil Procedure except in so far as that Code may expressly confer jurisdiction on any other

Court to try it as such. S. 24 of the Code confers on a District Judge jurisdiction to withdraw a suit pending in a Small Cause Court and to try it himself, unhampered by any restriction as to his competency to try the same. Where he tries such a suit, he tries it as a Small Cause Court suit, and his decision under Cl. (4), S. 24 is final. But where he transfers such a suit to any other Court, the law insists on competency as one of the essential conditions precedent to the transfer, and that competency is determined not only by the value but also by the nature of the suit. An insolvency or probate proceeding cannot, for instance, be transferred by him from his Court or from that of any Additional Judge, to the Court of a Mansif or Subordinate Judge not invested by the Local Government with power to try those cases. A Small Cause Court suit cannot, similarly, be transferred to a subordinate Court not invested with the powers of a Small Cause Court, that is, not competent to try it as such so long as the Small Cause Court capable of trying it is in existence. If the law gives to the Small Cause Court exclusive jurisdiction to try such a suit, the transfer of that suit to a Court not possessing such jurisdiction would offend that law.

Section 25 of the old Civil P. C., expressly declared that the transfer could only be made to a subordinate Court competent to try the same in respect of its nature and the amount or value of its subject-matter. The legislature omitted the words "in respect of its nature and the amount or value of its subject-matter", when enacting S. 24 of the present Code, treating them probably as surplusage. If the intention of the legislature had been that the competency for the purposes of transfer should be determined only by the valuation of the suit or proceeding, it would have retained the reference to the amount or value of the subject-matter, and omitted the reference to the nature, and it would have thereby brought the Code of Civil Procedure into conflict with the other laws.

Where a Court of Small Causes has ceased to exist and a suit is transferred on its cessation either under S. 24, Civil P. C. or by operation of law under S. 35 of Act 9 of 1887 different considerations apply. The view taken in *Mangal Sen*

v. Rup Chand (2) and *Lalla v. Tej Pishen* (3) was that a decision passed in such a suit by the Court to which the suit was sent or had to go for disposal was final. But a contrary view was taken in *Dalal Chandra Deb v. Ram Narain Deb* (4), *Udho Singh v. Mulchand* (5), *Sarja Prasad v. Mahadeo Pande* (6) and *Kamta Parshad v. Mahabai Singh* (7).

No question of competency however arises where a Small Cause Court has ceased to exist; but where a suit is transferred by the District Judge from an existing Small Cause Court, capable of trying that suit, to another subordinate Court, not invested with Small Cause Court powers and therefore not competent to try the same, such a transfer would not invest the latter with the jurisdiction of a Small Cause Court over such a suit, for it is not authorized by S. 24, Civil P. C. In *Chhotay Lal v. Firm Lakhmi Chand* (8), *Sankarama Aiyar v. Padmanabha Aiyar* (9) and *Sukha v. Raghunath Day* (10) it was held that where such a suit was transferred to another Court the latter could try it as a Small Cause Court suit, and that its decision thereon would be final under S. 24, Cl. (4) of the Code. But the question of the competency of the District Judge to transfer such a suit to a Court not invested with the powers of a Small Cause Court was not there raised or considered. In the cases last mentioned, it was pointed out that the legislature apparently intended that the District Court should have power to make an order of transfer, trusting to the discretion of that Court and its knowledge of local conditions not to make an order to transfer to a Court not competent to make a proper exercise of the special powers, which an order of transfer carried with it in respect of the particular cases so transferred; but the intention of the legislature, as expressed in S. 16 of Act 9 of 1887 and S. 24 of Act 13 of 1879, which corresponds with S. 25 of Act 12 of 1887, is in no way affected by

2. (1891) 13 All 324.

3. (1897) 2 O C 143.

4. (1904) 31 Cal 1057.

5. (1916) 36 I C 317.

6. (1915) 17 All 430=29 I C 336.

7. (1908) 6 O C 81.

8. (1916) 38 All 425=31 I C 113.

9. (1915) 33 Mad 125=17 I C 425.

10. (1917) 39 All 214=37 I C 809.

the provisions of S. 24, Civil P. C., in so far as the latter makes the competency of the Court to which the transfer is proposed a condition precedent to the transfer.

It can hardly be supposed that by competency the legislature meant judicious selection or that it was intended that while the Local Government and the Judicial Commissioner should confer powers of a Small Cause Court on select officers, the District Judge should have power to transfer any suit or proceeding to a Probationary Munsif so as to give him final authority to try the same regardless of its nature. A transfer, not warranted by the first three clauses of S. 24, is outside the purview of Cl. (4) of that section, and the trial of these suits, by the Probationary Munsif was therefore illegal and without jurisdiction. No objection as to jurisdiction was taken in these cases, but as the question of finality or right to appeal is dependent on the propriety of the transfer, it is desirable that the cases should be re-tried by the proper Court. The question of competency arises under Cl. (a) and sub-Cl. (i), Cl. (b), S. 24 (1), Civil P. C., but not under the other sub-clauses.

I would therefore allow the applications, and setting aside the orders of transfer and the decrees passed there-after, remand the original suits to the Court from which they were transferred for re-trial and disposal in accordance with law. No order will be made in the circumstances as to the costs of these proceedings.

Stuart, A. J. C.—I concur in the order proposed.

B. V. B. K.

Appeal allowed.

A. I. R. 1918 Oudh 162

KANHAIYA LAL, A. J. C.

Tribhawan and others—Accused—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 15 of 1917, Decided on 11th February 1917, against order of Dist. Magistrate, Gonda, D. 9th January 1917.

Penal Code (1860). S. 186—Obstructing public servant in discharge of public function—Written order need not be shown to accused.

In order to constitute an offence under S. 186, it is not necessary to prove that the written

order under which the public servant was acting was actually shown to the accused. It is enough if it is found that the public servant had the order with him and could show it to anybody who wanted to see the same or question his authority. [P 162 C 2]

F. G. D. Lincoln—for Applicants.

Government Pleader—for the Crown.

Judgment.—In a suit brought by Tribhawan against Raghu for damages for malicious prosecution, Raghu was awarded Rs. 25.9.0, about his costs. Raghu applied for the execution of his decree for costs, and got two bullocks, belonging either to Tribhawan or his father or to both, attached. When the process servers were preparing the list of attachment Tribhawan and the other accused appeared, and assaulted the decree-holder who was holding the ropes of the bullocks and took the bullocks away. They have accordingly been convicted of offences under Ss. 183 and 186, I. P. C., and sentenced to different terms of imprisonment.

On behalf of the accused it is urged that they have been improperly convicted, as no warrant of attachment was shown to them and that the convictions under both sections were in any case illegal. Both the peons however say that they had gone with the warrant of attachment, and the cattle were rescued after they were attached. There is nothing to show that they were asked to show the warrant or that they refused to show them. It was sufficient that they had the warrant which they could show to anybody who wanted to see the same or question their authority. As the attachment had already taken place, and the cattle were rescued before the process servers could make any arrangements for their custody, the accused were rightly convicted under S. 186, I. P. C., for obstructing public servants in the discharge of their duty. * S. 183, I. P. C., only applies when the seizure of the cattle is obstructed. No force was used to the public servants and even the decree-holder hardly received anything more than a knocking. Tribhawan is a well-to-do zamindar and the amount of the decree was small. The rescue was probably due to some misunderstanding and a sentence of fine would have been sufficient. The applicants have however undergone a good portion of the sentence. The conviction under S. 183, I. P. C., is set aside and that under

S. 186, I. P. C., is maintained. The sentence under the latter section will be reduced to the period of imprisonment they have already undergone.

B.V./R.K. *Order modified.*

A. I. R. 1918 Oudh 163 (1)

LINDSAY, J. C.

Rameshwar Bakhsh Singh—Defendant—Applicant.

v.

Rasul Beg—Plaintiff—Opposite Party.
Civil Revn. No. 205 of 1917, Decided on 21st February 1918, against order of Addl. Sub-Judge, Lucknow, D/- 17th September 1917.

Civil P. C. (1908), O. 23, R. 1 and O. 6, R. 17—Defect curable by amendment of pleadings—Leave to withdraw with liberty to bring suit should not be granted.

An application for leave to withdraw a suit with liberty to bring a fresh suit under O. 23, R. 1, should not be granted if the defect on the basis of which the leave to withdraw is asked for can be cured by amendment of the pleadings.

[P. 163 C 2]

Hari Kishen Dhaon—for Applicant.

Salig Ram—for Opposite Party.

Judgment.—This application must be allowed. It seems that a suit was pending in the Court of the Additional Subordinate Judge of Lucknow, the subject matter of the suit being a small strip of land. The plaintiff claimed possession. The defendant denied the plaintiff's right. A commission was issued to a pleader of the Court and his report was received. There can be no doubt that so far as it went and for whatever it was worth, the report of the Commissioner was unfavourable to the plaintiff. Upon this the plaintiff filed an application under O. 23, R. 1, asking for leave to withdraw the suit with liberty to bring a fresh suit. I have before me the allegations which were contained in that petition. One was that the suit had been brought on a presumption that the entries in the khasra and map were correct and that they correctly showed the position of the plaintiff's house. Another allegation was that it had now become apparent that, although a certain "gosha" described as No. 25 was shown in the khasra, nevertheless it was not shown in the map. It was alleged therefore on these two grounds that the suit could not proceed. Why it could not proceed I cannot imagine. Clearly if there was any mistake in the allegations contained in the plaint which

were due to wrong presumptions or wrong information given to the plaintiff the plaintiff could have applied for amendment of the plaint. However the Subordinate Judge without giving any reasons for his decision accepted the petition and allowed the case to be withdrawn.

There were no sufficient grounds upon which an application of this kind should have been granted. Mr. Salig Ram who appears for plaintiff says that his client, if not entitled to possession, might have had a very good case for asking for a declaration of his right of possession. All I have to say is that if he has any such case he can ask for amendment of the plaint and sue for this relief in the alternative. The Court below was not justified in allowing the withdrawal of the suit on the grounds stated; and I therefore set aside the order and direct the Court to resume the case at the stage where it was left. The plaintiff will be given full opportunity of amending his pleadings, and the other party will be given an opportunity of meeting any new case set up. Costs in this Court will be paid by the plaintiff opposite party.

B.V. R.K.

Order set aside.

A. I. R. 1918 Oudh 163 (2)

STUART AND KANHAIYA LAL, A. J. CS.

Narendra Bahadur Singh—Applicant.

v.

Oudh Commercial Bank of Fyzabad—Opposite Party.

Misc. Civil Appln. No. 283 of 1917, Decided on 22nd August 1917, for leave to appeal to His Majesty in Council from order of Judicial Commissioner's Court passed in Privy Council Appeal No. 24 of 1915, D/- 28th January 1916.

(a) Civil P. C. (5 of 1908), S. 151, O. 45, R. 1—Application for leave by ward under Court of Wards rejected as incompetent—Second application more than two years after release of estate—First application cannot be revived—Application being incompetent, revival cannot help—No sufficient cause for extension of time was shown—Application of S. 151 was not justifiable.

An application for leave to appeal to His Majesty in Council was rejected on the ground that the applicant's estate being under the superintendence of the Court of Wards he was not competent to make the application. After the release of the estate from the superintendence of the Court of Wards, the applicant made another application for leave to appeal to His Majesty in

Council. This application however was made more than two years after the date of the decree sought to be appealed from:

Held: (1) that the second application could not operate to revive the first application;

[P 164 C 2]

(2) that even if the first application was revived, the revival could not in any way benefit the applicant, inasmuch as the application which was sought to be revived was an application by a person disqualified to make it, and it would remain an application by a disqualified person if revived;

[P 164 C 2]

(3) that no sufficient cause had been shown to enable the Court to apply the provisions of S. 5, Lim. Act, to the case;

[P 166 C 1]

(4) that the Court would not be justified in utilising the provisions of S. 151, Civil P. C. so as to revive the previous application and to grant the applicant permission to appeal to His Majesty in Council.

[P 166 C 1]

(b) Civil P. C. (5 of 1908), S. 151—Power has to be used only to serve ends of justice and prevent abuse of process.

The provisions of S. 151 can only be utilised to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

[P 166 C 2]

Wazir Hasan and Lachmi Narain—
(for Applicant).

Gokaran Nath Misra — for Opposite Party.

Judgment.—The Oudh Commercial Bank of Fyzabad instituted a suit against Babu Narendra Bahadur Singh in the Court of the Subordinate Judge of Fyzabad on 22nd August 1911. The hearing of the suit was transferred to the Subordinate Judge of Mohanlal Ganj, who passed a decree against the defendant on 31st October 1912. An appeal was filed by the defendant to the Court of the Judicial Commissioner, which was decided on 15th June 1915. The Court of the Judicial Commissioner varied the decree of the Subordinate Judge in favour of the defendant-appellant. It was open to either party to prefer an appeal to His Majesty in Council against the decree of this Court as the decree had not affirmed the decision of the Court below; the value of the subject-matter was over Rs. 10,000 and on the decision of the Judicial Commissioner's Court either the plaintiff-respondent or the defendant-appellant would have been in the position to question the decision to an amount which would have justified the grant of permission to appeal to His Majesty in Council. The plaintiff-respondent accepted the modification of the decree and took no action towards an appeal. On 21st July 1915 the superintendence of the property of the de-

fendant-appellant was assumed under the provisions of S. 8, Local Act 4 of 1912, and on that date he became a ward under the Court of Wards in the United Provinces. On 13th December 1915 he applied for permission to appeal to His Majesty in Council. His application was resisted. This Court found that, as the application was made in the defendant-appellant's own name and had not been made in the name of the Collector in charge of his property or any other person appointed by the Court of Wards in that behalf, the application could not be accepted as it contravened the provisions of S. 55, Local Act 4 of 1912. The Court of Wards was represented in the case. The counsel for the Court of Wards stated that his client was no party to the application and did not desire that it should be made. The application was dismissed on 28th January 1916. Babu Narendra Bahadur Singh, defendant appellant, has since ceased to be a ward. The actual date when his property was released is not quite clear, but it may be taken (with consent of parties) that his estate was released about the end of June 1917. He had then been a ward for a little under two years. He has now applied to revive his application of 13th December 1915 (he wrongly calls his application of 14th December 1915), and in the alternative for leave to appeal on the ground that there is sufficient cause within the meaning of S. 5 of Act 9 of 1908 for his delay in making the application.

With regard to the question of revival we first note that if his application was revived as it stands the revival could not in any way benefit him, for the old application which it is sought to be revived is an application by a person disqualified to make it, and it would remain an application by a disqualified person if revived. The applicant's case is that he has been debarred from exercising his right to appeal to His Majesty in Council by the action of the Local Government in making him a ward under the Court of Wards Act. His learned counsel has pointed out that between 15th June 1915 and 21st July 1915 his client did not have the opportunity of procuring a copy of the lengthy judgment of the Court of the Judicial Commissioner in the appeal, obtaining counsel's opinion, and preparing an applica-

ion for permission to appeal to His Majesty in Council. The plea may be conceded. He did not have a reasonable opportunity of filing his application for leave to appeal between 15th June and 21st July 1915. His learned counsel's argument proceeded that, inasmuch as his client was disqualified under the provisions of the Court of Wards Act without his consent and against his will, he should be allowed an opportunity of proceeding with his application now that his estate has been released, in spite of the lapse of over two years which has intervened from the date of the decree of this Court. He has asked to be permitted to support this plea by the production of evidence to show that the superintendence of his client's property was assumed under the provisions of Local Act 4 of 1912 owing to influence exerted by the plaintiff-respondent, that the superintendence was improperly assumed, and that the property has been released under the orders of the Government of India which refused to sanction the action of the Local Government. We have refused to admit evidence upon these points. In the first place, the provisions of S. 14, Local Act 4 of 1912, appear to us to bar our jurisdiction to discuss the validity of the declaration. That section is as follows:

"No declaration made by the Local Government under S. 8 or by the Court of Wards under S. 10, shall be questioned in any civil Court."

But apart from that fact, if in such a proceeding as this we were to admit evidence as to the justification of the Local Government to assume superintendence of the applicant's property, we should embark upon an inquiry which could not be conducted satisfactorily. The reasons why the Local Government assumed superintendence of the estate must necessarily be contained largely in documents and correspondence of a confidential nature. The reasons why the Local Government have ceased to superintend the property must be contained in similar documents, and an attempt to go into the question would be doomed to failure as the decision would have to be based upon fragmentary evidence which would not afford sufficient material for a right decision of the point. Even if it be granted that the plaintiff-respondent suggested to the Local Government the advisability of superintending the

applicant's property, it does not follow that the decision of the Local Government in assuming such superintendence was based upon such suggestions. It might well be based on many other grounds which a civil Court would not have the opportunity of discovering and the reasons for the discontinuance of the superintendence would also not be discoverable by this Court in the course of such an inquiry. We therefore take the position, which appears to us to be the only position possible, that the discretion of the Local Government both in assuming superintendence of the property and in discontinuing that superintendence is not to be questioned. The learned counsel's main argument is that his client has been deprived of the exercise of the right to appeal to His Majesty in Council within the period of limitation by causes beyond his own control, and he invokes to assist him the provisions of S. 5, Act 9 of 1908, which states that:

"any ... application ... for leave to appeal ... may be admitted after the period of limitation prescribed therefor when the ... applicant satisfies the Court that he had sufficient cause for not ... making the application within such period."

The first point to be decided is whether the applicant was deprived of his right to appeal. The right to appeal was there, but the exercise of that right was taken away from him and vested in the Court of Wards during the period that he was a ward. It was for the Court of Wards to exercise their discretion, as to whether such an appeal was to the advantage of their wards. So long as he remained a ward the Court of Wards alone was judge of the desirability of making the appeal. His own views on the subject were immaterial. To all intents and purposes he was as absolutely disqualified from giving effect to his own wishes in the matter, as a minor or a lunatic would be disqualified during the period of his minority or lunacy. This comparison is to some extent helpful. Act 9 of 1908 has provided certain safeguards in the case of a minor and an insane person or an idiot with reference to the institution of suits or the making of applications for the execution of decrees. These safeguards are contained in Ss. 6, 7, 8 and 9 of the Act. It is to be remarked that under those provisions persons under such legal disability would not be permitted to apply for leave to

appeal after the period of limitation had expired. Once litigation is commenced for or against a minor or a lunatic, the subsequent conduct of the proceedings is left by the law in the hands of the guardian of such person. The discretion as to the institution of an appeal is left absolutely in the hands of the guardian and the person under the disability is not permitted, after the disability has ceased, to come forward and take action which his guardian has refused to take on his behalf, if the taking of such action is barred by limitation. Act 9 of 1908 does not cover the case of a ward under the provisions of Local Act 4 of 1912. The provisions of that Act do not give a ward the facility granted to a minor or a lunatic under Act 9 of 1908.

The conclusion at which we arrive is that, inasmuch as the Court of Wards had the authority to apply for leave to appeal on the applicant's behalf, as it was their duty to consider whether such an appeal was for the benefit of their ward, as the Court of Wards abstained from applying for leave to appeal, and as in addition, and this is the most important point, the legal personality of the applicant must be considered as absorbed in the personality of the Court of Wards during the period that his property remained under their superintendence, it cannot be said that the applicant had sufficient cause for not making the application within the period. We thus do not consider that the provisions of S. 5 of Act 9 of 1908, can be utilised on behalf of the applicant.

The last point remains whether under our inherent jurisdiction under S. 151 of Act 5 of 1908, we should not as a special case revive his previous application and allow the applicant the permission which he desires. We consider we should not be justified in utilising the provisions of the section for this purpose. If we took the action which he desires us to take we should be laying down a principle that, in every case in which the Court of Wards has refused to make an appeal on behalf of a ward, the Court should permit the ward to make the appeal on his own behalf as soon as the estate is released from superintendence. The effect of the acceptance of this principle might well be to render the position of the opposite party in litigation with a ward almost intolerable. The estate

might not be released for 20 or 30 years and during that period the title of the other side would remain undetermined and uncertain. We can only utilise the provisions of S. 151 to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. So far from considering that the acceptance of this application would be for the ends of justice or to prevent abuse of the process of the Court, we consider that its acceptance would distinctly be against the ends of justice. We therefore dismiss the applicant. The applicant will pay his own costs and those of the opposite party.

B.V./R.K. *Application dismissed.*

A. I. R. 1918 Oudh 166

KANHAIYA LAL, A. J. C.

Mt. Nidha—Plaintiff—Appellant.

v.

Ram Prasad and another—Defendant and Intervener—Respondents.

Second Rent Appeal No. 26 of 1916, Decided on 30th August 1916, from decree of Dist. Judge, Rae Bareilly, D/- 13th March 1916.

Landlord and Tenant—Rent—Payment to intervener is not good if landlord is proved to be in receipt and enjoyment of rent.

Where in a suit for arrears of rent the defendant pleaded that he had paid the rent for the period in suit to an intervener, and the plaintiff proved that up to that period he had actually and in good faith been in receipt and enjoyment of rent :

Held : that under these circumstances the plaintiff was entitled to a decree against the defendant, who had no right to pay the rent for the period in suit to the intervener. [P 167 C 2]

Ali Mohammad—for Appellant.

Aditya Prasad—for Respondents.

Judgment.—This appeal arises out of a suit for arrears of rent brought by the plaintiff-appellant for 1321 and 1322 Fasli against Ram Prasad. The defence of Ram Prasad was that Thakur Amir Haider took possession of the entire village in 1321 Fasli, that since then all the tenants have been paying rent to him, and that he too consequently paid rent to him for the period in suit. It was further pleaded that the patts of the village were jointly owned by several cosharers and that the plaintiff alone was not competent to sue. Thakur Amir Haider was therefore added as co-defendant. It does not appear whether he was directed to file a written statement, but it is admitted on his behalf

that he realized that rent from Ram Prasad for the period in suit.

The Assistant Collector found that the practice in the village was for each co-sharer to collect rent from each tenant to the extent of his share, that it was doubtful whether Ram Prasad paid rent as alleged to Thakur Amir Haider as the latter was not a co-sharer in one of the pattis, and that if any such payment was made, it was not made in good faith. He therefore decreed the claim. In appeal the learned District Judge reversed that decree on the ground that the village was joint and undivided and that the payment of rent to one co-sharer was binding on the others. The learned District Judge does not however appear to have approached the case from the right standpoint. As pointed out in *Sripat v. Ram Saron* (1), which was followed in *Chandrawati Kunwar v. Bhagwant* (2), the only point material to the decision of such a case is whether the rent was received prior to the period in suit by the plaintiff or by the intervenor, and it is for the plaintiff to prove that he actually and in good faith was in receipt and enjoyment of the rent during that period. That evidence has been supplied by the plaintiff, who examined the patwari of the village on the point. The patwari gave evidence that for the last 20 or 25 years the arrangement was that each co-sharer used to realize the rent of his share from each tenant and that this arrangement continued in force till Kharif 1321 Fasli, when Jagannath, the husband of the plaintiff, was alive. Gokul Prasad, the Waslibaqi Nawis, states that the revenue is also paid separately by each co-sharer. The learned District Judge observes that the arrangement was not permanent and was not binding on the tenants, but the evidence of Gangadin and Baijnath, who were produced by the intervenor, shows that the arrangement was observed and continued in force till the period in suit. They admit that the plaintiff used to realize the rent from Ram Prasad and also from the other tenants prior to 1321 Fasli and that from three years the intervenor has started realizing the rent on his own account. On that evidence the plaintiff was entitled to a decree

against Ram Prasad, who has no right to depart from the previous practice and to pay the rent for the years in suit to the intervenor.

It appears that there is a dispute between the intervenor and the present plaintiff in regard to the redemption of a mortgage under which the plaintiff claims to be in possession. The intervenor alleges that he has paid up the money due on the mortgage to Jagannath, the husband of the plaintiff. He files a receipt, purporting to have been given to him by Jagannath, in proof of that statement. The receipt is unregistered and is not admissible in evidence in proof of the extinction of the mortgage under S. 17, Registration Act (16 of 1908). Jagannath was illiterate. The genuineness of that receipt is denied by the plaintiff. An application made by the intervenor to get mutation of names effected in his favour on the strength of that receipt was unsuccessful and the assertion of the plaintiff is that since that date the intervenor has been trying to take forcible possession. On the evidence of the witnesses produced by the intervenor himself, it cannot be said that the alleged payment of rent was made to him in good faith. The appeal is therefore allowed and the decree of the Court of first instance restored with costs throughout.

B.V. R.K.

Appeal allowed.

A. I. R. 1918 Oudh 167

KANHAIYA LAL, A. J. C.

Bhairon Prasad — Defendant — Appellant.

v.

Sheo Darshan and others—Plaintiff and Defendants—Respondents.

Second Appeal No. 344 of 1916, Decided on 14th May 1917, from decree of Dist. Judge, Rae Bareilly, D/- 30th June 1916.

Civil P. C. (1908), O. 21, Rr. 66 and 102 — Sale in execution—Mortgage prior to attachment is binding on auction-purchaser even in absence of notification.

A person who purchases property, which has already been mortgaged, in execution of a decree, cannot acquire larger rights than those which his judgment-debtor possessed on the date of the sale. An auction-purchaser of a property mortgaged to a person under a registered deed, executed prior to the attachment of the property, is bound by the mortgage even if he had no notice of the mortgage and the mortgagee failed to have his lien notified at the time of the sale.

[P 168 C 1,2]

1. (1899) 2 O C 137.

2. (1916) 19 O C 32=35 I C 444.

Surendra Nath Roy—for Appellant.
Zakur Ahmad and Lachman Prasad—
 for Respondents.

Judgment.—Ganga Bakhsh Singh held a decree for arrears of rent against Mt. Indrana, in execution of which he brought to sale certain trees in a grove situated in the village Manjhawan belonging to the latter. Prior to the sale Lodheshwar made an application on behalf of his brother Sheo Darshan, the plaintiff, to Revenue Court, stating that his brother held a mortgage of the said grove for Rs. 48 and that the money due on that mortgage should be notified at the time of the sale. The Revenue Court refused to recognize Lodheshwar as having any authority to present the application on behalf of his brother Sheo Darshan and rejected the application. In the order rejecting the application the Revenue Court further observed that the time fixed for payment in the mortgage was four years and that it was noticeable that the mortgagee had not brought a suit for the recovery of his money in spite of the expiry of that period. What the relevancy of that observation was to the order which was passed on that application is not quite apparent. The trees were purchased at the auction-sale by Bhairon Prasad. Subsequently Sheo Darshan filed the present suit for recovery of the money due on the mortgage, praying in addition that the sale effected in favour of Bhairon Prasad should be set aside. The Court of first instance dismissed the claim on the ground that the plaintiff was estopped by reason of his failure to notify his lien in the manner provided by law. The lower appellate Court however came to the conclusion that the plaintiff was not guilty of any act or omission, such as would operate as an estoppel against him. It therefore decreed the claim for the sale of the mortgaged property.

The learned counsel who appears for the defendant-appellant contends that his client was a bona fide purchaser for value and that the plaintiff was not consequently entitled to bring the mortgaged property to sale in satisfaction of his mortgage. A person who purchases property subject to a prior mortgage in execution of a decree for arrears of rent cannot however acquire larger rights than those which his judgment-debtor possessed on the date of the sale. The

mortgage held by the plaintiff was registered, and the defendant-appellant, as the purchaser of the rights of the judgment-debtor, is bound by the mortgage, which was effected prior to the attachment, which gave rise to the sale. The mere fact that the appellant had no notice of the mortgage or that application made by the brother of the plaintiff for notification of his lien was disallowed is of no avail to him, because if it be assumed that Lodheshwar had any authority to file the application on behalf of the plaintiff, the fact that the suit has been filed within one year from the date of the order passed by the Revenue Court is sufficient to render it maintainable. As a matter of fact no application for the notification of the lien was made by the plaintiff himself, and no act of his or omission on his part can be relied on in proof of the plea, which the defendant-appellant has pressed in this appeal. It has also been argued on behalf of the defendant-appellant that the mortgage held by the plaintiff was collusive and without consideration. But no such plea was set forth in the grounds of appeal or appears to have been urged at the time of the hearing of the appeal in the lower appellate Court. The finding of the learned Munsif was that the mortgage was made for consideration. The appeal is therefore dismissed with costs.

B.V./R.K.

Appeal dismissed.

A. I. R. 1918 Oudh 168

LINDSAY, J. C.

Ram Dut Singh and another—Defendants—Appellants.

v.

Balkaran Singh—Plaintiff—Respondent.

Second Appeal No. 276 of 1917, Decided on 5th February 1918, from decree of Dist. Judge, Gonda, D/- 19th April 1917.

Pre-emption—It is not permissible to put transaction into fraudulent form to avoid pre-emption.

Persons are entitled to defeat the operation of the law of pre-emption if they can do so by legitimate means, but it is not permissible to throw a transaction of transfer into a fraudulent form for the purpose of avoiding a claim for pre-emption. Where a property was mortgaged with possession for a long term to one of two brothers forming a joint family and the mortgage was followed by a sale of the equity of redemption in favour of the other brother:

Held: that there was really only one transaction, thrown into a fraudulent and deceptive form, to effect a complete sale so that pre-emption of the property could be allowed regardless of the mortgage created on the same. [P 169 C 2]

Aditya Prasad—for Appellants.

C. Thompson—for Respondent.

Judgment.—This appeal has arisen out of a pre-emption suit brought by the plaintiff-respondent Balkaran Singh. The two principal defendants in this case were Ram Dut Singh, defendant 1, and his brother Drig Bijai Singh, defendant 2. Both these men are admittedly members of a joint Hindu family. The case for the plaintiff was that the other defendants had, on 16th June 1915, transferred their property to the first two defendants in circumstances which gave him a right of pre-emption. What took place was this: On 15th June 1915, a mortgage of this property was executed in favour of defendant 2, Drig Bijai Singh, to secure a loan of Rs. 100. The mortgage was a mortgage with possession and the period was 55 years. On the following day what purported to be a sale deed of the right of redemption was executed in favour of the other brother Ram Dut in consideration of a payment of Rs. 450, out of which Rs. 100 were left for the purpose of redeeming the mortgage which had been executed on the previous day. Both deeds were registered on 16th June. After the trial had opened and the pleas of the parties had been recorded, an amendment of the plaint was made and a new para. 5 (a) was introduced into the plaint alleging that although the transaction had been carried out by means of the two deeds just referred to, it was in reality one solitary transaction and amounted to a transfer by sale. The Munsif gave the plaintiff a decree for pre-emption in respect of the sale of 16th June, but he held that the mortgage transaction could not be disturbed and that all the plaintiff was entitled to was to acquire the right of redemption which had been transferred to Ram Dut.

The plaintiff appealed to the learned Judge. He came to the conclusion that the dealings between the other defendants and the first and the second defendants were intended to deceive and that in fact the property was sold to these defendants under the guise of a mortgage followed by conveyance of the equity of redemption. The point taken

here before me on behalf of the first and second defendants is that the decision of the Court below is wrong. It has been argued that there was nothing illegal in the manner in which the property was transferred and that these appellants were entitled to resort to any device which was not illegal for the purpose of defeating the plaintiff's right of pre-emption. It need not be doubted that persons are entitled to defeat the operation of the law of pre-emption if they can do so by legitimate means, but it is not permissible to throw a transaction of transfer into a fraudulent form for the purpose of avoiding a claim for pre-emption. In the present case I think the learned Judge was entitled to hold that the transaction was a fraudulent one and intended to deceive. We have the admitted fact that both the transferees are brothers and members of a joint family and it is hardly to be doubted that it was the intention of the parties to effect a complete transfer by sale. In the course of the argument it was stated that the plaintiff had never set up a case that the transaction was one intended to deceive or defraud, but in view of the amendment made in the plaint to which I have referred above that argument seems to me to be untenable. When the plaintiff became aware of the facts set up by way of defence he took the plea that the dealings between the defendants, although thrown into the form of two separate transactions, amounted to only one transaction of sale. In this connexion I may refer to what was stated by defendant 1 in para. 11 of his written statement. The plea taken there reads as follows:

"The sale has been effected for Rs. 450 and according to the market rate the price of the property sold is not less than Rs. 450."

This practically amounts to giving away the whole of the case. I look upon this plea as a distinct admission by defendant 1 that the intention was to effect a transfer by sale. In these circumstances I hold that it is not possible for the appellant here to argue that in dealing with the property as they did they were resorting merely to legitimate devices for the purpose of defeating a pre-emption suit. I think the Judge was entitled to find that the first and the second defendants had conspired to throw the transaction into a fraudulent

form. The appellants are not, in my opinion, entitled to any relief. I affirm the judgment of the Court below and dismiss the appeal with costs.

B.V. R.K. *Appeal dismissed.*

A. I. R. 1918 Oudh 170 (1)

KANHAIYA LAL A. J. C.

Sheoraj Singh — Defendant — Appellant.

v.

Sriprakash Singh — Plaintiff — Respondent.

First Rent Appeal No. 9 of 1917, Decided on 9th May 1917, from decree of Dy. Commr. Kheri, D/- 17th November 1916.

Oudh Rent Act (1886), Ss. 52 and 141—Grant for maintenance under conditions—Grantee held tenant holding under special agreement and liable for interest on arrears.

Defendant held a village for his maintenance under a grant from the talukdar on condition (1) that he paid the revenue assessed on the same and 15 per cent. malikana and 7 per cent sawai to the talukdar; (2) that the grant was resumable if the grantee failed to maintain the members of his family; and (3) that while the grant was hereditary the grantee was debarred from selling or mortgaging the village.

Held: that the grantee was a tenant holding under special agreement within the meaning of S. 52 and was therefore liable to pay interest on the arrears of rent due from him under S. 141. [P 170 C 2]

Kailash Nath Chak—for Appellant.

Bisheshwar Nath Srivastava—for Respondent.

Judgment.—The plaintiff-respondent is the present proprietor of the Mallanpur Estate. The defendant-appellant represents one of the junior branches of the family of the former proprietors of that estate. It appears that six villages were granted by the ancestor of the plaintiff to the ancestor of the defendant for his maintenance, subject to the condition that he paid the revenue assessed on the same and 15 per cent. malikana and 7 per cent sawai to the talukdar. The terms of the grant are embodied in the *wajib-ul-arz* of the villages granted, wherein it is stated that the grant shall be resumable, if the grantee fails to maintain the members of his family, and that while the grant will be hereditary, the grantee shall have no power to sell or mortgage the villages granted. The present suit was filed by the plaintiff for the recovery of the arrears of rent for 1322 and 1323 Fasli in respect of some of those villages

with interest thereon at 1 per cent. per mensem. The learned Collector decreed the claim. The only question for determination in this appeal is whether the plaintiff was entitled to claim interest on the arrears and whether the defendant was entitled to a set-off of Rupees 1,124-4-6, which he claims to have paid in excess to the plaintiff in 1321 Fasli.

It is clear from the terms of the grant that the defendant is not a transferee of a proprietary interest in the villages in question, for the right conferred was not transferable and the grant was resumable on the happening of a certain contingency. It is also clear that the defendant is not an under-proprietor within the meaning of S. 3, Cl. 8, Oudh Rent Act (22 of 1886), because the rights conferred by the grant were non-transferable. The items specified in the *wajib-ul-arz* as being payable by the grantee represent the measure of the malikana or rent payable by him on account of the right he holds in the land; and in the absence of anything to show a limited proprietary grant, he must be deemed to be a tenant, holding under a special agreement within the meaning of S. 52, Oudh Rent Act, and therefore liable to pay interest under S. 141 of the said Act. In regard to the set off claimed by the defendant, it appears that a decree was obtained by the plaintiff for arrears for 1319 and 1320 Fasli against the defendant in execution of which Rs. 1,124-4-6, which had actually been paid by the defendant in excess in 1321 Fasli, were credited and an execution was taken out for the balance. This fact was not disputed in the Court below. The question of set-off therefore does not arise. The appeal accordingly fails and is dismissed with costs.

B.V./R.K. *Appeal dismissed.*

A. I. R. 1918 Oudh 170 (2)

STUART, A. J. C.

Fida Abbas and another—Plaintiffs—Appellants.

v.

Rahim Bakhsh and others—Defendants—Respondents.

Misc. Appeal No. 34 of 1917, Decided on 1st August 1917, against order of Sub-Judge, Unao, D/- 12th June 1917.

Civil P. C. (1908), O. 41, Rr. 23 and 27—Lower Court refusing to record evidence—

Order under R. 23 is bad—Court can only direct recording of additional evidence.

Where an appellate Court considers that certain evidence refused to be recorded by the lower Court ought to have been recorded, it has no power to remand the suit for rehearing ab initio under O. 41, R. 23, but can direct any additional evidence to be recorded, under O. 41, R. 27. [P 171 C 11]

Ram Bharose Lal—for Appellants.

M. A. Khan—for Respondents.

Judgment.—In this case the learned Subordinate Judge has remanded the suit for rehearing ab initio under the provisions of O. 41, R. 23. Those provisions have no application. This was not a case in which the Court from whose decree the appeal has been preferred has disposed of the suit upon a preliminary point and the decree has been reversed in appeal. The Court from whose decree the appeal has been preferred has refused to record certain evidence which the learned Subordinate Judge considered ought to have been recorded. The learned Subordinate Judge could have directed any additional evidence to have been recorded under the provisions of O. 41, R. 27.

I therefore allow this appeal. I set aside the order remanding the case under O. 41, R. 23, and direct that the learned Subordinate Judge take the appeal on his file again and proceed to decide it. He will be at liberty to utilize the provisions of O. 41, R. 27, in any manner which may appear good to him. As the difficulty has arisen not through the action of the parties but through the action of the Court, I direct that the costs of the present appeal abide the result.

B.V./R.K.

Appeal allowed.

A. I. R. 1918 Oudh 171

LINDSAY, J. C.

Ghani Khan and others—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 9 of 1918, Decided on 12th February 1918, from order of S. Judge, Gonda, D/- 8th January 1918.

Penal Code (1860), S. 146—Force need not be directed against any person or object—Even brandishing bamboos is sufficient.

It is not necessary for the purpose of S. 146 that the force or violence referred to in the section should be directed against any particular person or object. The brandishing of bamboos and the cutting of a branch of a tree by persons who are members of an unlawful assembly

amounts to a use of force within the meaning of S. 146 Penal Code. [P 172 C 2]

A. Shaw and H. C. Dutt—for Accused.

Judgment.—This is an application on behalf of 18 accused persons who were convicted on a charge of riot in the Court of a Magistrate of the First Class in the Gonda District. The convictions were upheld in appeal by the Sessions Judge who however reduced the sentences imposed by the Court of first instance. The petition which has been filed before me contains no less than 18 grounds, but substantially the case argued before me is that there was no evidence before the trial Court to justify the conviction of these applicants on a charge of riot. The riot in which these persons are said to have been concerned took place at Bahraich on 29th October last. The previous day was 10th day of the Muharram, the day upon which the Mahomedans take their tazias to the karbala. On the afternoon of 28th it was found that one of the large tazias which had been taken out for burial could not be carried under a certain pipal tree, the branches of which hung over the road. Some attempts were made to raise the branches in order to allow of the tazia passing, but this attempt was unsuccessful. It is in evidence that the District Magistrate and the Superintendent of Police arrived on the scene, and that they tried to make arrangements for the tazia being taken on its way.

It was also proved that the people who were interested asked the District Magistrate to have the overhanging branches of the pipal tree cut. He refused to do so although he promised to consider the matter. Meantime a suggestion was made to the Magistrate that the tazia might be got through by lowering the roadway, and it seems that this was done, the way being excavated to a depth sufficient to allow of the tazia clearing the overhanging branches. However this attempt to solve the difficulty did not meet with the approval of the Mahomedans and the evidence shows that they assembled there in a very large crowd the next morning and began a demonstration, their object being clearly to insist upon the branches of the pipal tree being cut. The police evidence shows that the mob assumed a threatening attitude and that cries were

raised that the branches should be cut. It was also proved that several men climbed up the pipal tree and began lopping off the branches. Meantime excitement had grown very intense and the District Magistrate and the Superintendent of Police were summoned to the spot. After they arrived the crowd still maintained a threatening attitude and a further demonstration was made, a great many of the people in the crowd being armed with bamboos or lathis.

In the end it became necessary for the Superintendent of Police to give the order to the armed police to load with ball cartridges. In the confusion it would seem that the order given was misunderstood by the constables. At any rate immediately after the order was given a number of shots were fired and several of the mob were killed. The mob after this began to disperse, and it is proved that under the orders of the District Magistrate a large number of persons were arrested. These persons were arrested, it seems, in three groups. The first lot taken into custody were the persons immediately under the pipal tree and these are the people with whose cases I am now dealing in this application. Some other persons were caught some little distance away. These were kept apart and marshalled in a separate place. The other persons who were at still greater distance from the scene of the occurrence were also arrested and kept separate from the others. In the end under the orders of the District Magistrate two sets of these people were let go and the only people who were detained in custody were those who were found immediately under the pipal tree.

The main argument put forward on behalf of these applicants is that there was no evidence to justify their being convicted on a charge of riot. As to this it is sufficient to refer to the evidence of Sub-Inspector Newal Kishore, who was the person responsible for their arrest. According to his statement these men were arrested immediately under the pipal tree and their names were taken down by him in a note-book. That fact of itself would, in my opinion, be sufficient for the purpose of showing that these men were in the very centre of the mob which collected by the tree. In addition to this it is proved that a number of these applicants were suffer-

ing from injuries caused by buck shot. That too is a circumstance which goes to show that they must have been in the forefront of the mob; so that apart from any other evidence there may be in the case, there is this evidence upon which it was open to both the Courts below to come to the conclusion that these applicants were members of this unlawful assembly. That the assembly was unlawful is a matter which is placed beyond all doubt by the evidence of the District Magistrate and the Superintendent of Police, not to mention the statements of other witnesses who were on the spot. It is perfectly clear that the intention of these persons who gathered together was to commit the offence of mischief by cutting the branches of the pipal tree.

It is not pretended, nor can it be pretended, that this tree was the property of any of the persons in the crowd. Consequently the crowd, when it first assembled with this undoubted common intention, was an unlawful assembly. Thereafter it became a riotous assembly, for there is plenty of evidence to show that force or violence was used by a number of members of the assembly. It is nothing to the point to argue that no force or violence was used towards the District Magistrate or the Police. It is not necessary for the purpose of S 146 I. P. C., which defines the offence of rioting, that the force or violence referred to in the section should be directed against any particular person or object. The meaning of the word "force" in this section may be interpreted in the light of the definition contained in S. 349, I. P. C. There can be no doubt that the brandishing of bamboos and the cutting of branches of the pipal tree amounted to an exhibition of force by persons who were members of the unlawful assembly. It seems to me therefore that it is not possible for these applicants to contend that there was no unlawful assembly and that there was no rioting. The facts of the case to my mind are quite clear, and it is proved beyond all doubt from the circumstances in which they came to be arrested that these applicants were members of the unlawful assembly which at a later stage became guilty of the offence of rioting. I dismiss the application accordingly.

B.V./R.K. *Application dismissed.*

A. I. R. 1918 Oudh 173

LINDSAY, J. C.

Satish Chander Mukerji — Defendant
— Appellant.

v.

Mahabali Prasad and others—Plaintiff and Defendants—Respondents.

Second Appeal No. 391 of 1917, Decided on 13th September 1918, against decree of Addl. Judge, Lucknow, D - 30th May 1917.

Hindu Law — Succession — Immorality of woman does not sever ties of blood relationship—Succession to property of unchaste woman is not prevented

Immorality on the part of a Hindu woman does not sever the ties of blood relationship and there is no rule of Hindu law which would prevent the blood relations of such a woman from succeeding to her property on her death.

[O 174 C 1]

J. K. Banerji—for Appellant.*Durga Kishen Seth and Bisheshwar Nath Srivastava*—for Respondents.**Judgment.**—The subject-matter of the suit out of which this appeal has arisen is a house in the City of Lucknow, which was conveyed on 20th December 1910 to a woman named Mt. Phulbasa who died in January 1915. It is an admitted fact that for about 40 years before her death this woman had lived as a concubine with a Bengali named Jagannath Mukerji, who was the father of the present appellant Satish Chander.

There can be no reasonable doubt that the house was purchased with money belonging to Jagannath, and that he bought the house for the benefit of the woman whom he had kept for so long. Both the Courts below are agreed upon this point, and it is not possible to argue that Phulbasa was a mere benamidar for Jagannath, this being the case set up in the first Court by the defendant-appellant. It must be taken therefore that the house belonged to Phulbasa at the time she died and the question for consideration is really, "who were the heirs of Phulbasa?" The plaintiff in the suit, who is the principal respondent here, is the brother's son of Phulbasa and therefore her blood relation. But he does not claim the property on the strength of his kinship with the deceased. His case was that Phulbasa before she took up with Mukerji was the wife of one Debi Din from whom she ran away. Debi Din thereafter married another woman Mt. Jagdei, a respondent in the case. When he died he left Jagdei and the respon-

dent Kusehar Din, his nephew. The plaintiff has bought up the titles or assumed titles of these parties and claims the property as their transferee. The first Court was of opinion that the plaintiff had failed to prove a marriage between Phulbasa and Debi Din and dismissed the suit. The lower appellate Court on the other hand has found that the marriage is proved. The finding has been attacked here on the ground that the Judge of the Court below misinterpreted the pleadings and assumed that the defendant Satish Chander had admitted that Phulbasa was a married woman when she began to live with Jagannath.

I am myself inclined to think that the learned Judge did construe the pleadings too literally. Satish Chander, in replying to the allegations in the plaint relating to Phulbasa's relations with Debi Din, stated that he had no knowledge of the facts and obviously he had not. I understand that there was a complete estrangement between Jagannath and his lawful wife who lived in Bengal, and Satish Chander seems to have lived with his mother and to have known nothing about his father or the woman Phulbasa. In the first of the additional pleas contained in para. 10 of his written statement, Satish Chander said that while Phulbasa lived with Jagannath as his mistress she had severed all connexion "with her husband and his relations." Bearing in mind the facts above stated I should not have interpreted this to mean that the defendant was admitting that Phulbasa was to his knowledge a married woman. The import of the plea appears to be that after Phulbasa took up with Jagannath she had no dealings with her relations, whoever they might be. And in any case there was no admission that the woman was the wife of Debi Din. The matter however is of little importance, for the plaintiff produced evidence which satisfied the Judge that Phulbasa had been married to Debi Din and I think that the fact of this marriage is established. To come then to the question of inheritance, the view of the Judge is that Debi Din's heirs are the heirs of Phulbasa, because the property in suit was "obviously" her stridhan and because the degradation of Phulbasa did not dissolve the ties of kinship.

With regard to these opinions I may say that the question whether the property was Phulbasa's stridhan is not quite so simple as the learned Judge thought. It is no doubt the case that according to the Bengal School of Hindu law the term "stridhan" has no technical meaning and embraces all property which a woman has power to give, sell or use independently of her husband's control. But Phulbasa was subject not to the Dayabhaga but to the Mitakshara school of law, and it is by no means clear that property which a woman subject to the Mitakshara acquires from the wages of sin is her stridhan property as known to that school of law. There is authority of this Court for the view that it is not: *Maharaja v. Thakur Pershad* (1). Again while there appears to be a general consensus of judicial opinion that immorality on the part of a Hindu woman does not sever the ties of blood relationship (indeed it is difficult to understand how a physical relation could be got rid of by mere immorality), it is by no means settled that the tie of affinity is not dissolved. And again there is authority for the view that even if the bond of marriage is not loosed by the misconduct of the wife, her status as an heir of her husband is forfeited so as to prevent the heirs of her husband inheriting to her. The question is one of great difficulty, as was said in the Full Bench ruling of the Calcutta High Court reported as *Hari Lal Singh v. Tripura Charan Roy* (2).

Fortunately it is not necessary for me to discuss this problem here. It is admitted that the plaintiff is the nearest blood relation of Phulbasa and if we take it that the tie of blood was not dissolved by the woman's immorality, the consequence seems to be that the plaintiff is entitled to the property by reason of his relationship with the deceased as there appears to be no definite rule of Hindu law which would prevent inheritance in such a case. If then it is uncertain whether the heirs of the woman's husband could lay a claim to the property, it is at any rate tolerably clear that her blood relations can. And in any event if we are driven to apply the principles of justice, equity and good conscience, it must be held that the

plaintiff's right is superior to that of Satish Chander who in fact has no right at all, for he can claim no relationship with Phulbasa. While I do not agree with all that has been said by the Judge of the Court below, I am satisfied that his decree is right and must be affirmed. I dismiss the appeal with costs.

B.V./R.K.

Appeal dismissed.

A. I. R. 1918 Oudh 174

LINDSAY, J. C.

Raghubar—Defendant—Appellant.

v.

Suraj Bakhsh and others—Plaintiff—Defendants—Respondents.

Second Appeal No. 336 of 1917, Decided on 3rd April 1918, from decree of Sub-Judge, Rae Bareilly, D/- 14th May 1917.

(a) *Landlord and Tenant—Trespass—Perpetual lessee is competent to sue raiyat for trespass—Planting more trees in grove amounts to trespass.*

A perpetual lessee is competent to maintain a suit against a raiyat with regard to a trespass committed by the latter, e. g., the planting of new trees in a grove without permission, on any portion of the land comprised in the lease.

[P 175 C 2]

(b) *Landlord and Tenant—Grove—Custom against planting more trees in grove—Proof of — Ikrammalikan prohibiting raiyat from planting new trees is sufficient to establish custom.*

Where an ikrammalikan of a village stated that no tenant holding a grove was entitled to plant fresh trees in the grove without the permission of the proprietor and that if he did so, the trees might be removed or the proprietor of the village might take possession of them:

Held: that the above statement constituted sufficient proof of the custom that a raiyat holding a grove had no right to plant new trees therein without obtaining the proprietor's permission.

[P 175 C 2]

Ram Bhargose Lal—for Appellant.

Wazir Hasan—for Respondents.

Judgment.—The appellant Raghubar was one of fifteen defendants in the suit which was brought in the Court of first instance by the plaintiff-respondent Lala Suraj Bakhsh. The dispute between the parties was with respect to grove No. 267 situated in the village of Parhari. The plaintiff alleged that he was the proprietor of the Mahal Suraj Bakhsh in which this grove lies. It was admitted that the grove was in possession of the defendants and it was stated that they held the grove as raiyats. In para. 2 of the plaint it was alleged that shortly before the suit was brought,

1. (1905) 14 O C 234=12 I C 778.

2. (1913) 40 Cal 650=19 I C 129.

the defendants had without obtaining the plaintiff's permission planted 67 new trees. In para. 3 of the plaint it was said that under the custom obtaining in the village the defendants had no right to plant these trees without getting the plaintiff's permission. Consequently the plaintiff prayed that the new trees might be delivered over to him or in the alternative that they should be uprooted. The defendants resisted the suit on a variety of grounds. The first plea taken was that the plaintiff was not the proprietor of the mahal and that he was not in a position to maintain the suit. Next it was denied that the custom alleged by the plaintiff prevailed and lastly the plea was taken that in any case the custom did not affect the rights of the defendants who claimed to be under-proprietors of the plot in question.

The Court of first instance decreed the plaintiff's claim and passed a decree directing the defendants to uproot the new trees. The Munsif was of opinion that on the evidence before him the plaintiff was an under-proprietor and was entitled to maintain the suit. He held also that the custom alleged by the plaintiff was established. For this purpose he relied upon the record of custom contained in the *ikrarnalikan*, a copy of which was produced before him. Lastly he held that the defendants had failed to show that they were under-proprietors of the plot in dispute. These findings were maintained in appeal by the Subordinate Judge. The first ground argued before me is that the decision of the Courts below regarding the status of the plaintiff is erroneous. It is claimed that the plaintiff is not an under-proprietor but only a perpetual lessee. The document upon which the plaintiff relies for his title was construed by both the Courts below as conferring under-proprietary rights. The language of the document is somewhat difficult of interpretation and I am not prepared to say that, if it were necessary for me to decide the point, I should agree with the decision of the Courts below. It does not, however, in my opinion, matter whether the plaintiff is an under-proprietor as he claims to be, or whether he is a perpetual lessee as argued by the learned counsel for the defendant-appellant. If the plaintiff is a

perpetual lessee, it seems to me that he was perfectly competent to maintain this suit. The case alleged in the plaint is a case of trespass pure and simple and if there was a trespass there can, I think, be no doubt that the plaintiff as a lessee of the property was entitled to maintain the suit.

The next question then is whether or not a trespass was committed. It is not denied that the defendants had within a short period before the suit was brought planted a number of new trees on the plot in question without obtaining the permission of the plaintiff or the superior proprietor. As to this I agree with the finding of the Courts below. It was competent to them to hold that the *ikrarnalikan* contained a statement of the custom relating to groves and, in my opinion, they were entitled to hold that the documentary evidence constituted sufficient proof of the custom. It has been argued here that the document, namely, the *ikrarnalikan*, does not contain a record of custom at all. A reference to its contents, however, convinces me that this argument cannot succeed. On the contrary it appears to me that the document purports to be and is record of custom, as it was declared at the time the village papers were first prepared. The provision of the *ikrarnalikan* with regard to rights in groves is clear. First of all it is stated that tenants and others who hold groves and all persons who plant trees with the permission of the *zamin-dar* are the owners of the trees, but not the land. Then it is stated that persons who plant groves have no power to put any new trees without the permission of the owner of the village. And lastly there is a special clause declaring that no tenant (*rai-yat*) is entitled to plant fresh trees without permission. If he does so, the trees may be removed or the proprietor of the village may take possession of them. Accepting this as a declaration of custom it seems to me that the defendants have no case. Admittedly they put down a large number of trees without obtaining permission either of the plaintiff or of the superior proprietor and consequently they have interfered with the possession of the plaintiff as perpetual lessee. He is entitled, therefore, to ask the Court to have the trees removed.

As regards the plea that the defendants are under-proprietors of the land of the grove plot, all I need say is that it cannot be entertained. In this connexion the learned counsel for the appellant referred to the provisions of S. 107-H Oudh Rent Act. Under that section rent-free tenure in certain circumstances confers under-proprietary right, but it is to be observed that this under-proprietary right can only be declared by a Revenue Court. A civil Court has no jurisdiction to declare under the terms of S. 107-H that any person has acquired an under-proprietary right in the land. I, therefore, held that the judgment of the Court below must be affirmed. The appeal fails and is dismissed with costs.

L. N. M. N.

*Appeal dismissed.***A. I. R. 1918 Oudh 176**

LINDSAY, J. C.

Khunnu Singh and another — Defendants—Appellants.

v.

Mt. Abbas Bandi Bibi and another — Plaintiffs—Respondents.

Second appeal No. 181 of 1917, Decided on 21st December 1917, from decree of Dist. Judge, Fyzabad, D/- 24th February 1917.

(a) **Landlord and Tenant—Under-proprietary rights—Persons escaping ejectment on ground that they are holding land as *sir* and that they had been described as *sir dars* by landlord—They are not under-proprietors of *sir* land.**

While there can be no doubt that under-proprietary rights may be acquired by long adverse possession extending over the necessary period, it is at the same time necessary that a person who claims to have acquired a title in this way, must give definite evidence to show that he asserted an under-proprietary title. [P 179 C 1]

Where it was found that certain persons had escaped ejectment on the ground that they had been holding their land as *sir* and that they had been described as *sir dars* in the receipts for rent given to them by the landlord:

Held: that on the above finding they could not be held to be under-proprietors of the *sir* land. [P 179 C 2]

(b) **Civil P. C. (1908), S. 11 — Decision against mortgagee is not binding on mortgagor—Mortgage.**

A decision obtained against the mortgagee alone in respect of a question as to proprietary title is not binding on the mortgagor. 2 O C 20, Expl. [P 180 C 2]

A. P. Sen — for Appellants.

Gokaran Nath Misra and Niwasa Ullah — for Respondents.

Judgment.—The suit out of which this appeal has arisen was brought by two plaintiffs Mt. Abbas Bandi and Mt. Kasim Bandi, who are the owners of a taluka named Samanpur. The defendants, who are the appellants here, were Khunnu Singh and Mt. Phulpati, widow of one Atbal Singh. The plaintiffs came into Court asking for a declaration that the defendants had no zamindari rights, superior or inferior, in certain lands which were specified in the plaint and the area of which is described as being 14 bighas odd. The cause of action upon which the suit was based was that in ejectment proceedings taken by the plaintiffs in a Rent Court in respect of the plots in suit the defendants had set up their case that they were under-proprietors.

The defendants' case was that they were under-proprietors of the lands in suit. They alleged that they were old zamindars of the village of Bahadurpur in which the property in dispute is situated, and they claimed that grants of "*sir* and *sagar*" had been made to them by the previous talukdars. The written statement filed by the defendants contained a history of certain claims and litigation between the talukdars and the defendants with respect to those lands and it was claimed that even if a grant of under-proprietary rights in the lands in suit had not been established, the defendants had, by adverse possession, acquired a good title. The Court of first instance dismissed the suit, being of opinion that the defendants had established an under-proprietary title by prescription. The lower appellate Court has reversed the decree of the first Court and decreed the plaintiffs' claim.

Now the defendants came in second appeal and it has been argued on their behalf that their claim to under-proprietary rights in the lands in question was established. The first question which has been argued here is the question of adverse possession. The learned counsel for the appellants contends that the decision of the Court below in this matter was erroneous. It may be as well to state here that it is now conceded that the defendants have not been able to establish any proof of a grant of under-proprietary rights in the lands in suit. Two documents were produced in the Court below, Exs. A 15 and A 16, which

were relied upon for the purpose of establishing a grant of these rights. As the learned Judge has correctly observed, even if these documents were proved to be genuine documents and even if it could be supposed that they purport to confer under-proprietary rights, nevertheless there is nothing in them to show that the lands to which they refer are the lands with which we are now concerned in this litigation. I may observe that there is evidence on the record that these documents were produced before a settlement Court in the year 1878 and that on the strength of them under-proprietary rights were decreed with regard to certain lands situated in the village of Abbaspur. But Mr. Sen has had to admit that in those proceedings no claim was made in respect of the lands with which we are now concerned, and consequently there is no reason to suppose that this decree passed in the year 1878 conferred any under-proprietary rights regarding the lands now in question.

To come to the point of adverse possession, it appears that in the year 1873 one Malik Hidayet Khan who was the talukdar at that time issued notices of ejectment to Gopal Singh and others. Gopal Singh, it is said, was the brother of the present defendant-appellant Khunnu Singh. The persons to whom these notices were issued brought a suit in the rent Court to contest the notices and it is admitted that the notices were set aside. Unfortunately all the record relating to this litigation in the rent Court in the year 1873 has been destroyed and consequently we are not in a position at the present day to say on what grounds the notices were contested. All we have is that the notices were set aside by the Tahsildar in whose Court the suit was brought. In the year 1878 the talukdar mortgaged his estate with possession to two persons, Lachman Prasad and Narotam Das, and these two mortgagees in the year 1886 issued notices of ejectment against the present defendant Khunnu Singh and Atbal Singh, who is now represented by defendant 2, Mt. Phulpati who is his widow. Those notices were cancelled on a suit being brought to contest them by Khunnu Singh and Atbal Singh. Following on this there was a litigation in the civil Court between these mortgagees and Khunnu Singh and

Atbal Singh in the year 1888. We have it that a suit was filed by the mortgagees in the Court of the Subordinate Judge of Fyzabad in which a decree for ejectment of Khunnu Singh and Atbal Singh was asked for.

Pausing here, I may say that I am unable to understand how a suit of this kind was entertained by a civil Court. The allegations in the plaint, a copy of which is Ex. A-8, indicate that the mortgagees asked for the ejectment of Khunnu Singh and Atbal Singh, alleging them to be mere tenants. I have always understood that a suit for the ejectment of a tenant lay only in the rent Court. However that may be, a defence was put forward by Khunnu Singh and Atbal Singh and the suit of the mortgagees was dismissed by the Subordinate Judge. A copy of his judgment is Ex. A-11. The mortgagees went in appeal to the District Judge, who affirmed the decree of the Court below. This litigation in the civil Court has been strongly relied upon by the defendants-appellants here in two ways. In the first place, certain statements contained in the judgments are appealed to for the purpose of showing that long before 1888, and in fact since the year 1873, the persons who were in possession of the lands now in question were setting up a claim to under-proprietary rights. Further it has been argued here, as it was in the Court below, that the decision of the Subordinate Judge, which was affirmed in appeal by the District Judge, operates as res judicata and prevents the present plaintiffs from asking the Court to declare that these defendants have no proprietary or under-proprietary rights. There was some discussion in the Court below, and there has been some discussion here, regarding the admissibility of the judgments of the Subordinate Judge, and the learned District Judge for the purpose of showing what sort of case had been set up in the rent Court in the year 1873 by Gopal Singh. Even however if I assume in favour of the appellants that resort can be had to these judgments for the purpose of showing what were the pleas raised in the ejectment proceedings in 1873, it seems to me that they throw no light on the subject. It is well understood that a person to whom a notice of ejectment has been issued may contest the notice on a variety of grounds. He

may, for example, plead that he is not an ordinary tenant and cannot therefore be ejected by notice. He may urge irregularities in the frame of, or in the manner of issuing, the notice and other grounds, any of which being established would lead to the notice being set aside.

Turning to the written statement which was filed in the civil suit in the year 1838 and reading it along with the plaint, a copy of which is Ex. A-8, it seems that it was alleged in this suit brought by the mortgagees that in the year 1873 Gopal Singh had got the ejectment notice set aside on a plea that the land was his *sir* land. This allegation was admitted in the written statement, Ex. A-9, filed by Khunnu Singh and Atbal Singh. They alleged in para. 2 of their further pleas that they were old Zemindars of Bahadurpur and that the lands in question were their *sir* lands ever since the time of native rule. At the most, therefore, all that we can say is that if we accept these statements as indicating the ground upon which the notice of ejectment was contested in the year 1873, a plea was raised that the lands in respect of which the notices were issued were *sir* lands. Now a man who sets up *sir* rights does not necessarily claim under-proprietary rights, for under S. 5, Oudh Rent Act, the person who is in possession of *sir* land under certain circumstances is deemed to be not an under-proprietor, but an occupancy tenant; and it is also clear from the provisions of the Rent Act that an occupancy tenant cannot be ejected by an issue of notice. It seems to me, therefore, to be impossible to say definitely on this evidence, if it is admissible, that in the year 1873 the ejectment notice was contested by Gopal Singh on the ground that he was an under-proprietor. Coming to the judgment of the Subordinate Judge, it appears to me that it does not help the case of the appellants very much. Issue 1 which the Subordinate Judge framed was whether the suit for possession brought by the mortgagees was or was not barred by limitation. Issue 2 was whether the lands in suit were the defendants' *sir* lands.

With regard to issue 1, the Subordinate Judge referred to the fact that a notice of ejectment had been issued against Gopal Singh in respect of these

lands and that the notice was cancelled on 5th June 1873 by order of the Tahsildar. The Subordinate Judge proceeds to observe that it was clear to him that the defendants' adverse possession commenced from the date of the cancellation of the notice. What is meant by this observation is not at all clear to me. I do not know what case of adverse possession in the ordinary sense could have been set up in the Rent Court. There is certainly nothing in the judgment to show that the Subordinate Judge had before him any evidence which would indicate that under-proprietary rights were claimed in the ejectment proceedings in the year 1873. As regards issue 2 the Subordinate Judge held that the lands were the defendants' *sir* and that they had been in possession of them as such for a long time. That finding, however, does not amount to a decision that Khunnu Singh and Atbal Singh were under-proprietors of the plots in question. The lands may have been their *sir* lands and yet under S. 5, Oudh Rent Act, they may have been nothing more than occupancy tenants.

Turning now to Ex. A-11, which is a copy of the judgment in appeal, here again we are left in the dark regarding what pleas were taken in the Rent Court litigation of the year 1873. The learned Judge observes that it is quite clear that in those proceedings the defendants' predecessor Gopal Singh set up an adverse title. The Judge, however, does not indicate what the nature of this adverse title was. He proceeds to remark that the defendants "had been in possession ever since and not as tenants." This remark too does not convey much. It may mean that they were not in possession as mere tenants as was the case alleged in the plaint, but were in possession as tenants with occupancy rights. As for the statement in the judgment, that the defendants had gained title by adverse possession, all that need be observed is that the nature of the title is not revealed by anything contained in this judgment. It may, for all I know, have been the opinion of the Court that the lessees were not entitled to eject these defendants, if it could be shown that they had any higher rights than those of ordinary tenants. Altogether it appears to me that the lower appellate Court was quite right in holding

that these proceedings in the year 1888 and the following years do not indicate with any certainty that a claim for under-proprietary rights in respect of these lands had been put forward in the year 1873. It is admitted that after this litigation, which was determined by the appellate judgment of the District Judge of Fyzabad on 23rd September 1890, Khunnu Singh and Atbal Singh got their names recorded in the register of under-proprietors and it seems that their names have been recorded there ever since.

To turn now to the plaintiffs: they redeemed the mortgage executed in favour of Lachhman Prasad and Narotam Das in the year 1908, and great stress has been laid by the learned counsel for the appellants on the fact that since this time the plaintiffs have been taking rents from the defendants and giving them receipts in which they are described as sirdars. This evidence is, of course, available to the defendants as against the plaintiffs, but I cannot agree with the value which has been put upon it by the lower appellate Court. The learned Judge observes that at the best they are records of admissions made, admissions which are not conclusive and which, as the Judge says, have not been proved to be in accordance with fact. I would hardly go so far as to say this, because it may be that these lands now in dispute are the *sir* lands of the defendants, that is to say, lands in which they hold a right of occupancy under the provisions of S. 5, Oudh Rent Act. I am not, however, prepared to hold in the appellants' favour that a description of them as "sirdars" necessarily means that it was admitted that they were under-proprietors; and in any case it cannot be pleaded, as it was pleaded in the Courts below, that by granting these receipts the plaintiffs were estopped in the present proceedings from denying that the defendants are under-proprietors.

While there can be no doubt that under-proprietary rights may be acquired by long adverse possession extending over the necessary period, it is at the same time to be observed that a person who claims to have acquired a title in this way must give definite evidence to show that he asserted an under-proprietary title; and I agree with the learned Judge of the Court below in thinking

that no definite proof of this fact is forthcoming in the present case. This, I think, is all that is necessary to say with reference to the question of adverse possession. While it may be that Gopal Singh and after him Khunnu Singh and Atbal Singh managed to escape ejectment by notice, it has not been established that they achieved that end by putting forward a definite plea that they were under-proprietors and not tenants.

The next question is with regard to the legal effect of the judgments which were delivered in the litigation which took place in the years 1888 and 1890. It has been argued before me that the judgments of the Courts, that is to say, of the Subordinate Judge and of the District Judge, operate as *res judicata* against the present plaintiffs. The case for the appellants is put in this way. It is said that when the mortgage with possession was given to Lachhman Prasad and Narotam Das, the mortgagor assigned to them all powers of ejecting tenants, and consequently it is claimed that to this extent at least the mortgagees in the suit which was brought in the year 1888 were fully representing the estate of the mortgagor and consequently the mortgagor is bound by the decision. A plea of a nature similar to this was put forward in a case which is reported as *Soshi Bhusun Guha v. Gopan Chunder Shaha* (1). There the argument was that a judgment obtained against a mortgagor bound the mortgagees on the ground that the interest of the mortgagees was sufficiently represented by the mortgagor, so that a judgment which bound the latter ought to be binding on the former. It was contended that this view of the law was based upon principles of justice and expediency. Dealing with this argument, their Lordships make certain observations at p. 371 of the report to which I now refer.

They mentioned several cases in which it had been held expressly that the mortgagee was not bound by a decree passed against the mortgagor after the date of the mortgage. They then go on to say that the reasons urged on behalf of the appellants were not sufficient to induce the Court to dissent from the view which had been taken in the cases referred to. Their Lordships observe that the general rule is that a judgment inter

1. (1895) 22 Cal 364.

partes binds only the parties and persons deriving title from them subsequent to the date of the judgment. There were, it was observed, many exceptions to this rule which were based upon grounds of justice and expediency, as for example, the cases in which judgments against a "Hindu widow or a Shebait" were held to be binding on the reversioner or the succeeding Shebait; or again cases in which by reason of express legislation decrees for rent against registered tenants were held to be binding on unregistered transferees of tenures; but their Lordships observe that the case before them did not fall under any of these descriptions :

"A Hindu widow or a Shebait must be held to represent the estate completely, as otherwise there can be no one to represent such an estate. But the same thing cannot be said of the proprietor of an estate after he has mortgaged it. The mortgagee can always be ascertained; very often his interest in the estate may be much greater than that left in the mortgagor, and sometimes, as in the present case, where after a decree it was no part of the mortgagor's interest to protect the encumbrance, the interests of the two are not identical. While on the one hand to one who is anxious to acquire a safe title by res judicata the inconvenience in including the mortgagee as a party defendant is not very great, on the other hand the injustice of binding the mortgagee by a decree to which he was not party must be very considerable. The balance of justice and expediency is, in our opinion, decidedly in favour of the view taken by the Court below."

In the same way it appears to me that it is not possible to argue that a decree which binds a mortgagee is binding upon the mortgagor who is no party to the suit. The general principle is that a judgment inter partes binds only the parties and persons deriving title from them subsequent to the date of the judgment. I am not prepared to accept the view that a mortgagor who, after a decree has been passed in proceedings to which the mortgagee was a party, redeems the mortgagee is a person who derives title from the mortgagee subsequent to the date of the judgment. In other words, to use the language of S. 11, Civil P. C., the mortgagor is not a person who claims under the mortgagee. It is well established, I think, and I need hardly cite any authority for the proposition, that while a lessee claims under his lessor and his successors-in-interest, the lessor cannot be said to claim under the lessee; and consequently he cannot be estopped by any decision obtained

against the lessee. I need only refer for authority on this point to a Full Bench decision of the Calcutta High Court reported as *Brojo Behari Mitter v. Kedar Nath Mozumdar* (2). Further it is to be observed that the mortgagor, although he makes a mortgage even with possession, does not cease to be the proprietor of his property and consequently in a case like this, where the claim put forward on behalf of the defendants is of a proprietary nature and constitutes an attack upon the proprietary right of the talukdar who was the mortgagor, it could not, I think, be held that any decision given in a suit between the present defendants and the mortgagees would be binding on the mortgagor, the reason being that in the earlier suit the mortgagees did not represent the proprietary right of the mortgagor.

The learned counsel for the appellants has drawn my attention to an observation to be found in the case reported as *Sheikh Muhammad Alam v. Raghbir Singh* (3). At p. 34 of the report Mr. Chamier is quoted as having observed that a mortgagee may represent his mortgagor in suits fairly conducted for the ejectment of trespassers but the mortgagor cannot be bound by the dismissal of such a suit in consequence of the mortgagee's failure to prosecute the suit. The case before Mr. Chamier was one in which the mortgagee of a village had let some waste land to A to have it reclaimed and brought under cultivation. The defendants interfered with A and the mortgagee brought a suit for possession in which the mortgagor was impleaded as a defendant. The suit was dismissed because the mortgagee failed to put in an appearance. Subsequently the mortgagor brought a suit for possession of the waste land against the defendants. It was held that the decision in the former suit did not render the question res judicata. The remarks of Mr. Chamier at p. 34 of the report appear to me to be obiter, and I can hardly think that his remarks amount to the enunciation of any general principle of law that a decision against the mortgagee binds the mortgagor. It is possible that there may be cases in which it could be held, consistently with the principle of the doctrine of res judicata, that the mort-

2. (1886) 12 Cal 580.

3. (1906) 9 O C 33.

gagor was bound. But for the reasons which I have given I am satisfied that in the case now before me it cannot be maintained that the decisions of the civil Courts in the year 1888 and again in 1890 are binding upon the present plaintiffs. I hold therefore that it is not possible for the defendants-appellants to plead that the matter now in question between themselves and the plaintiffs has been decided finally so as to estop the plaintiffs from putting up their present claim.

I may refer here to another point which was argued in connexion with this litigation of the years 1888 and 1890. The learned District Judge has observed in connexion with the argument relating to the question of adverse possession that there was no evidence on the record to show that any adverse title, which was set up in this civil litigation, was ever brought to the notice of the present plaintiffs and consequently he was of opinion, and I think rightly, that nothing in these proceedings could help the defendants for the purpose of proving that they had established an adverse title by prescription against the present plaintiffs. I have further to remark upon one point upon which some considerable stress was laid by the learned District Judge. It has been made clear that in the present suit Khunnu Singh has been relying upon assertions of adverse title made in the year 1873 by his brother Gopal Singh. When Khunnu Singh was being cross-examined in the Court of first instance, he stated as follows :

" Except myself and Mt. Phulpati no other person has a share in it (the land). Gopal's sons have no share in it. Gopal had also relinquished it in my favour in his lifetime whether by his own will or through force of me (zabardasti se). I would say that it was my zabardasti that he gave up possession. I took possession after he obtained a sir decree in 1873."

The learned Judge points out that in the face of this statement it was not open to Khunnu Singh to take advantage of Gopal Singh's success in the litigation in the Rent Court of 1873, because on his own showing he is not the representative-in-interest of Gopal Singh whom he says he ousted from possession. It has been argued here that this statement was made by Khunnu Singh mistakenly or by reason of some confusion. That however is not a matter which I can

consider here in second appeal. It was certainly open to the learned Judge to make use of any statement of this kind made by Khunnu Singh when he was being examined as a witness and to use it as evidence in support of his conclusion that Khunnu Singh is not the legal representative of Gopal Singh and that he has not acquired title by continuous adverse possession. I have now dealt with all the points which were raised in the memorandum of appeal and which were argued before me. Ground No. 5 of the memorandum was not pressed. With reference to what is stated in ground No. 6 of the memorandum of appeal, in which it is said that a judgment of the First Additional Judicial Commissioner in Second Civil Appeal No. 224 of 1913 lays down too broad a rule of law, it is necessary to say that that was a case in which Mr. Stuart held that a decree obtained against a mortgagee would not bind the mortgagor. It is true, as has been argued, that Mr. Stuart gives no reasons for his decision, but I have dealt sufficiently with this point in an earlier portion of the judgment and I think that the general principle laid down by Mr. Stuart is a correct one. The result therefore is that the defendants-appellants failed, in my opinion, to adduce satisfactory proof that they are under-proprietors of the plots in suit. The appeal fails and is dismissed with costs.

B.V./B.K. *Appeal dismissed.*

A. I. R. 1918 Oudh 181

LINDSAY, J. C.

Sheoraj Singh—Plaintiff—Appellant.

v.

Debi Bakhsh Singh and another—Defendants—Respondents.

Second Appeal No. 337 of 1917, Decided on 23rd April 1918, against decree of Dist. Judge, Sitapur, D/- 17th May 1917.

Limitation Act (1908), Art. 144—Right to parjot, charai and charsai for use of land is interest in immovable property—Non-collection of particular item in one year or of full amounts due does not break continuity of adverse possession—Adverse possession, Landlord and tenant.

The right of a landlord to demand and receive certain dues, e.g., parjot, charai, and charsai from persons who occupy or use land in the village in one way or another must be deemed to be an interest in immovable property within the meaning of Art. 144, Sch. 1, Lim. Act.

[P 183 C 1]

Where a stranger has been collecting these dues adversely to the landlord during a series of years, it is not possible to argue that because in one particular year no collection of one or other of the items was made, or because in some of the years the full amounts of the dues were not collected, the adverse possession of the stranger was not exclusive, especially where the landlord has made no collections at all during those years. [P 183 C 2]

K. N. Chak and Iswari Prasad—for Appellant.

Bishwar Nath Srivastava—for Respondents.

Judgment.—This appeal has arisen out of a suit brought in the Court of the Subordinate Judge of Kheri by the appellant Bhuiya Sheoraj Singh against Raja Debi Bakhsh Singh, the Talukdar of Mallanpur. The plaintiff sought to recover a sum of Rs. 1,298 from the defendant on the allegation that the defendant had, during the years 1319-1320 and 1321-1322 Fasli, realised certain manorial dues in six villages mentioned in the plaint. The case for the plaintiff was that he was entitled to collect these dues and that the defendant had wrongly interfered with the collections and had received this money which was held to the plaintiff's use. The Court was further asked to issue a perpetual injunction to the talukdar restraining him from interfering with the collections of the dues in question. The case for the talukdar was that the plaintiff was not entitled to collect these dues and that he had never collected them at any time within limitation. The Court of first instance dismissed the plaintiff's claim. The Subordinate Judge held in the first place that the plaintiff had failed to prove that he was entitled to collect the dues. In the next place he held that if the right had ever existed in the plaintiff, it had been lost by adverse possession on the part of the defendant talukdar. The suit was dismissed accordingly and the decree has been sustained in appeal by the District Judge.

The plaintiff now comes in second appeal and two points have been argued for decision. The first of these is with regard to the title of the plaintiff to collect the dues in suit and the second is the question of limitation. If the decision of the Courts below upon the issue of limitation is correct, then it will not be necessary for me to enter into the question of the plaintiff's title.

It seems that at or before the time of the First Regular Settlement two whole villages and four hamlets in certain other villages were made over by the Talukdar of Mallanpur to the predecessor in interest of the plaintiff, who belonged to a junior branch of the family. The grant was made for the maintenance of the junior members and there is no serious dispute as to this fact. The terms of the grant however were a matter of discussion in the Courts below. The plaintiffs were unable to produce any written evidence of a grant and had to rely upon certain statements contained in the *wajibularzes* of five out of the six of the villages in suit. Both the Courts below construed these documents and held that the plaintiff had failed to make out that he was entitled exclusively to realize these dues, which are described as *parjot*, *charai* and *charsai*. With regard to the question of limitation the evidence has been analysed very minutely in the judgment of the Court of first instance. The learned Subordinate Judge observes that there was a mass of documentary evidence upon the record to show that the talukdar had all along been receiving these dues and certainly for a period more than 30 years before the suit. A great deal of oral evidence was produced on the part of the plaintiff. This was rejected by the Subordinate Judge as being unreliable. He pointed out that the plaintiff's witnesses had not been able to produce any receipts granted to them by the plaintiff.

On the other hand, the documentary evidence which the defendant put forward established that for years the dues in question had been received by the talukdar. They were copies of decrees obtained by a lessee of the talukdar to whom the right to collect the dues in question had been granted, and there was a long series of account-books kept by the talukdar which were produced and which proved in the opinion of the first Court that the talukdar had been collecting these imposts. The accounts were examined at length by a Commissioner and it was principally upon his report that the issue of limitation was decided. In the Court below the learned Judge has considered the evidence which was brought forward for the purpose of showing by whom the collections

had been made. He states that there is no reason for doubting the genuine character of the documents put forward by the defendant and which prove, in his opinion, that the talukdar had been realizing the dues for about 30 years. He held that there was no creditable evidence on the part of the plaintiff to rebut the case which had been proved by the defendant, and he consequently came to a definite finding that there was no evidence that either parjot, charai or charsai had been collected by the plaintiff or his father. On the contrary it was proved that for about 30 years these dues had been collected by the talukdar. If this finding of both the Courts below is correct there is an end to the plaintiff's case; but a number of arguments have been addressed to me for the purpose of showing that the decision is wrong. It has been argued in the first place that the Courts below were wrong in applying the rule of 12 years' adverse possession. This argument rests upon the proposition that the rights in question, the exercise of which is disputed, do not constitute immovable property or an interest therein. I am unable to agree with this contention. It is quite clear that the case of both parties is that the right to claim these dues is connected with the possession of the villages in which they are collected. In other words, it is not the case of anyone that a person who has no connexion at all with the villages would be in a position to demand payments of these dues. The property which is in dispute here is a right, namely, the right to demand and receive certain dues as a landlord from persons who occupy or use land in the village in one way or another; and it seems to me that this right must be deemed to be an interest in immovable property. I hold therefore that if the defendant succeeded in showing that he had exercised this right adversely to the plaintiff for a period of more than 12 years the right of the plaintiff, if he ever had any, had become extinct and can no longer be enforced.

In the next place it has been suggested that the defendant failed to prove continuous adverse possession over the property in dispute, that is the right to collect dues, and for this purpose attention has been drawn to the accounts which were put forward on behalf of the

defendant and the Commissioner's report which he made after having examined them. It is no doubt the fact that in some years we find that one or other of the dues were not collected and in other instances we find that the full amount of the dues was not collected in any particular year, and so it has been argued that these entries do not prove that the talukdar was exercising the right to collect these dues to the total exclusion of the plaintiff. There is, I think, no force in this contention; and it is not possible to argue that, because in one particular year out of the series of years no collections of one or other of the items was made, or that because in some of the years covered by the accounts the full amounts of the dues were not collected that therefore the adverse possession of the defendant was not exclusive. There might have been some force in this argument if the plaintiff had been able to show by any reliable evidence that he himself had realized any of these dues during the period covered by the accounts; but, as I have mentioned, the finding of both the Courts is that the plaintiff failed to produce any evidence of this kind at all. So far therefore the situation is that it is proved that the defendant made such collections as were made, and it is not proved that the plaintiff or anyone else received any share of these dues. In these circumstances it is not to be doubted that the defendant must be taken to have established his plea of adverse possession.

I cannot either accept another argument which was put forward for my consideration, namely, that upon the case set up by the defendant all that was shown was that he was trying to establish an argument in the nature of a profit a prendre, which is treated as an easement under the Easements Act (5 of 1882). No such consideration can arise in the present case, for it cannot be pretended that there is any dominant heritage as distinct from a servient heritage for the benefit of which the easement or profit could be claimed. The only land with which we are concerned in the suit is the land contained in the six villages mentioned in the plaint. It is idle to argue that the case for the defendant is that he is claiming to receive profits from these lands in suit by reason of his ownership of certain

other lands which are quite distinct. That is not at all the case which the defendant was putting forward. It is perfectly clear that the defendant was raising a plea of adverse and exclusive right to receive the dues in suit; and for the reasons already given I hold that the Courts below were right in saying that this claim had been established and that the plaintiff had no longer any title. This finding disposes of the appeal, which I accordingly dismiss with costs.

B.V./R.K.

*Appeal dismissed.***A. I. R. 1918 Oudh 184**

LINDSAY, J. C.

Tasaddug Husain—Defendant—Appellant.

v.

Asghar Husain and others—Plaintiff and Defendants—Respondents.

Second Appeal No. 143 of 1917, Decided on 3rd December 1917, against decree of Offg. Sub-Judge, Bara Banki, D/- 30th March 1917.

Civil P. C. (1908), O. 21, R. 96—Formal possession does not affect strangers to decree — Mortgage-decree against mortgagor after sale of equity of redemption—Formal possession given to auction purchaser—Purchaser of equity of redemption can recover possession.

Formal possession, the nature of which is described in O. 21, R. 96, is no possession at all against any party whose rights are not affected by the decree. [P 185 C 1]

J made a simple mortgage of certain groves to *M* in 1895. In 1907 he transferred the equity of redemption to the plaintiff, who got into possession of the property. Subsequently to the transfer the mortgagee obtained a mortgage-decree against *J*, and in execution purchased the property himself. Formal delivery of possession was made to the mortgagee, who afterwards sold the property to the defendant. The latter dispossessed the plaintiff, who thereupon brought a suit to recover possession of the property :

Held : (1) that the mortgage-decree having been obtained against *J* after the transfer of the equity of redemption to the plaintiff, the latter was not affected by the decree. [P-185 C 2]

(2) that the delivery of formal possession did not affect the plaintiff who was no party to the decree, and that therefore he was entitled to recover possession of the property. [P 185 C 2]

Sami-Ullah Beg, Wazir Hasan and M. Wasim—for Appellant.

Mujtaba Husain, H. N. Misra, Bishe-shwar Nath Srivastava and Ali Mohamad—for Respondents.

Judgment.—This second appeal has sprung out of a suit in ejectment brought by the plaintiff-respondent Syed Asghar Husain for recovery of actual

possession of certain groves situated in a village called Sewan. There were five defendants impleaded in the case, and it is necessary to set out some of the facts in order to show how these defendants came to be interested in the proceedings. The groves in question belonged to a man called Jagannath, who in the year 1895 made a simple mortgage of them in favour of one Munna Lal. Munna Lal has died since and was represented in the suit by defendants 4 and 5 Husaini and Hanuman. A suit was brought upon this mortgage and a decree was obtained upon it in the month of November 1908. It is admitted that the only defendant impleaded in that case was the mortgagor Jagannath. After the decree the property was sold in a execution and was bought by the representatives of the mortgagee on 25th October 1909. Later on, that is to say, in the month of March 1910, formal delivery of possession was made to the purchasers. Defendants 4 and 5, subsequently sold their rights in the property to defendant 3, Syed Tasaddug Husain, who was the principal contesting defendant in the present case and who is the appellant before me. Subsequent to the mortgage which he made in the year 1895, Jagannath sold his equity of redemption in these groves to defendant 2, Zakar Husain. This transfer was made in the year 1907, and in the year 1915 Zakir Husain sold his interest in the property to the plaintiff Asghar Husain. The plaintiff came into Court alleging that he and his predecessor-in-title had been in actual possession of the mortgaged property since the date of the transfer of the equity of redemption by Jagannath. It was alleged that subsequent to 6th January 1916 defendant 3, that is, Tasaddug Husain, had unlawfully taken actual possession of the property and had cut down 30 trees. The plaintiff claimed that he was entitled to the actual possession of this property and that Tasaddug Husain had no right to actual possession and he therefore asked for a decree for damages in respect of the trees which had been cut down.

It has not been disputed before me that the plaintiff in the present suit is entitled to possession. But the position taken up by the defendant-appellant is that the plaintiff's right is only a quali-

fied right and that as the defendant-appellant is in actual possession of the property, he is not liable to be turned out by the plaintiff until the plaintiff has offered to pay the sum which is due in respect of the charge held by the appellant on the property. The Courts below have both held that the plaintiff was entitled to actual possession, that the appellant here has no right to actual possession and that consequently the plaintiff was entitled to a decree.

After hearing much argument in the case and considering what judgment should be given, I have come to the conclusion that the decision of the Court below is perfectly correct. The only matter for consideration is which of these two parties is entitled to actual possession of this property. We start with the admitted fact that in the suit which was brought to enforce the simple mortgage executed by Jagannath in the year 1895 the only defendant was the mortgagor Jagannath. It is now clear that at that time Jagannath had disposed of all his interest in the property in favour of defendant 2, Zakir Husain, who was the predecessor-in-title of the present plaintiff. It consequently follows that the decree for sale, which was obtained upon the basis of the simple mortgage, in no way affected the rights of the transferee of the equity of redemption and that under the execution proceedings and the delivery of formal possession which took place in the course of these proceedings the representatives of the mortgagee, who had purchased the property in execution, had no right whatever to immediate and actual possession as against the transferee of the equity of redemption. It is now well established that formal possession, the nature of which is described in O. 21, R. 96, is no possession at all as against any party whose rights are not affected by the decree. This has been laid down in a long series of rulings: one of these, to which reference may be made, is a decision of the Calcutta High Court reported as *Runajit Singh v. Bunwari Lal Sahu* (1).

The Courts below have found as a matter of fact that after Jagannath transferred the equity of redemption in the year 1907 the transferee, that is Zakir Husain, was in possession of the

property and there is documentary evidence on the record to support this finding. Certain khasras were produced, which demonstrated that Zakir Husain was recorded as being in actual possession between the Fasli years 1315 and 1320. After the year 1320, for some reason which was not explained to the satisfaction of the Courts below, the entry in the khasra was altered. There can, I think, be no doubt that the finding as to actual possession is in every way justified. It is to be remembered that the mortgage which was executed by Jagannath in 1895 was a simple mortgage and conferred no right of possession upon the mortgagee. Consequently when Jagannath transferred the equity of redemption in the year 1907, it must be taken that he was entitled to transfer actual possession of the property and that such possession actually followed the transfer, and so it appears to me to be well established that the person in actual possession of this property was the transferee of the equity of redemption and his successor-in-title. As against him, for the reasons I have already given, the formal delivery of possession which was effected in favour of the auction-purchasers was of no avail whatever and did not amount to any disturbance of the possession of Zakir Husain.

Now we find it proved that the defendant-appellant is in actual possession of the groves and that he has cut down trees and for the reasons just given, it must be held that his possession is that of a trespasser. He has got no right to resist the claim brought by the present plaintiff for restitution of actual possession. As regards any remedy which the defendant-appellant may have in view of the fact that he is the representative of the auction-purchaser under the mortgage-decree, all that need be said is that his rights, whatever they were, have been extinguished by limitation. It is no longer possible for him to bring a suit for sale inasmuch as a period of 12 years has expired. On the other hand, he cannot be allowed by his own wrongful act to take possession and to resist the suit of the plaintiff, who was in actual possession, for the purpose of enforcing any claim he may have had as the representative of the mortgagee. To allow that would be to allow a party to

1. (1884) 10 Cal 993.

take advantage of his own wrong. I am quite clear, therefore that the defendant-appellant here has no right to remain in possession of this property and to call upon the plaintiff to redeem it. The case has been properly decided. The appeal fails and is dismissed with costs.

B.V./R.K.

*Appeal dismissed.***A. I. R. 1918 Oudh 186**

LINDSAY, J. C.

Sundara Debia—Defendant—Appellant.

v.

Sheo Ram and another—Plaintiffs—Respondents.

First Appeal No. 103 of 1917, Decided on 20th August 1918, from decree of Sub Judge, Unao, D/ 13th July 1917.

(a) **Hindu Law—Partition—Separation—Entry in revenue papers cannot be treated as conclusive evidence of separation.**

Where the name of the widow of a deceased member of a Hindu family is entered in the revenue papers in respect of the joint share belonging to her husband in the family property, such entry cannot, in the absence of any very definite evidence as to the manner in which that entry came to be made, be treated as conclusive evidence of the fact that the family separated although there was no actual division of the property, especially when it appears that the entry was disputed immediately after it had been made. [P 189 C 1]

(b) **Hindu Law—Maintenance—Measure of maintenance allowance—Conditions for determination laid down.**

In fixing the maintenance allowance for a Hindu female, the Court has to look to the circumstances of the joint family, i. e., to the value of the joint family property, to the income of the family, and to the number of people who have claims to be supported out of the said property. [P 190 C 1]

George Jackson and Salig Ram Sinha—for Appellant.

Gokaran Nath Misra and Parag Narain—for Respondents.

Judgment.—The plaintiffs in this suit were one Sheo Ram and his son Rameshwar. Sheo Ram is the son of one Dwarka Prasad and the defendant Mt. Sundara Debia is the widow of Ram Shankar, who was also a son of Dwarka Prasad. This man, Dwarka Prasad, died some seven or eight years before the present suit was brought and Ram Shankar the husband of the defendant, died eight months before the suit was brought. The case for the plaintiffs is that at the time of Ram Shankar's death they were joint in estate with him. It was alleged that

the defendant, on the assertion that her husband Ram Shankar was separate had taken possession of certain immovable property and had also got possession of certain bonds, which, according to the case for the plaintiffs, were part of the joint family property. It may be explained here that Sheo Ram and his brothers were natives of a village in the Unao District. It is admitted that they carried on a money-lending business in the District of Mymensingh in Bengal, and on the evidence there can be no doubt that one or other of the brothers used to reside in Mymensingh for the purpose of superintending the family business. Money-lending transactions were also carried on in the District of Unao. The case set up for the defendant was that very soon after the death of Dwarka Prasad, the two brothers Sheo Ram and Ram Shankar decided to separate, and accordingly a division of the household goods was made at the village of Raipur. It is stated that there was no actual division of the landed property because it was thought more economical to keep the property intact. It is also stated that there was no division of the various sums which were owing to the brothers by various people to whom money had been advanced on loan.

The principal issue in the case therefore was whether or not at the date of Ram Shankar's death he and his brother Sheo Ram had been separate in estate for a period of nearly seven years. The burden of proving this issue was very properly laid upon the defendant. She called a number of witnesses who supported her story. The plaintiffs on the other hand produced a number of witnesses all of whom stated that the two brothers were joint up till the time of Ram Shankar's death. A number of documents have also been filed in the suit, the bearing of which is of considerable importance when we come to consider the value of the oral evidence put forward by either party. This oral evidence is of the description usually found in cases of this kind and little reliance can be placed on it as a whole. The Subordinate Judge was of opinion that the defendant had failed to discharge the burden of proof which rested upon her; and the principal argument in appeal is that on the evidence this finding of the Subordinate Judge is wrong. Be-

fore the issues were framed in the suit the defendant's pleader made a short statement of his case to the Court. He said that Sheo Ram and Ram Shankar had made a partition some seven years before the date of the suit and that this partition had been carried out "without the intervention of any third person." The pleader also stated that at the time the division was made lists of the property allotted to each of the brothers were prepared. The pleader admitted that Mt. Sundara Debia could not produce the list of the property which had been assigned to her husband at the time of division.

The two principal witnesses put forward by the defendant for the purpose of showing that a division of the household goods took place were Ram Lal and Ballu. The latter, it may be observed is the father of Sundara Debia and his evidence is certainly open to suspicion on the ground that he is a deeply interested party. Indeed the case for the plaintiffs is that Ballu has instigated the defendant to put forward the false claim that her husband was separate from the rest of the family and in pursuance of this claim to assert her rights to a half share of the family property. The Subordinate Judge has described the statements of these two witnesses as being vague and unconvincing, and after a careful perusal of what was said by each of them, I think his opinion is correct.

In the first place, it is not made to appear why these two men were summoned from their homes in order to be present at this alleged division of the family property. Ram Lal professes to be a somewhat distant relation of the two brothers. He tries to make out that a message was sent to him calling upon him to come and to be present at the partition. He admits however that when he was summoned to the family house he was not called upon to do anything. In fact, as the Subordinate Judge observes, he seems to have sat there as a mute witness of all that took place. He is unable to give any precise details as to the manner in which the property was divided, and this is all the more remarkable when it is borne in mind that he was deposing to an affair which had taken place at no very great interval of time. Ballu was also vague in his

statements. He professed to have been in attendance only for one of the two days which, it is said, were taken up in effecting the partition. It is admittedly a very unusual thing for a man to visit the house of his son-in-law and this was conceded by Ballu in the course of cross-examination. He admitted that only some urgent circumstance would justify a visit of this kind and it is not made to appear what urgency there was for asking him to be present. According to his own statement he did nothing whatever. He took no part in the division of the property. He suggested no course of action, nor was he called upon to settle any disputes between the brothers. He admits clearly that written lists of property were prepared.

So far then as this evidence goes, I think any Court might well hesitate to draw from it a conclusion that there had in fact been a division of the family property. The strongest point against the story is the non-production of the written list of property said to have been assigned to Ram Shankar. Both the defendant and Ballu say that such a list was prepared, and no satisfactory explanation has been given as to why it was not put forward. There is indeed a vague sort of suggestion that the plaintiffs, after the death of Ram Shankar, managed to get hold of all the family papers. I am not disposed to believe the story, for it is an admitted fact that when Ram Shankar died in Unao, the plaintiffs were away in Bengal and did not come to Unao till a week or ten days after Ram Shankar's death. It is also admitted that immediately after Ram Shankar's decease the property which was in the family house, consisting of account books, documents and the like, were taken to the house of one Sheo Sahae. It is hardly possible to believe that if Ram Shankar had in fact separated entirely from his brother, his widow or her father would have tamely handed over all the documents and books to the plaintiffs.

As for the other evidence adduced for the defendant it is of a very general character. The witnesses state in a broad way that the two brothers were separate, that they occupied separate portions of the family house, that they performed sbradh separately and that on occasions of ceremony invitations were

sent to the brothers separately. Bearing in mind the fact that one or other of the brothers was always away from home attending to the business in Bengal, this evidence is of no value at all and may be discarded as being entirely useless for the purpose of proving separation. The defendant relied very strongly upon one circumstance for the purpose of showing that her husband had separated. It seems that a mortgage had been executed in favour of the brothers while the family was joint, and it is said that after the brothers separated the mortgage debt was discharged by Matadin, the son of mortgagor.

The defendant stated that when this debt was paid up, half of the money owing under the bond was made over to her. This fact is admitted, but the plaintiff's account of the affair was that he had been compelled by a show of force or by threats to hand over half of the money to his sister-in-law. The plaintiff's case on this point is not borne out by the evidence of Matadin who was called as a witness. What he says is that having been pressed by the plaintiff Sheo Ram to pay off the debt, he took the money to Sheo Ram's house. He was told that the money could not be received at that time inasmuch as Sundara Debia had gone off to live with her father and was not present. Accordingly Matadin was told to come on another date. He says he did so and on that day the money was handed over to the parties in equal shares. Matadin observes that in any case he would not have handed over the money to one of the parties separately. It is hard therefore to believe that Sheo Ram was compelled to hand a share of this money over to the defendant. At the same time there is evidence to show that although Sheo Ram was the elder of the two brothers, the chief duties of management of the family property were made over to Ram Shankar, who is said to have been the more clever man of the two, and it may be that Sheo Ram is an easy going person who would have handed over half of this money to his brother's wife without trying to make any trouble over the matter.

The plaintiffs called a number of witnesses, all of whom stated that the brothers were joint to the time of Ram Shankar's decease. I do not set any

great value upon this oral evidence either, but I have been much impressed by the statement of the P. W. 8, a man named Chander Nath, who, so far as I can see, is a disinterested party. This man too carries on business in Bengal and he knew all about the money-lending business which these two brothers were carrying on in those parts. He speaks of one or other of the brothers coming at times to Bengal to look after the business, and he was able to point out in the account-books which were produced in Court the various entries which were in the writing of Sheo Ram and Ram Shankar respectively. There is certainly nothing in the cross-examination of this witness which affords any ground for supposing that he has any particular interest in supporting the case for the plaintiffs. I am inclined to believe his evidence and to hold that it is quite sufficient to rebut the story which was put forward for the defence.

To turn now to the documentary evidence in the case, it is an admitted fact that after the death of Ram Shankar the name of his widow was recorded in the khewats of the villages in which the parties own immovable property. These khewat entries have been produced before me, and there can be no doubt that orders were passed in the month of April 1916 directing that the name of the defendant should be entered in place of that of her deceased husband. How then are these entries in the khewat to be accounted for? The case for the defendant-appellant is that they afford conclusive proof of the defendant's story that the two brothers had separated although there had been no actual division of the landed estate. There is no documentary evidence before us to show in what way these entries came to be made. The defendant gave evidence in the case, and her story is to the effect that after the death of her husband she went to the plaintiff, Sheo Ram, and said that she would have her name entered in the village papers in the same way as her husband's name had been entered. The plaintiff said that she might do so if she chose. On the other hand according to the allegation in the plaint the name of Sundara Debia was allowed to be put in the village papers merely by way of consolation (tasalli). There being no very definite

evidence as to the manner in which these entries in the lady's favour came to be made, it is hardly possible to treat them as conclusive evidence of the separation; and in this connexion it is important to observe that the quarrel arose almost immediately after mutation had taken place. There seems to be no doubt that what brought the parties into Court was an attempt made by the defendant to make collections of the rents of the shares which are recorded in her name.

In her statement which was taken on commission the defendant stated that ever since the time of separation, that is to say, for 7 years before this case came into Court, the two brothers had regularly divided the profits of the immovable property. She could not however give any details of any occasion on which there had been any settlement of accounts and she was unable to produce any documentary evidence in the shape of account books for the purpose of proving her story. It has been argued here that the learned Judge of the Court below has attached too much importance to this failure of the defendant to produce books of account. Indeed it was suggested that she had made over all the accounts and papers to the plaintiffs shortly after her husband's death. That however is not the story which the defendant herself tells. She admits that she had a number of account-books in her possession which she handed over to her mukhtar, and the fact remains that those books were not placed before the Court. It is hardly possible to believe that if a separation took place Ram Shankar would not have kept some record of his separate account of the profits of the zamindari property. The parties are people who make a living out of money-lending and they are in the habit of keeping accounts. Some of these books have been produced in Court and show that two sets of account-books were kept, one in Bengal and one in Unao. But there is nothing in any of these books to indicate that Ram Shankar's share was in any way separate from the rest of the family property. On the other hand, certain entries have been referred to which all point the other way. There is for example an entry in the cash book (Ex. 41) which was kept up in Bengal, showing various items of expenditure incurred jointly on behalf

of Ram Shankar and the second plaintiff Rameshwar.

It is also proved that in connexion with the money-lending business which the parties carried on two ledgers were maintained, one called the home ledger and the other the Bengal ledger, and an examination of these two books shows that there are common entries in the accounts indicating that a double set of ledgers was kept up on account of the same business. This seems to me to be a very strong piece of evidence in support of the plaintiffs' case. Then we have the admitted fact that after the date of this alleged separation documents were on some occasions executed in the names of both the brothers. In particular there are three documents, namely, deeds of sale (Exs. A-2, A-10 and A-11), all executed on 30th August 1912, that is to say, long after the date of the alleged partition. It would, I think, be a very unusual circumstance for two brothers who had separated in the manner described to have joint dealings of this kind after separation; and although such a case is not inconceivable, it would at any rate be supposed that in any dealings of this kind after partition had taken place the shares of the brothers would be specified in the documents. There is nothing of this kind here and no satisfactory explanation has been placed before me to account for the fact that these properties were purchased in the joint names of the two brothers.

I do not think it necessary to examine in any further detail the evidence produced on this issue of separation. It seems to me that the only possible conclusion is that the defendant failed to prove the separation which she alleged and this being so, the plaintiffs' claim was bound to succeed. I agree with the finding of the Court below on this issue. The only other matter argued before me was the question of the allowance for maintenance which should be made to the defendant. The Subordinate Judge came to the conclusion that she ought to receive an annuity of Rs. 10 a month. Having found however that previous to the suit she had collected a sum of between six and seven hundred rupees to which she had no right, he set off this amount in making his calculation and reduced the amount of the annuity to Rs. 7 a month. It has been argued

strenuously on behalf of the appellant that this is a wholly inadequate allowance for the lady, considering the value of the family property. I have very little doubt that these two brothers were in very comfortable circumstances and that they had extensive money-dealings, and I am inclined to agree with Mr. Jackson's contention that the sum which has been allowed to the widow is in the circumstances insufficient. It is difficult to assess the amount of the allowance which should be made in these cases. I have been referred to several rulings of the Calcutta High Court, in which various sums were allowed in cases of this kind. It is not possible, I think, to lay down any hard and fast rule in the matter or to say that in no circumstances ought a widow to receive more than a certain proportion of the income from the joint property.

A great deal depends upon the number of people who have claims to be supported out of the joint family property. In the present case we have the fact that the only persons with claims on the property are plaintiff 1 and his son with their families. It has been stated in evidence that the income of the family is between seven or eight hundred rupees a year. It is probably considerably more than this. On the whole I think the claims of the lady will be fairly met by awarding her an allowance of Rs. 12 a month. This is to be irrespective of the money which she has realized according to the Subordinate Judge's finding. I allow the appeal therefore to this extent that I direct that in place of the annuity of Rs 7 a month there be awarded to the defendant a sum of Rs 12 a month for her maintenance. In other respects the appeal fails. The defendant-appellant will pay three-fourths of the costs incurred by the respondents in defending this appeal.

B.V./R.K. *Appeal partly allowed.*

A. I. R. 1918 Oudh 190

LINDSAY, J. C.

Chandi—Prisoner—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 34 of 1918, Decided on 11th April 1918, against order of Dist. Magistrate, Hardoi, D. 5th January 1918.

Criminal P. C. (1898), S. 110—List of cases filed by police is inadmissible.

In cases under S. 110 a list of cases filed by the police in which the accused was suspected of having been concerned is not admissible in evidence: 5 O C 203; 10 O C 132 and 10 O C 168, Poll. [P 190 C 2]

A. P. Sen—for Applicant.

Government Pleader—for the Crown.

Judgment.—The applicant has been bound over under S. 110 to keep the peace, and revision of the order of the District Magistrate confirming the order of the first Court is applied for here on the ground that inadmissible evidence was let in for the purpose of coming to a finding that the applicant is an habitual thief and housebreaker. It is clear from a perusal of the judgment of both the Courts below that the evidence was fairly equally balanced on both sides. It seems that the accused hails from a town called Gopamau in which there are two factions: one led by a gentleman Nawab Nazir Husain and the other being under the guidance of a person named Lala Kedar Nath. The accused belongs to Kedar Nath's faction. About 17 or 18 witnesses were produced on either side. The prosecution evidence for the most part admittedly consists of the statements of persons belonging to Nazir Husain's faction. On the other hand the evidence for the defence is stated to consist of the testimony of the adherents of Lala Kedar Nath. In this state of things the Courts below seem to have been rather in a difficulty as to how to decide the case. Eventually the evidence of three police officers was allowed to decide the matter; and as their evidence was against the accused, it was held that he was liable to give security for his good behaviour.

It is somewhat surprising after reading the appellate order of the District Magistrate of Hardoi to find that he treats as admissible in evidence, against one accused in a case of this kind, a list of cases in which the accused was suspected of having been concerned. I thought the law on this subject was well understood by this time, but it appears that this is not the case; so all I can do is to invite the attention of the District Magistrate of Hardoi and of other Magistrates to the rulings which are to be found reported as *Dunia Singh v. King-*

Emperor (1), *Gokul v. King-Emperor* (2) and *Raghuber Dial v. King-Emperor* (3). A reference to the latter ruling will show what the opinion of this Court was regarding the practice of filing a list of cases in which the accused is suspected of having been concerned as an offender. Mr. Chamier described it as being "most objectionable." As regards the other statements made by these police witnesses, it seems to me that they do not amount in any sense to evidence of the general reputation by which an attempt was made to prove that this accused was an habitual offender. These police officers seem to have been allowed to depose from mere hearsay. They mentioned witnesses from whom they had heard that the accused was of bad character, and witness I Dilawar admits that there were other persons from whom he had heard that the accused was of a good character. The evidence, as evidence of reputation for the purpose of establishing the liability of the accused under S. 110, Criminal P. C., is worth nothing.

I allow the application, set aside the order of the Court below and direct that the applicant's security bond be discharged.

B. V. R. K. Application allowed.

1. (1922) 5 O C 204.
2. (1907) 10 O C 132.
3. (1907) 10 O C 108.

A. I. R. 1918 Oudh 191

KANHAIYA LAL AND DANIELS, A. J. CS.
Lachhman Prasad—Defendant—Appellant.

v.

Baldeo Prasad and another—Plaintiff and Defendants—Respondents.

First Appeal No. 37 of 1916. Decided on 27th June 1918, from decree of Sub-Judge, Hardoi, D/- 1st February 1916.

(a) *Deed—Proof of—Deed filed for collateral purpose—Nature of proof as to execution.*

Where a deed is filed merely for a collateral purpose it need not be proved with the same formalities as when it is sought to enforce its provisions in a suit. (P 192 C 1)

(b) *Deed—Construction—Gift-deed providing postponement of possession till death of donor and his wife—Interest of donee is vested—Transfer of vested interest is valid—Transfer of property Act (4 of 1882). S. 6 (a).*

Where a deed of gift provided that the donee would not take possession of a portion of the gifted property until after the deaths of the donor and his wife, and the donee transferred

this portion of the gifted property after the death of the donor but in the lifetime of his widow:

Held: that the gift must, so far it related to the said portion of the gifted property, be regarded as a will, that the donee was given a vested interest in the same subject only to a life-interest in favour of the donor's widow, and that therefore its transfer by the donee was not forbidden under S. 6 (b), T. P. Act—20 O C 155. *Disa from.* (P 192 C 1; 2)

Daya Kishan Seth—for Appellant.

Gokaran Nath Misra—for Respondents.

Judgment.—This appeal arises out of a suit for sale on a mortgage and two deeds of further charge executed by one Jadunath Singh in favour of the plaintiff-respondent Baldeo Prasad. The defendant-appellant Lachhman Prasad was impleaded as a subsequent transferee of the rights of Jadunath Singh. He however claims priority in respect of a previous mortgage of 15th January 1897 in favour of one Chaudhri Fateh Ali, which he redeemed. The learned Subordinate Judge has disallowed his claim on the ground that 29 bighas 16 biswas covered by this mortgage never passed into the possession of Chaudhri Fateh Ali under the prior deed, and the correctness of this finding is one of the two issues which have been contested in appeal. The other and main issue is whether the plaintiff obtained any title in virtue of the deed of 5th March 1900 in his favour. It is common ground between the parties that the plaintiff's mortgage, Jadunath Singh, obtained the property in suit under a deed of gift from his maternal grandfather Subha Singh, comprising in all a share of 4 annas 8 pies. The 29 bighas 16 biswas which are the subject of the plaintiff's mortgage form part of 44 bighas 12 biswas 6 biswasis or land out of the share of Subha Singh, of which the donee was not to obtain possession until after the deaths of Subha Singh and his wife. The question at issue between the parties is whether Jadunath Singh obtained under the deed of gift a vested interest in this property which was capable of transfer or merely an expectancy of succession, a transfer of which was forbidden under S. 6 (a), T. P. Act.

The deed of gift has been admitted by the appellant Lachhman Prasad in the previous suit, the plaint in which is Ex. 20 on this record. The learned Subordinate Judge based his finding on this admission and on the provisions of the

deed as stated in the judgment in that case, Ex. 23. The actual deed was filed in another record and was not put in. As both parties are fighting as to the nature of the interest admittedly acquired under this deed, we considered that it was impossible for us to decide the issue satisfactorily without seeing the actual deed, and we accordingly directed the respondent to get it back from the Court in which it was filed and file it with an affidavit in order to enable us to pronounce judgment on the issue. The appellant who has been disposed throughout to stand on technical objections has not admitted the deed. But there can be no question that this is the deed in dispute and we accept the affidavit filed by the respondent read with the admission of Lachhman Prasad in the previous suit, Ex. 20, as sufficient proof of it for the purposes of this case. It is well established that where a deed is not in suit but is merely filed for a collateral purpose, it need not be proved with the same formalities as when it is sought to enforce its provisions in a suit. Although however the appellant objected to the production of the deed, he at the same time contends that if properly construed it is in his favour. The terms of the deed, so far as they affect this case, are as follows:

"And inasmuch as out of this deed of gift 25 plots of sir land amounting to 44 bighas 12 biswas 6 biswas are excepted after my death and that of my wife he (the donee) shall take possession of these plots also."

The mortgage in favour of the respondent was executed after the death of Subha Singh but in the lifetime of his widow, Mt. Munna Bibi. The contention of the appellant is that the effect of this clause was to confer on the latter a widow's estate under Hindu law with the power to represent the estate and the limited power of alienation which such an estate confers and that the donee acquired no interest in these plots until her death. We can find nothing in the deed to indicate any such intention. On the contrary the donee was to take the land on the same footing as the rest of the share, though his possession was to be postponed till the widow's death. Inasmuch as this part of the instrument was not to take effect till after the testator's death it must, in our opinion, be regarded as a will so far as these plots

of sir land are concerned, and under the this testamentary disposition Jadunath Singh was given a vested interest in the land subject only to a life-interest in favour of the widow. In this view of the deed S. 6 (a), T. P. Act, has no application. From the date of the testator's death Jadunath Singh had a subsisting interest in the land which was capable of being transferred. The positions of the executant and his widow under the deed are not parallel. The executant was the owner of the land prior to the deed and retained the power of alienation unless he deprived himself of it under the terms of the deed. The widow's rights on the other hand were derived solely from the deed and were limited by its terms.

The case of *Shiam Sunder v. Dilgan Singh* (1) relied on by the appellant is clearly distinguishable. There the person in possession held an ordinary widow's estate and the transferor neither had nor professed to have anything more than a mere expectancy of succession. The appellant himself has understood the deed in the same sense and indeed has obtained possession of these very plots on the very ground which he now repudiates, namely, that Mt. Munna Bibi had only a life interest. He purchased from Jadunath Singh on 19th January 1908 a 2 annas 61/4 pies share in the gifted property but did not obtain actual possession of 24 bighas 4 biswas, the proportionate area of the reserved sir land, because Mt. Munna Bibi was at that time alive and in possession of it. After her death however he sued Jadunath Singh for possession and obtained a decree. It is needless to say that if the mortgage to the plaintiff was invalid in respect of this land the sale-deed in favour of the defendant was equally invalid and indeed one of the issues was whether this land passed under the sale-deed. The plaint in the suit is Ex. 20 on the record and the judgment is Ex. 23. Under these circumstances it is unnecessary for the respondent to fall back on S. 43, T. P. Act, though if it were necessary to do so we should be prepared to hold that Jadunath Singh did in good faith purport to transfer the full proprietary right. It is argued that the transferee could not

Taluqas or Taluqdari Mahals. The names of these Taluqas are set out as being Bijua, Ramnagar, Daulatpur and Nighasan. The estate as originally granted was a List No. 4 estate, the rule of succession being that where the owner dies intestate the property descends according to the ordinary law to which members of the intestate's tribe and religion are subject.

Raj Gobardhan Singh had no male issue. He had an only daughter Mr. Raj Kunwar alias Bitto Sahab, who was married in the month of April 1903 to Maharaj Kunwar Sardar Singhji, the second son of the Ruling Chief of Shahpura in Rajputana. This lady gave birth to a son, the plaintiff in the present case, in the month of June 1904. She died in July of the same year about a month after the birth of the child. Gobardhan Singh died in March 1905, leaving three widows Rani Suraj Kunwar, Rani Devi Kunwar and Rani Dammar Kumari Devi. It is proved that shortly after the death of Raj Gobardhan Singh mutation in respect of the immovable estate left by him was made in favour of two of these Ranis, namely, the senior and the junior Rani. These ladies were placed in possession of 30 villages each, constituting the estate which had been left by their husband, and the order for mutation was passed in accordance with the terms of a will purporting to be the will of Raj Gobardhan Singh which was produced in the revenue Courts in the month of June 1905. The plaintiff in this suit claims that under the will in question he has a vested interest in the property left by Raj Gobardhan Singh and that he has the right to succeed as absolute owner of the property on the death of the survivor of the widows of Raj Gobardhan Singh. It may be mentioned here that since the death of Raj Gobardhan Singh one of his widows, who is described as the "maunhili" (middle) Rani, has died. Under the terms of the will she took no share in the estate, but was entitled to a grant of maintenance at the rate of Rs. 250 a month.

The will left by Raj Gobardhan Singh also contains a bequest in favour of the defendant-appellant Raj Bachan Singh to take effect on the determination of the life-estates created in favour of the widows. It is not disputed that Raj Bachan Singh is the nearest male col-

lateral relative of Raj Gobardhan Singh now alive. He is a somewhat distant kinsman of Gobardhan Singh, the fact being that his great-grandfather and Gobardhan Singh's grandfather were full brothers.

In September 1912 the Allahabad Bank brought a suit against the three Ranis of Raj Gobardhan Singh and the parties to this present suit to recover money due on certain mortgages said to have been executed by Gobardhan Singh. In the course of that suit the present defendant-appellant denied the genuineness and validity of Gobardhan Singh's will, and it is this denial which has furnished the cause of action for the present declaratory suit.

The claim of the plaintiff here was resisted in the Court below on a variety of grounds. It will not be necessary for us for the purpose of disposing of this appeal to notice all the grounds of defence which were taken in the Court below. It was alleged for example that the plaintiff was not the son of Raj Gobardhan Singh's daughter. That position has now been abandoned. The defendant denied the execution of the will. In his written statement he had put forward various allegations for the purpose of pleading that the will could have no operation in law. There were averments of fraud, which were ultimately struck out of the written statement on the ground that the defendant declined to verify or vouch for the truth of them. The result of the exclusion of these pleas of fraud was that the only averment which was left in the written statement and which attacked the validity of the will was one to the effect that the testator Raj Gobardhan Singh was an ignorant and illiterate man who was incapable of understanding the language or the purport of the will now produced in Court. The case for the defendant therefore was that this document upon which the plaintiff relied did not and could not represent the intentions of Raj Gobardhan Singh and could not in these circumstances take effect as a valid disposition of Gobardhan Singh's property.

The genuineness and validity of the will were the principal matters for discussion and decision in the Court below. The Subordinate Judge has found that the will is a genuine and valid document. He has found that it was duly

executed and attested on the date on which it purports to have been executed and attested. He has also found that Raj Gobardhan Singh was of sound disposing mind and that he knew and approved of the contents of the will which according to the Subordinate Judge, was prepared agreeably to the instructions given by Raj Gobardhan Singh himself. Acting upon this finding the learned Subordinate Judge gave the plaintiff the declaration which he sought, and now the defendant has come here in appeal and has attacked the judgment of the Court below on various grounds which are set out in the 30 paragraphs contained in the memorandum of appeal.

We may state here that the learned advocate for the appellant has not attempted to argue all the matters which are raised in the petition of appeal. He has confined his arguments to a few points only, and the first and principal one of these is the genuineness and validity of the will in suit. It is claimed here that on the evidence placed before the trial Court the finding that the will was duly executed by Raj Gobardhan Singh is erroneous. We are asked to hold that it was proved that Gobardhan Singh, although not in any way of unsound mind, was a man of no education and of feeble understanding who could not possibly have understood the language in which the will is written, and that he could not have understood or approved of the dispositions of his property which are set out in the will, in short, that he never had any real intention of bequeathing his estate in the manner and on the terms set out in the will.

The original will was produced in Court and is marked as Ex. 92 on the record. It is a registered document, which according to endorsements was presented for registration and registered in the office of the Sub-Registrar of Lakhimpur on 15th November 1903. At the bottom of the deed, which purports to be in the handwriting of one Marli Manohar now deceased are to be found the signature of Raj Gobardhan Singh as executant and the signatures of two attesting witnesses Roshan Lal and Zamin Ali, who have been examined in the case. The text of the will purports to have been written on 29th August 1903, but the story for the plaintiff is that

although the will was drawn up and ready for execution on the date last mentioned, it was not actually executed or attested until the time it was presented for registration on 15th November 1903.

It may be observed here that some importance attaches to the dates which we have referred. The will being the will of a Talukdar and purporting to dispose of property which is talukdari property, regard must be had to the special provisions of S. 19, Act I of 1869, which provide that in certain cases of bequest (of which the present case is one) the will in order to take effect must be registered within one month from the date of its execution. It has been argued here that as a matter of fact the will, if it was ever properly executed at all, was executed on 29th August 1903 as soon as it was ready and that consequently registration having been delayed beyond the period of one month just referred to, the will has no effect in law. Before proceeding to an examination of the evidence which is relevant for the purpose of deciding the question of execution and the further question of the legal validity of the document in suit, we may refer to the law which applies to suits in which a will is propounded by a plaintiff. We have been referred to a great many authorities, principally decisions of the English Courts, on this question. Most of the cases which were cited before us have been referred to in a judgment of the Calcutta High Court reported as *Woomesh Chunder Biswas v. Roshmohini Dasi* (1). We accept the law as laid down in this ruling of the Calcutta Court. A plaintiff who sets up a title under a will must satisfy the Court that the will was "duly executed" that is to say, he must furnish proof of execution which carries with it a conviction that the testator knew and approved of the contents of the instrument. This involves the proposition that he was a free and capable testator. The ordinary rule is that the execution of a will by a competent testator raises a presumption (sufficient, if nothing appears to the contrary) that he knew and approved of the contents of the will and ordinarily the competency of the testator is presumed, if nothing appears to rebut the ordinary presumption. (1, (1893) 21 Cal 279.)

tion. But where the mental capacity of the testator is challenged by evidence, it is the duty of the Court to find whether upon the evidence it is established that the testator was of sound disposing mind and did know and approve of the contents of the will. What constitutes a "sound disposing mind" has been defined in one of the English cases referred to in the Calcutta report: *Sefton v. Hopwood* (2). According to this authority it must be shown that the testator was able to understand his position, able to appreciate his property and able to form a judgment with respect to the parties whom he chooses to benefit. If the testator has this capacity, it is sufficient for the purpose of showing that he had what is known in law as "a sound disposing mind."

We have already indicated the line of defence which was set up regarding the capacity of Raj Gobardhan Singh. It was not stated that he was in any way of unsound mind. The allegation was that he was an uneducated man, of a low degree of intelligence and that he was incapable of understanding the language or purport of the will which he is said to have executed. We have therefore to consider the evidence which was put forward by the defendant in support of this plea, consisting of statements made by some 16 witnesses all of whom profess to have had some acquaintance, more or less intimate, with the character and manner of life of Raj Gobardhan Singh. The whole of the evidence on this part of the case has been analysed at great length by the learned Subordinate Judge in his judgment. The evidence has again been read over to us at the time of the hearing of the appeal and we do not deem it necessary to subject it to further recapitulation and analysis. We may say at once that our estimate of the evidence agrees generally with that which was formed by the Judge of the trial Court and we are satisfied that it falls very far short of proving that Gobardhan Singh was a man of less than ordinary mental capacity. To begin with, it is evident that some of the witnesses who depose in support of the defendant's case had very meagre opportunities of forming an opinion regarding the mental power of the testator. It is further

manifest that a good deal of the evidence of those of the witnesses who profess to have had a more extensive acquaintance with Gobardhan Singh's ways of life was biased and in parts certainly untrue. Some of the evidence has been discarded altogether by the learned Subordinate Judge, for example, the testimony of a Hakim named Niamatullah Khan who was examined as D. W. 16s. The admissions of this witness in the course of cross examination lead us to the conclusion that he was hired for the purposes of the suit and was prepared to stick at nothing not merely to support the case put forward by the defendant but to carry it much further than the defendant was himself prepared to go. This witness ventures to assert on the strength of an alleged medical acquaintance with Gobardhan Singh which began and terminated many years ago that Gobardhan Singh was a man whose mental faculties were impaired. The witness describes him as suffering from what he calls "Humuq" or imbecility.

We agree with the learned Subordinate Judge that no reliance whatever can be placed upon this man's testimony. Then we have the statements made by other witnesses describing various eccentricities of behaviour on the part of Raj Gobardhan Singh. If it be assumed that all these statements are true (though we think the assumption would in some instances at least be a very rash one), all that they tend to show in our opinion is not that Gobardhan Singh, to quote the words of the deponents themselves, was a "fool" but a rough, uneducated man of unpleasant manners. Gobardhan Singh, according to these witnesses, spoke nothing but the coarse village dialect and was unable to comprehend the more elegant language affected by his visitors.

According to their evidence he seems to have been a man who was lacking in any sense of dignity and a man who comported himself in defiance of the conventions of polite society—conventions which he seems to have been ignorant of or to have despised. Some of the acts attributed to Gobardhan Singh, on the strength of which the witnesses have expressed their opinion that he was a man of mean intelligence would suggest to us rather that Gobardhan Singh was the possessor of a fund

of rough humour which the witnesses themselves had not the intelligence to appreciate. What they describe as acts of imbecility might equally well be understood to be the efforts of a man who had a strong propensity for practical joking. It is asking too much of us to invite us to assume that a man who had not the manners to send for a groom to hold his visitors' horse or to offer his friends a chair is a person of low mental calibre, nor are we prepared to believe that a rough and boorish man who walked with a line of beaters and made facetious remarks to a Deputy Collector about the lack of game is necessarily a person who is in any way mentally deficient. Some of the witnesses who were most vigorous in their declarations regarding Gobardhan Singh's immoderate use of intoxicants cut a poor figure in cross-examination. In many instances their affected knowledge dwindled down in cross-examination to information which had been picked up in the course of idle gossip. One witness, who committed himself to the opinion that Gobardhan Singh was a fool because he was fond of singing, had to admit that he had never listened to any of Gobardhan Singh's performances.

The same witness referred to Gobardhan Singh's indulgence in a certain form of sport which for the want of a more suitable expression we may describe as "lark fighting." This was described by the witness as being a striking example of Gobardhan Singh's infirmity of mind. In cross-examination however the witness was constrained to admit that he had only seen Gobardhan Singh following this harmless pastime on one occasion. It would, we think, be useless to describe in detail the various acts to which the defence witnesses refer. It may be that Gobardhan Singh was a bit of a buffoon, but we decline to draw the conclusion that he was a man of less than ordinary mental power. After reading all the evidence produced on this head for the defence we think that Gobardhan Singh may be fairly described in the language which was used by one of the defendant's own witnesses, a respectable Talukdar named Saiyed Raza Husain who was on intimate terms with Gobardhan Singh. He speaks of him as being an uneducated man of

ordinary intellect who could converse in the ordinary Urdu language and understand it.

Another defence witness is Sheo Dayal, D. W. 11, who knew Gobardhan Singh for many years and was in fact in his employ for a time. While he did his best to support the case for the defendant, he was obliged to admit in cross-examination that although Gobardhan Singh was of "weak intellect," he nevertheless had sense enough not to sign documents until their meaning had been explained to him. The witness says distinctly that when any matter was under discussion Raj Gobardhan Singh used always to ask for explanation of things he did not understand. We think we may safely act upon this statement which was obviously made with considerable reluctance and, if we do, the matter of Gobardhan Singh's capacity to make a will is disposed of at once. It may be mentioned that this same witness further deposed that Gobardhan Singh knew that he had an estate, that there must be an heir to his estate, and that he had quite sufficient understanding to be able to express an opinion as to who his heir and successor should be. The witness also speaks of Gobardhan Singh as being able to read and write the Hindi language. We need only refer to the deposition of another witness Mendai Lal, D. W. 12, who started life as a menial servant in Gobardhan Singh's employment. He says he was with Gobardhan Singh for about 21 years and while he was ready to depose to various acts of imbecility committed by Gobardhan Singh, he stated in cross-examination that Gobardhan Singh had sufficient intelligence to be able to talk about his heir and to indicate where his estate should go after his death. The question of Gobardhan Singh's testamentary capacity may, we think, be allowed to rest upon these statements. We think it however proper to mention that although Gobardhan Singh's two widows were examined as witnesses in the case no question seems to have been put to them for the purpose of eliciting any information regarding their husband's mental powers. It would almost seem from the manner in which this part of the case was presented that Gobardhan Singh must have reserved his eccentric-

cities of behaviour for people outside his family circle. Not a single question was asked of these ladies for the purpose of showing that Gobardhan Singh was in the habit of using intoxicants freely and yet we have the statement of a defence witness, one Thakur Gobardhan Singh (D. W. 17), who went the length of saying that he had never seen Raj Gobardhan Singh sober outside his house.

The last comment which we shall make on this part of the case is that the defendant, who admittedly lived next door to Gobardhan Singh, who was constantly in Gobardhan Singh's society and who from all accounts was managing Gobardhan Singh's estate for him for some time before his death, did not think it fit to enter the witness-box to support the case put forward by him in his written statement. Obviously if these stories which the defence witnesses told about Gobardhan Singh's manner of life and habits are true, the defendant was in a position to depose to his own impressions gathered from an intimate personal experience. He has however chosen to leave the task of proving this part of his case to a miscellaneous collection of outsiders and his keeping away from the witness-box is hardly to be explained or excused on the ground that he is deeply interested in the result of the suit. There can, we think, be no doubt that Raj Gobardhan Singh, in spite of his rough ways, was a good-natured man. This is the testimony of his old servant Mendai Lal. It is also proved by evidence on both sides that Gobardhan Singh always showed a kindly disposition towards the present defendant-appellant. He treated him very kindly and entrusted the management of his estate to him. Bearing in mind the conduct of Bachan Singh since the time of Raj Gobardhan Singh's death, and in particular his conduct with regard to the present suit, it might well have been suggested that if any folly is to be imputed to Gobardhan Singh the most conspicuous and convincing proof of it is to be found in the fact that he treated Bachan Singh so well. Raj Gobardhan Singh, if he could come to life again, would probably acknowledge readily that his kindly treatment of Bachan Singh, viewed in the light of subsequent events, has laid him open to

the imputation of a serious lack of discretion.

We have no doubt therefore that Raj Gobardhan Singh had a sound disposing mind; and we proceed now to examine the evidence relating to the preparation and execution of the will. The three principal witnesses on this part of the case are Kampta Prasad, Zamin Ali and Roshan Lal. The two last named witnesses are attesting witnesses of the will. Kampta Prasad does not profess to have been present at the time the will was actually signed by the testator. He deposes however to events which took place up till the time the draft of the will was prepared. Three other witnesses whose evidence is material on this part of the case, are the two Ranis Suraj Kunwar and Dammar Kumari Devi and a man named Parbhu Dayal. Both the Ranis depose that Gobardhan had expressed to them his intention of making a will in favour of his daughter's son. The evidence of the junior Rani is more particular in this respect, and we have it from her statement that her husband during his lifetime showed her the will on one occasion. She also deposes that she found the will in a box after her husband's death. Kampta Prasad is a man who was in the service of Gobardhan Singh for a considerable period and according to his story, Gobardhan Singh first expressed his intention of making a will at a time when a suit known as the Mallanpur suit was going on. In order to explain what the witness means in this connexion it is necessary to refer shortly to this litigation.

The history of it is to be found in Vol. 8, Oudh Cases, at p. 94 *Mt. Parbati Kuar v. Rani Chandrapal Kuar* (3). The suit was brought by one Parbati Kunwar claiming the property which had been left by her father Milap Singh. Her suit was resisted by a number of defendants and it is proved that Gobardhan Singh himself was a defendant in the suit, being at that time in possession of some property which the lady was claiming. The main defence which was set up to her claim was that under a family custom daughters were excluded from inheritance, and her suit was dismissed on the finding that the custom was proved to exist. The learned coun-

sel for the respondent in addressing us on this part of the case has pointed out that Gobardhan Singh did not actually file any written statement of defence in the suit just mentioned. It appears however that he was represented by an agent and that the agent intimated to the Court that his principal took the same line of defence as the other defendants in the case.

To continue the story of Kamta Prasad, he says that Gobardhan Singh first conceived the idea of bequeathing the estate to his daughter some 5 or 6 months before the marriage of the girl took place. According to the witness the reason which prompted Gobardhan Singh to make a will in favour of his daughter was that the present defendant Bachan Singh, who was the nearest male heir, had no sons of his own but had only a daughter. According to Kamta Prasad, Gobardhan Singh expressed an apprehension that if the estate devolved upon Bachan Singh he would make it over to his daughter, and consequently Gobardhan Singh thought he might as well make a disposition of his estate in favour of his own daughter. The witness proceeds to state that a draft will was prepared on these lines by one Murli Manohar, who was in the service of the estate and who is now dead. Afterwards Gobardhan Singh made certain alterations in the draft, the principal one being the introduction of a clause by which the estate was bequeathed to his daughter's son, if she should have any, after the termination of the life-estate in favour of the widows. The daughter's right to succeed was postponed to her son according to the new arrangement. Kamta Prasad's story is that this alteration in the will was suggested to Gobardhan Singh by a pleader named Babu Sheo Bakhsh Rai, who was consulted at Lakhimpur at the time the draft of the will was being prepared. The witness goes on to say that after these changes had been made a fresh copy of the will was prepared, namely, the document which is now before the Court. The witness speaks of the contents of this document being read over to Gobardhan Singh, who afterwards put the document away in his box. Kamta Prasad was not present at the time the will was executed and he was therefore unable to depose to the events which happened later, that

is to say, in the month of November 1903.

The evidence of this witness has been exposed to a good deal of criticism. It has been suggested that his story regarding the motive of Gobardhan Singh in making this will is a false story and we have also been asked to find that his statement regarding the circumstances in which the bequest came to be made in favour of the daughter's son is also untrue. It is pointed out in particular that Kamta Prasad's story regarding the advice or suggestion given by Babu Sheo Bakhsh Rai was introduced at a late stage of his story. We are not much impressed by this criticism and we agree with the Subordinate Judge in thinking that in substance this story of Kamta Prasad is perfectly true. No doubt, as has been pointed out, there are some variations between the statement of Kamta Prasad and that of Roshan Lal, which we shall presently consider; but it is fair to say as regards these that they are discrepancies of minor importance and that they are probably due to the fact that the witness was being examined and cross-examined regarding events which had taken place some twelve years before the date upon which he was giving his evidence. In circumstances like these it would be unreasonable to expect a witness to remember every petty detail or to preserve an accurate recollection of events in their chronological sequence. Kamta Prasad was subjected to a very severe cross-examination, and it is due to him to say that nothing was elicited in the course of it which can reasonably be pointed to as indicating that he was giving false evidence.

We next proceed to discuss the evidence of Roshan Lal, one of the attesting witnesses in the case. Like Kamta Prasad he makes certain statements relating to a point of time anterior to the execution of the will. In some respects his story regarding the story of the preparation of the will does not agree with that of Kamta Prasad. As to this fact we are content to accept what the Subordinate Judge has found in this connexion, namely, that the discrepancies between Roshan Lal's story on this part of the case and the story of Kamta Prasad are really of no importance whatever. To come now to the important statements of Roshan Lal, he began his

evidence by saying that Gobardhan Singh executed a will in favour of his daughter's son. The witness says he attested it and that the other attesting witness was Zamin Ali. He deposed that the attestation took place in the office of the Sub-Registrar of Lakhimpur. His first statement regarding the execution of the will by Gobardhan Singh was that Gobardhan Singh's signature was already on the will. He stated that Gobardhan Singh admitted before him that he had executed the will and asked him to attest it. Accordingly he made the attestation in the Sub-Registrar's office and the will was thereafter registered in his presence. In answer to a question put by the Court the witness stated that he did not remember whether Gobardhan Singh had or had not signed in his presence. He admitted however that he had given evidence regarding the execution of this will in the Court of the Tahsildar in the year 1905.

Before this statement was put to him, he was asked if he could remember what he said on that occasion. His story was that he could not, but that he was prepared to say that any statement he made before the Tahsildar was true. Roshan Lal confirmed the statement of Kamta Prasad regarding the preparation of the will by Murli Manohar and he too states that Murli Manohar read the will over to the Raja. The witness was cross-examined at very great length and clearly a very strenuous effort was made to break down his credit. He admitted that in the suit which was brought by the Allahabad Bank a year or two before the institution of the present suit he had told the Court that he had attested a will of Gobardhan Singh but was unable to say where Gobardhan Singh had got it written. He admitted that he told the Court on that occasion that Gobardhan Singh did not sign the will in his presence but that it bore his signature. When this statement was put to the witness in cross-examination, he stated plainly that it was not a true statement. He explained that when he was being examined in the Bank case his memory must have failed him at the time. He said that he had come to Court on that occasion in a hurry and the will was not shown to him. He went on to say that at the time he was making his deposi-

tion in the present case, he was able to say definitely that the Raja actually did sign the will in his presence in the office of the Sub-Registrar. This statement was made in the course of cross-examination. The witness admitted that in his examination-in-chief he failed to make a definite statement on this point, but his explanation was that he had stirred up his memory since the time his examination began and that at the time his answer was given he was thoroughly assured that the Raja executed the will in his presence. His last statement regarding the execution of the will reads as follows :

"The Sub-Registrar read the will to the Raja and then told him to sign it and get it attested. It was then he signed and after it we attested."

It is not to be doubted that Roshan Lal's evidence is open to the adverse criticism which has been freely bestowed upon it. The Subordinate Judge seems to have thought that Roshan Lal was a witness who in the matter of giving false evidence was prepared to sail as near the wind as he dared. We are inclined to agree with the Subordinate Judge on this point, and we think there is reason to suspect that some attempt had been made to tamper with the witness. We have it that although a summons was duly served on him, Roshan Lal kept away from the Court and it was only when the plaintiff, who was bound to call him as being one of the attesting witnesses, applied to the Court for a warrant for his arrest that he appeared in Court. We think it is a fortunate circumstance that the plaintiff was able to show that Roshan Lal was examined on two occasions in the year 1905 shortly after the death of Gobardhan Singh for the purpose of proving the execution of the will. The record of those statements still exists, and it was no doubt the knowledge of this fact that helped to keep Roshan Lal in the present case from committing downright perjury. Ex. 13 is a copy of the statement which Roshan Lal made to the Tahsildar of Lakhimpur on 19th July 1905 in the course of the mutation proceedings. Obviously the original will was before the Court at that time and after seeing it Roshan Lal deposed that he identified the signatures of Gobardhan Singh on the will, signatures which he said were made in his presence in the

office of the Sub-Registrar. He told the Tahsildar that he was one of the attesting witnesses, that Zamin Ali was the other attesting witness, that the will had been written by Murli Manohar who was then dead, that the Raja took the will to the Sub-Registrar and handed it over for registration and that it was then that he made the signatures on the will in the Sub-Registrar's office.

The word "signatures" used in the plural is to be explained by the fact that there are three signatures of Gobardhan Singh on the document, one at the bottom of the document intended to be his signature as executant, the other two signatures are on the back of the document and are made underneath the two endorsements made by the registering officer on 13th November 1903. Ex. 50 is a certified copy of another statement made by Roshan Lal to the Tahsildar at Nighasan on 28th July 1905. The original will was not produced before this Tahsildar, but Roshan Lal deposed that he had already given evidence before the Lakhimpur Tahsildar regarding the original will. His statement to the Tahsildar of Nighasan agrees with what he stated before the Tahsildar of Lakhimpur. We agree with the Subordinate Judge that Roshan Lal's attempt to explain away the statement he made in the Bhat case regarding the execution of this will is a clumsy one, but we are not prepared to reject his statement on this ground as being false and unreliable. With regard to some of the contradictions which appear in his evidence, it is fair to make allowance for the very long period which elapsed between the time of the events deposed to and the time on which the witness was giving his evidence. We must attach very great importance to Roshan Lal's present statement, namely, that the story he told in the Courts of the two Tahsildars was the true story regarding the execution of the will. At the time the will was produced in the revenue Courts there was no particular reason why Roshan Lal should have made anything but a straightforward statement, and besides at that time the circumstances attending the execution of the will were all fresh in his memory. A good deal has happened since the time Roshan Lal gave evidence before the Tahsildars, and it is only too probable that some attempt

has been made to corrupt him and induce him to give false evidence. This conjecture is, we think fortified by the fact that he appeared as an unwilling witness in the present suit.

The next witness Zamin Ali entered Gobardhan Singh's service in the month of November 1903, only a few days before the date of the registration of the will. There is documentary evidence on the record to prove that the power-of-attorney which Gobardhan Singh gave this witness was registered at Lakhimpur on 10th November 1903, that is to say, three days before the will was registered. Zamin Ali began his evidence by saying that he did not remember whether or not Gobardhan Singh signed the will in his presence. He was able, however, to say that Gobardhan Singh made his signatures on the back of the will in his presence. The document was then shown to the witness. He admitted that it bore his signature and that his signature was dated 13th November 1903. It is important to note, moreover, that the witness signed as "Mukhtar-ur-Rahman" (general attorney) of the Bijua Estate. The witness admitted that Roshan Lal attested the document on the same date and that the attestation took place in the office of the Sub-Registrar. The witness was pressed for an answer as to whether the Raja signed the will in his presence in the Sub-Registrar's office; his answer was that he did not remember. He deposed that the Raja had asked him to attest saying that he had executed the will. The witness was then confronted with the statement which he had made before the Tahsildar in the mutation proceedings in the year 1905 (Ex. 14). This document having been put to him the witness made the following answer:

"I did tell the Tahsildar that the Raja signed in the Sub-Registrar's office in my presence and that I attested. The statement is true and correct."

The witness went on to explain that without his memory having been refreshed by hearing his previous statement read out to him, he could not have recollected all that had taken place at such a distant time. He was however prepared to say after hearing his previous statement that as a matter of fact the Raja did sign the will at the registration office in his presence. The wit-

ness, it may be remarked, does not profess to know anything about the contents of the will. He says he never read it and he was unable to say whether the will had been read out in the Sub-Registrar's office. Roshan Lal's story on this point was that the will had been read out. The cross-examination of this witness brought out nothing to his discredit. He merely reiterated the statements he had made in his examination-in-chief. In answer to a question put by the Court he deposed that after the will had been executed, he heard the Raja discussing the matter with one Nil Kanth Dhuja Sah who was employed for some time as a manager. His story was that Nil Kanth told the Raja that he had done wrong to make such a will. The Raja's answer was that he was sorry for having done so and would cancel it. We may dismiss this statement as being pure invention. We do not believe a word of it.

Lastly there is the evidence of the witness Parbhu Dayal. He was not called upon to attest the document, but he swears that he was present at the registration office at the time the will was presented and that he saw the Raja sign the will and saw the two witnesses Roshan Lal and Zamin Ali attest it. It is the fact that neither Roshan Lal nor Zamin Ali made any mention of the presence of this man at the registration office at the time the will was put in. The Subordinate Judge says that it is not necessarily to be assumed from this fact that Parbhu Dayal was not there. There is no reason to disbelieve the story of Parbhu Dayal that he was in the employment of Raj Gobardhan Singh. He says that he was called to Lakhimpur at the time this document was registered and that he went there bringing with him some money which the Raja wanted. We are not prepared to differ from the view which the Subordinate Judge took regarding the evidence of Parbhu Dayal. What then is the sum and substance of the statements of all these witnesses, statements which we are prepared to accept as being in the main true accounts of what took place? They show to us very clearly that the Raja had made up his mind to make a will, first, in favour of his daughter and afterwards, when the suggestion was made to him, in favour of his daughter's son. A

great deal of argument has been addressed to us regarding the probabilities of such a thing having taken place.

It is pointed out that the Raja in the Mallanpur case had taken up the line that daughters were excluded from inheritance and so, it is said, being conscious of this fact, it is not likely that he would have made up his mind to make a will either in favour of his daughter or of her son, if she had one. It is one thing to say that a custom of exclusion of daughters existed in this family, but it is another thing to say that Gobardhan Singh necessarily approved of the custom. Being a talukdar he had full powers to dispose of his property as he thought fit and if, as we believe he entertained great affection for Mt. Bitto who was his only child, then we can see no reason whatever why Gobardhan Singh should not have decided to defy the custom and to pass the property on to his daughter or her children; and we think there is every reason to believe the story told by Kamta Prasad regarding the motive which prompted Gobardhan Singh to prepare this will. If Bachan Singh had no son of his own, and if there was any likelihood of his handing over the property to his daughter, then we think Gobardhan Singh might very well make up his mind to see that his own daughter or her children should get the benefit of his property rather than Bachan Singh's daughter.

Another argument put forward is that Gobardhan Singh could never have intended to make a will of this kind in view of the fact that he was greatly displeased with the family into which his daughter was married. In fact evidence has been led for the defence to show that Gobardhan Singh was so much dissatisfied with his daughter's marriage that he expressed an intention of never having anything to do with her. We may say at once that we believe that all the evidence given to this effect is false. The man who might have been expected to give the best evidence on this part of the case was Bachan Singh himself. He however as we have already mentioned, preferred to remain away from the witness-box. It is proved that Bachan Singh was present at the marriage and took a prominent part in the marriage ceremonies and festivities. He now asks

the Court to believe that certain events took place at the time of the wedding which incensed Gobardhan Singh so much that he shut himself up and refused to have anything to do with the proceedings. This story has been allowed to be told by two outside witnesses, one of whom is a retired Sub-Inspector of Police named Ghulam Yazdani; another is D. W. 1, a fellow named Liakat Ali Khan, who follows the profession of a mukhtar or karinda.

According to Liakat Ali Khan's statement at the time when the marriage took place he (the witness) was in the service of the Talukdar of Kothwara. He mentions that the talukdar was unable to attend the wedding but sent some little time afterwards in order to pay his congratulations to Gobardhan Singh. According to Liakat Ali Khan on that occasion the Raja told the Talukdar of Kothwara that it was a good thing; he had not been present at the wedding because he (Gobardhan Singh) had been disgraced. He said that his daughter had lost her religion (he dharan bogai). As regards this statement we need only refer to the evidence of Saiyel Raza Husain, the Talukdar who was employing Liakat Ali Khan at this time. His story is that no such conversation ever passed between Gobardhan Singh and himself. We have no hesitation therefore in disposing of Liakat Ali Khan's story as being untrue. As for the evidence of the Sub-Inspector we are unable to attach much importance to it. It appears that he was sent to Gobardhan Singh's house for the purpose of keeping order at the time of the wedding festivities. He was not invited there as a guest, and his cross-examination tends to show that his knowledge of the events he deposes to was acquired by hearsay. Other evidence was given for the purpose of showing that Gobardhan Singh practically cut off all connexion with his daughter. The lie to all this has been given in the evidence of the two Ranis, whose statements we are prepared to accept. We might observe here that neither of these ladies is the mother of Mt. Bitto who was Gobardhan's daughter by another wife. It can hardly be suggested therefore that they have any particular interest in supporting the plaintiff's case. They deny altogether that Gobardhan Singh was displeased with the marriage

and they swear that presents were sent on various occasions to the lady after she had gone to her husband's home.

There is also evidence from the Shah-pura estate which proves, in our opinion, conclusively that these presents were actually sent and we therefore dismiss as fiction the story that Gobardhan Singh had made for his mind to have nothing more to do with his daughter or any child that might be born from her. Even the defendant's witnesses were not prepared to go the length of saying that Gobardhan Singh had ceased to have any regard for his child. We have the statement of the witness Mendal Lal that Gobardhan Singh had a great affection for Bitto and that he was not in any way displeased with her marriage. Another objection put forward to the story regarding the execution of the will is the circumstance that the act of execution was postponed for a considerable period. It is argued that there was no reason why, if the will in its present form was ready for execution at the end of August 1903, it should not have been there and then signed and attested.

It is hardly to be expected that any definite evidence should be forthcoming for the purpose of explaining the delay in execution. Kamta Prasad indeed suggests that the Raja was suddenly called away, after the fair copy of the will had been prepared, by reason of his wife's illness. That statement may or may not be true, but it is as likely as not that Gobardhan Singh determined not to be in too great a hurry about making a final decision regarding the disposal of his estate. The evidence all shows that he took a long time in discussing the matter before he arrived at the stage of having a preliminary draft prepared; and it is by no means unlikely that he was further determined to deliberate over the matter before he finally decided to put his name to the will. While it may be an unusual thing for a document of this kind to be presented for registration without having been previously executed, we are not prepared to say that this circumstance is so suspicious as to justify us in rejecting the story of the witnesses regarding the execution and attestation.

To sum up this part of the case, we think the learned Subordinate Judge has expressed a correct appreciation of the evidence which was before him. He

refers in his judgment to certain pieces of circumstantial evidence which fortified him in accepting the statements of the plaintiff's witnesses. He points in the first place to the fact that the will was produced very shortly after the death of Gobardhan Singh. He further points out that at the time the will was produced and the mutation proceedings were going on, Bachan Singh was still the manager of Gobardhan Singh's estate. It is not to be doubted that Bachan Singh knew all about this will from the very moment it was produced, if not before, and it is impossible to suppose that the terms of this will could have been kept from his knowledge, and yet we have it that a will about which so much is said in the present suit was allowed to go unchallenged by Bachan Singh up till the time the suit was brought by the Allahabad Bank in the year 1912. Then again, as the learned Judge observed, the publicity attending the execution and attestation of the will is a strong point in favour of the view that it is an absolutely genuine document, and due weight must also be given to the fact that it was registered. We have no hesitation therefore in affirming the finding of the Court below. We believe that this will was as a matter of fact executed by Gobardhan Singh on 13th November 1903, that it was attested on the same date by the two witnesses Roshan Lal and Zamin Ali, that it was prepared in accordance with instructions given by Gobardhan Singh, that it was read over and explained to him after the fair copy had been drawn out and that it expresses correctly the intentions which Gobardhan Singh had formed regarding the disposal of his estate.

It is not necessary for us to find that Gobardhan Singh could have understood every single word contained in the will. Most probably he could not understand such of the expressions as are technical and high-flown, but we entertain no doubt whatever that Gobardhan Singh did intend that his property should pass after the death of his widows to his daughter's son; and we have no reason therefore for supposing that he did not understand and approve of the contents of the will. In our opinion, the plaintiff has established everything which under the law he was bound to establish for

the purpose of obtaining a declaration that the will was a genuine and valid document. This is the main part of the appellant's case and we have only now to deal with one or two other points relating to the construction of the will and to the form of the decree which the Subordinate Judge has granted. As regards the construction of the will, the view taken by the learned Subordinate Judge is that it creates a vested remainder in favour of the plaintiff which is to take effect in possession immediately on the termination of the life-estates created in favour of the two widows. As regards the ten villages which under the will are to go to Bachan Singh for life after the death of the two widows, the Subordinate Judge declared that the plaintiff has a contingent remainder.

It has been argued very strenuously that we ought not to find on the language of the will that the plaintiff has any vested interest in the property bequeathed to him. We are asked to find that Gobardhan Singh could only have intended that the plaintiff was to have this property in the event of his surviving the two widows. To this one answer is that if Gobardhan Singh had any such intention, it would have been very easy for him to give expression to it by providing in the will that the plaintiff was only to take the estate in case he survived the Banis. The fact however is that there is nothing in the language of the document to indicate that Gobardhan Singh had any such intention. There is a gift of a life estate to the Banis with an absolute gift over to the daughter's son, and it is not denied that this language, if given its due legal effect, amounts to the bequest of a vested remainder in favour of the present plaintiff. But it is said we ought not to construe the language of the will by the rules which would be observed in dealing with the will of a testator in England. It is argued that Gobardhan Singh knew nothing about vested or contingent remainders and that it is more natural to suppose that he intended the property to go in the usual way it would go according to the provisions of the Hindu law.

If Gobardhan Singh was content to let his property devolve according to the Hindu law, there appears to have been

no particular reason why he should have gone to the trouble of making a will, at any rate of making a will containing the directions which we find in the document now before us. We have already expressed our belief that it was the intention of Gobardhan Singh to prevent this property from going away to the daughter of Bachan Singh, and this being so, there can, we think, be no good reason why we should not assume that in order to anticipate such a contingency Gobardhan Singh had made up his mind that the property should go into the family into which his daughter had married. We have no doubt therefore that the Subordinate Judge was perfectly right in holding that under the terms of this will the plaintiff has a vested interest in the estate left by Gobardhan Singh. We may conclude our observations on this part of the case by drawing attention to the fact that although the question of the nature of the interest taken by the plaintiff under the will was the subject of an issue in the Court below, no argument was addressed to the Court by the defendant's learned counsel. It is only when the case comes up here in appeal that it has been argued seriously that the interest of the plaintiff in the property is not a vested interest.

Before concluding our judgment we have to refer to one point which it was sought to make on behalf of the appellant, a point which is raised in para. 26 of the memorandum of appeal. It is complained that the Subordinate Judge wrongly refused to allow the issue of a commission for the examination of Sir Harcourt Butler, who was at the time the trial was going on the Lieutenant-Governor of Burma. The object of applying for the issue of this commission was to obtain Sir Harcourt's evidence regarding his opinion of the state of mind of Raj Gobardhan Singh with whom, it is said, he was acquainted many years ago at the time when he was the Settlement Officer of the Kheri district. The application for the issue of a commission was made to the Court on 5th January 1916, i.e., more than a year after the institution of the suit. On 6th January the Subordinate Judge refused to issue the order. It appears from the proceedings of the Court below that an affidavit was filed in support of

the application for the issue of a commission. The learned Subordinate Judge pointed out that certain material particulars were not disclosed in the affidavit. He further pointed out that no suggestion to call Sir Harcourt Butler was ever made until 5th January 1916, after the plaintiff had closed his evidence. At the time the application was presented the evidence of the defence witnesses was being taken. In these circumstances we think the Subordinate Judge was thoroughly justified in refusing to issue a commission.

Lastly there remains the form of the declaration contained in the decrees. We have already said that we agree with the finding of the Subordinate Judge that the plaintiff has a vested interest in the property bequeathed to him by Raj Gobardhan Singh, and so far as the decree declares the nature of this interest we can see no reason to interfere. The plaintiff, who has succeeded in establishing the genuineness and validity of the will, is certainly entitled to have an expression of the opinion of the Court regarding the nature of the interest which has devolved to him.

There remains however the question as to whether in the circumstances the Court was justified in making any declaration regarding the nature of the plaintiff's interest in the ten villages which were referred to in the will. With regard to this portion of the property the position is this. The villages are named by name in the will, and it is provided that after the demise of all the three widows of the testator these villages are to be held by Raj Bachan Singh for the period of his life. It is further provided that, if Bachan Singh should have a son, the ten villages are to descend to him in full ownership after the termination of Bachan Singh's life estate. Further it is provided that in the event of Bachan Singh's having no male issue, the ten villages are to revert to the estate after Bachan Singh's death and are to become the property of the testator's daughter. From this last clause in the will it would appear that this provision was made at the time when Gobardhan Singh was still minded to dispose of his estate in favour of his daughter and before it had been suggested to him that the bequest in the first

instance should be made in favour of the daughter's son, if she had one.

After hearing the argument of the learned counsel on both sides we have come to the conclusion that in view of the contingencies which may happen, the interest of the plaintiff in these ten villages is so remote and uncertain that it would be premature and futile to give any declaration regarding it in the present case. In the first place both the widows are still alive and one of them is a comparatively young woman. In the next place Bachan Singh is at present not much over 40 years of age, and it may very well happen that a son may still be born to him, in which case of course the ten villages will pass to his issue. In these circumstances we think the plaintiff cannot reasonably call upon the Court to give any pronouncement regarding the nature and extent of his interest in the ten villages just mentioned and we direct therefore that the decree of the Subordinate Judge be modified in this respect by striking out the declaration contained in para. 3 of the lower Court's decree, which reads : (3) "That he has a contingent remainder in the said excepted items 2, 6, 7, 11 to 14, 18, 21 and 61." In other respects the decree is affirmed and we dismiss this appeal with costs to the respondent.

E.V. B.K.

Appeal dismissed.

A. I. R. 1918 Oudh 206

KANHAIYA LAL, A. J. C.

Durga Prasad and others—Defendants—Appellants.

v.

Ram Charan—Plaintiff—Respondent.

Second Appeal No. 373 of 1917, Decided on 11th June 1918, from decree of Dist. Judge, Hardoi, D. 6th June 1917.

Oudh Rent Act (22 of 1886), S. 3 (10)—Grove-holder granted land for planting grove without any contract to pay rent is not tenant—Cultivation of land does not make grove-holder tenant—Notice for ejectment is not valid so long as grove exists.

A person to whom land is granted for the purpose of planting a grove without any contract to pay rent is not a tenant within the meaning of the Oudh Rent Act. He is a grove-holder and is entitled to hold possession so long as the land remains the character of a grove. The mere fact that the land is liable to resumption or assessment of rent, if brought under cultivation after the grove ceases to exist, does not make the grove-holder a tenant so as to render him liable to ejectment on notice at will so long as the grove exists.

[P. 207 C. 1]

A. P. Sen and Har Gobind Das—for Appellants.

Harkaran Nath Misra—for Respondent.

Judgment.—The dispute in this case relates to plot 589/1 khasra measuring 7 biswas, which is occupied by a grove planted by the plaintiff. The defendants are the proprietors of the land on which the grove stands. They took proceedings against the plaintiff in the revenue Court for his ejectment from the said land, treating him as a tenant paying rent. The plaintiff contested the notice of ejectment but was unsuccessful. The finding of the Board of Revenue, which directed his ejectment, was that there were some very young trees in No. 589/1 and that the said land was not held rent-free under a grove-tenure (Ex. A.7). The present suit was filed by the plaintiff for a declaration that he was the grove-holder of the said plot and had a right to maintain his possession as such and that the defendants were not entitled to eject him from the same. His allegation was that the grove in question was planted by him 16 or 17 years ago with the permission of Dargahi Lal, the father of the defendants, that he built a pucca well over the land and that no rent was ever paid by him to the plaintiffs. In other words, he denied that he was a tenant of the defendants and set up his right to maintain the grove so long as the grove existed. The defendants pleaded that the land in dispute was cultivated by the plaintiff at a rental of 8 annas per annum, that there were 8 trees on the said land, some of which were planted by the plaintiff, 3 or 4 years ago without the consent or permission of the defendants, and the rest had sprung up spontaneously, that the well standing in the land, was constructed by the plaintiff without the consent or permission of the defendants during the pendency of the ejectment proceeding, and that the suit was not cognizable by the civil Court. They further stated that in the survey which took place in 1302 Fasli the number of the plot in dispute was changed from 589/1 to 389/2.

The Courts below held that the land in dispute was given by Dargahi Lal, the father of the defendants, to the plaintiff for planting a grove about 16 or 17 years ago, that the trees standing thereon were

planted by the plaintiff and that no rent was paid by him for its occupation. In regard to the question of jurisdiction, the opinion of the Court of first instance was that the plaintiff was not a tenant but a grove-holder and as such he was not liable to ejectment by notice, but before the lower appellate Court that question was not pressed. A tenant is defined in the Oudh Rent Act (22 of 1886) as a person liable to pay rent. A person to whom land is granted for the purpose of planting a grove without any contract to pay rent is not a tenant within the meaning of that Act. He is a grove-holder and is entitled to hold possession so long as the land retains the character of a grove: *Mehdi Ali Khan v. Guchin* (1). He is really a licensee and no rent can be assessed on the land contrary to the original license or grant; much less can the land be resumed so long as the grove exists.

As pointed out in *Raghunath v. Raja Rampal Singh* (2), the revenue Courts have exclusive jurisdiction to decide, where a tenancy is admitted, what the nature of the tenancy is; but when the existence of the relation of landlord and tenant is denied, they have no exclusive jurisdiction to decide as to the existence of such relation. The mere fact that the land is liable to resumption or assessment of rent, if brought under cultivation after the grove ceases to exist, does not make the grove-holder a tenant so as to render him liable to ejectment by notice at will so long as the grove exists. On the findings arrived at in this case, which are conclusive, the proceedings taken for ejectment against the plaintiff in the revenue Court were without jurisdiction. The appeal fails and is dismissed with costs.

APPEAL ALLOWED. *Appeal dismissed.*

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A. I. R 1918 Oudh 207

SHREE 22 AND KANHAMMA LAL A. J. Cs.
Mt. Lakshmi Kunwar :- Defendant—
Appellant.

v.

Murari Kunwar and others—Plaintiffs—
Respondents.

First Appeal No. 45 of 1916, Decided on 11th January 1918, from decree of Addl. Judge, Fyzabad, D/- 21st February 1916.

(a) Civil P. C. (1908), S. 92—Deed of endowment silent as to nature of trust—Trust held to be public trust on basis of extrinsic evidence.

Where a deed of endowment did not expressly state whether the temple built by the executant was intended for private or for public worship, but it was found from extrinsic evidence that the executant was anxious to obtain religious benefit for her soul, that the temple had been from its very inception open to the public for worship, and that the management and the festivals had been from its origin in a public manner.

Held: that the trust was to be taken to be a public trust created for religious purposes.

(P 207-2)

(b) Civil P. C. (1908), S. 92—Persons entitled to worship can sue.

Persons having a right to perform worship in a temple founded for public worship, are entitled to institute a suit under S. 92. [P 208 C 2]

(c) Civil P. C. (1908), S. 92—Trustee not guilty of mismanagement or misappropriation—Still Court may frame scheme for better management.

Where a Court does not find a trustee to be guilty of neglecting the trust or misappropriating its property, it has no jurisdiction to direct a scheme for the better management of the trust. Still, under the circumstances, such a scheme is deemed to be in the interests of the trust. [P 210 C 1]

Gulab Nath Misra and Mohendra Das Varma—for Appellant.

J. P. Sen, H. K. Ghosh and Satyendra Kumar—for Respondents.

Judgment.—This appeal arises out of a suit brought by the late Raja Udai Pratab Anaya Das Singh, C. S. I. of Bhinga, now represented by his widow, and three other persons for the removal of Mt. Lakshmi Kunwar from her position as a trustee and manager of a temple at Andha and the property appertaining to it. The temple aforesaid was constructed by Thakurain Sukhraj Kunwar, the wife of Deotaha. At the time of the Summary Settlement, the Deotaha Estate was incorporated with that of Bhinga. In 1871 Thakurain Sukhraj Kunwar succeeded in establishing her right to the Deotaha estate and obtained possession thereof under a decision of their Landships of the Privy Council in *Mt. Thakurain Sukhraj Kunwar v. Government* (1). The construction of the temple was started in 1857 and completed in 1861. On 31st May 1872, Thakurain Sukhraj Kunwar executed what she described as a *muassama* or deed of endowment, entrusting the village Dharu Nagar, forming part of the Deotaha estate, to her family gauri or

L. (1870-72) 11 N. I. A. 114=20 15 126 (1916)

preceptor Mahant Rangrajpat for the purpose of providing for the performance of the worship of and the offering of bhog or food to the deity installed in the temple and authorizing him and his successors to collect the rents thereof without any liability for the payment of the revenue and to apply the same to the purposes of the trust. By the said deed she directed her heirs and descendants for all generations to come not to interfere with the collection of the rents of the village, which was set apart for the said purposes. On the same date she executed a will, by which she bequeathed the rest of her estate to Raja Udai Partab Adya Dat Singh of Bhinga.

On 2nd June 1875 the lady died without leaving any issue. It is not denied that Rangrajpat remained in possession of the temple and of the village endowed for its use till his death in 1893. He was succeeded in the management by his son Rasikrajpat alias Babhinpat, who died in 1905, and was succeeded in turn by his widow Mt. Lakshmi Kunwar, the present defendant-appellant. Between 1893 and 1911 several attempts were made by the Court of Wards in charge of the Bhinga estate and after its release by the Raja of Bhinga to obtain possession of the village and the temple but they were unsuccessful. A suit filed by the Court of Wards in 1893 was dismissed on the ground that the Court in which it was instituted, had no jurisdiction to entertain it (Ex. A-5). Another suit filed by the Court of Wards in 1897 was similarly dismissed on the ground that the deed of 21st May 1872 created an endowment for a public religious purpose and that no suit was maintainable except in accordance with S. 539, the then Civil P. C., (Ex. 33). In 1911 a suit brought by the Raja of Bhinga for possession of certain buildings appertaining to the temple was withdrawn. In 1904 the Raja however succeeded in obtaining a decree for the resumption of the village Dharem Nagar under S. 107, Cl. (E), Oudh Rent Act, thereby depriving the temple of the main source of its income, which was derived from that village. In the present suit the plaintiffs seek to oust the defendant from the management of the temple and the buildings appertaining thereto alleging that the defendant has been mismanaging the trust neglecting to

keep accounts and disregarding the regular performance of worship and the celebration of the customary festivals, and that she had misappropriated jewellery, clothes and other valuable furniture appertaining to the temple. It is also asserted that she is an illiterate pardanashin lady about 70 years old and consequently incompetent and unfit for the office and duties appertaining to the trustee of a temple. The learned Additional Judge exonerated her from the charge of neglecting the trust and misappropriating its property; but in the interests of the trust framed a scheme for the better administration of the trust, giving the defendant a position on the Board of Trustees. The defendant seeks to challenge the decree passed by the Court below on three grounds. In the first place, she contends that the plaintiffs other than the Raja Bhinga had no right to institute the suit inasmuch as they were not interested in the object of the trust. In the second place she contends that the trust was a private trust in regard to which the Court had no power to interfere under S. 92, Civil P. C. In the third place, she argues that on the finding that she had committed no breach of trust, she ought not to have been deprived of her power of management.

In the written statement, filed by her in the Court below, she had denied the existence of a trust of any kind whatsoever suggesting that the temple had been made over to her father-in-law Rangrajpat Tewari, by Thakurain Sukhraj Kunwar, but no such position has been taken up in this Court. In the deed of endowment, executed by Thakurain Sukhraj Kunwar, it is not expressly stated whether the thakurdwara or temple built by her was intended for private or for public worship; but from the circumstances admitted by the witnesses of either party, that the temple has been from its very beginning open to the public for worship and that the customary religious festivals have been celebrated therein in a public manner, there can be no doubt as to the intention of the author of the trust. The lady lived in Bhinga. The temple was constructed in Ajudhia, a place of pilgrimage. The lady had no issue and was obviously anxious to obtain religious benefit for her soul. The temple forms the main struc-

ture in a set of buildings in one of which she herself lived in the latter days of her life, looking after the performance of worship, and died. In the written statements filed by Rasikrajpat, the husband of the defendant-appellant, in the previous suits, it was distinctly admitted that the trust was not a private trust. In her own statement in one of the previous suits, the present defendant-appellant admitted that Thakurain Sukhraj Kunwar had told her that she had built the temple for the public benefit and to perpetuate her name (Rs. 10). In her statement in this case she similarly admits (O. P. 288) that the temple was constructed for being visited by the Hindu public and that no restriction was placed on visitors. Several witnesses of the defendant-appellant, including Banke Baijuri Lal (O. P. 184), Mahabir Prasad (O. P. 198), Shambhu Nath (O. P. 201) and Jai Dayal (O. P. 220), also admit that the temple is open to the Hindu public like the other temples at Ayodhya. The evidence adduced to show that a gift of the temple was made in favour of Bangarajpat after it was completed, was rightly disbelieved by the learned Additional Judge. In *Mohun Lalji v. Tilak Sri Girdhari Lalji* (2) their Lordships of the Privy Council pointed out that apart from positive testimony of the point the performance of the worship of an idol in accordance with the rites of the sect for whose benefit it was held, might be treated as good evidence of dedication, and the ordinary rule of the Hindu law, relating to the descent of private property would not apply to the temple, where such worship was conducted. The evidence led in the case sufficiently justifies the finding of which the learned Additional Judge has arrived.

The next question is whether this temple being one intended for public worship the plaintiffs other than the Raja of Bhinga were sufficiently interested in its proper management to entitle them to bring the suit. S. 539 of the old Civil P. C. required that the persons who would have a right to sue under that section, would have a direct interest in the trust; but the word "direct" was taken out by Act 7 of 1888. The inference as pointed

out in *Sajedur Raja Chowdhury v. Gour Mohun Das Baishnax* (3), is that the legislature intended to allow persons having the same sort of interest, that is, sufficient under S. 11, Act 20 of 1863, to maintain a suit under S. 539. In *Jawahra v. Akbar Hussain* (4) and *Jugal-kishore v. Lakshminudra Baglanathdas* (5), it was accordingly held that any person having a right to use a mosque or a temple for purposes of devotion was entitled to seek a proper administration of the trust and to prevent its breach. Plaintiffs 2 to 4 are as much interested in the proper management of the trust as plaintiff 1 for they have a right to perform worship in the temple whenever they visit Ayodhya, and as the suit was filed with the leave of the Legal Remembrancer, the Court below had ample jurisdiction to entertain it.

In regard to the alleged breach of trust, the learned Additional Judge finds that the defendant-appellant kept no accounts of the income, derived from the temple, that she allowed one of her relations to live in one of the buildings attached to the temple presumably without the payment of any rent, that the paintings inside the temple had been neglected, and that a crack was noticeable in the gate, leading to the temple. He exonerates the lady from the charges of misappropriation of jewellery and furniture belonging to the temple and the neglect of worship and the celebration of the customary festivals. The small funds at the disposal of the lady after the temple was deprived of its main income from the village Dharam Nagar by the Raja of Bhinga, are probably responsible for the expenditure in connexion with the temple having to be kept within the narrowest limits. But in the interest of the proper administration of the trust, it is desirable that an account should be kept of such income, as may be realized, and of its being put to the best use. A person, who has no business in connexion with the temple should not moreover, be allowed to stay in its precincts without paying any rent. The position of the defendant as an illiterate pardanashin lady of an advanced age and protracted to some extent by disease also renders it desirable

3. (1897) 24 Cal 418.

4. (1885) 7 All 178.

5. (1899) 23 Bom 659.

2. (1913) 35 All 283=19 I C 337=40 I A 97 (P C).

that the management of the trust should be placed on a sounder footing. She has no male issue, who can help her in the management of the trust, and we agree with the learned Additional Judge that a Committee should be placed in charge of the temple with a representative of the family of the founder of the trust and another representative from the family of Rangrajpat, the family preceptor, and a third selected from among the respectable Hindu residents of Ajudhia or Fyzabad. Rangrajpat has however no male descendant alive, and it does not seem desirable that after the death of the defendant either her widowed daughter or her widowed daughter-in-law should necessarily be accorded a position on the Board of Trustees. Rangrajpat had four brothers, from among whose descendants a suitable representative can be selected to take up the place of the defendant when it falls vacant.

The plaintiffs have held certain cross objections, impeaching the findings, at which the learned Additional Judge has arrived, and questioning the propriety of the scheme which he has framed. We do not think that any of these objections, except in so far as they have already been dealt with above, are entitled to any weight. In deference to the wishes of the founder of the trust and the interest which the defendant has shown in preserving the trust property, we do not consider it desirable to remove her entirely from the management. Her position as the widow of the family preceptor will exert an influence for good in favour of the temple, while her absence may alienate the sympathies of many by whom Rangrajpat and his family were held in very high esteem. We append a scheme for the administration of the trust which modifies the scheme framed by the learned Additional Judge in a few particulars and subject to that modification we dismiss the appeal and disallow the cross-objections, directing the parties to bear their own costs throughout. A copy of the scheme will be sent to the members of the Committee for information and necessary action.

B.V./R.K. *Appeal dismissed.*

Advocate High Court

Jammu & Kashmir

Srinagar.

A. I. R. 1918 Oudh 210

KANHAIYA LAL AND DANIELS, A. J. Cs.
Bishunath Singh and another—Plaintiffs—Appellants.

v.

Baldeo Singh and others—Defendants—Respondents.

First Appeal No. 7 of 1916, Decided on 28th June 1918, against decree of Sub-Judge, Hardoi, D/- 23rd September 1915.

(a) Evidence Act (1 of 1872), S. 92—S. 92 does not apply to claims by or against third person.

Section 92 is confined to proceedings between the parties to the deed or their representatives in interest and has no application to claims by or against third persons. [P 211 C 1]

(b) Evidence Act (1 of 1872), S. 92—Oral evidence to show real nature of transaction contained in deed is admissible.

Parties to a transaction which is not really an out and out sale are not estopped in a suit for pre-emption brought by a third party from adducing oral evidence to show the real nature of the transaction, even when the document evidencing the transfer stands in the form of a sale-deed. [P 211 C 2]

(c) Evidence Act (1 of 1872), S. 115—Object of S. 115 explained.

Section 115 contemplates some act or conduct affecting the party pleading it and having the effect of inducing him to change his position for the worse. [P 211 C 2]

(d) Evidence Act (1 of 1872), S. 115—Right of pre-emption cannot be obtained by means of estoppel—Transaction of sale—Suit for pre-emption is maintainable—Pre-emption.

Unless a transaction is really one which gives rise in law to a right of pre-emption, no such right can be obtained by means of an estoppel. [P 212 C 1]

There is no estoppel where all that is proved is that the transaction in dispute was in form a sale and that the plaintiff treated it as a sale for the purpose of bringing a suit for pre-emption which he would not otherwise have been entitled to bring. [P 212 C 1]

*Gokaran Nath Misra—*for Appellants.
*Samiullah Beg—*for Respondents.

Judgment.—This appeal arises out of a suit for pre-emption in respect of a sale deed, dated 5th January 1914, executed by Ram Singh, now represented by defendant 3, Partab Singh, in favour of his brother-in-law, defendant 1, Baldeo Singh. The property consisted of the entire south mahal (mahal dakhin) of Mauza Rudauli in the Sandila Tahsil of the Hardoi District, and the price was Rs. 8,775. The substantial defence in the suit was that the transaction was not an out and out sale, but of the nature of a mortgage by conditional sale, the parties agreeing that Baldeo Singh would reconvey the property after three

years on being repaid the amount advanced by him and that in the meantime Ram Singh would pay interest. There is no question here of a transaction disguised in order to avoid pre-emption. Baldeo Singh holds an important position in the Kottah State. Ram Singh was already heavily in debt and showed a disposition to plunge still more heavily. He wanted money urgently to file a suit for the redemption of a very onerous mortgage executed by him in respect of another village, Sunda. Baldeo Singh who had already lent him money on mortgage on this very property, agreed to advance the sum required, on condition that Ram Singh would execute a sale deed so as to make it impossible for Ram Singh to incur any further debts on the security of the same property. No one would be likely to advance money to Ram Singh on the security of the property so long as the name of Baldeo Singh stood recorded as owner in the proprietary register.

The plaintiff-appellant, Bishunath Singh on the one hand, disputes the facts and on the other urges a plea of estoppel against the defendants. This plea he bases on two grounds. In the lower Court S. 92, Evidence Act seems to have been relied on, but in this Court it had to be admitted that S. 92 has no application. That section is expressly confined, as its own language clearly shows and as was emphatically held by the Privy Council in a recent case from Burma: *Maung Kyn v. Ma Saice La* (1), to proceedings between the parties to the deed or their representatives in interest, and has no application to claims by or against third parties. The appellant therefore shifts his ground and urges that as Baldeo Singh could plead S. 92 in answer to a suit for redemption by Partab Singh therefore he should not be allowed to prove against the plaintiff anything which he could not have proved against Partab Singh. Otherwise it is said he would get all the advantages of the position of vendee without the corresponding liability to pre-emption. This is the first argument. The second is that by reason of the fact that the deed was registered as a sale deed the plaintiff has been induced to embark on an expensive litigation and

therefore the defendants are estopped by S. 115, Evidence Act, from denying that the transaction was a sale. Neither of these pleas has any force. If the parties are permitted, as by law they clearly are permitted, to give evidence of the real nature of the transaction, they cannot be prevented from doing so because one of the defendants might possibly at some future time take advantage of the situation to commit a fraud on the other. The probability in this case is extremely remote as Baldeo Singh and Partab Singh are father and son, Ram Singh having died leaving a will in favour of his sister's son.

As regards the second argument it is sufficient to say that S. 115 contemplates some act or conduct affecting the party pleading it and having the effect of inducing him to change his position for the worse. Here there was no representation made directly or indirectly to the plaintiff with a view to influence his conduct. In the lower Court he set up a representation, but it was amply proved that his statement was false. He therefore lifts back no sort of general estoppel based solely on the fact that the transaction was in form a sale and available to any person who might be entitled to any right on the assumption that a sale had already taken place. This is carrying the doctrine of estoppel to impossible lengths. If the appellant's doctrine were accepted, it would be equivalent to extending S. 92, Evidence Act, to all suits in which a third party was plaintiff. Such a plaintiff could always plead that he had been induced to embark on an expensive litigation owing to the form in which the transaction was clothed. In *Nanab Begam v. Hamid Ali* (2), a Bench of this Court held that the mere fact that what was really a gift was couched in the form of a sale would not in itself estop the parties from proving the real nature of the transaction in a pre-emption suit; assuming that the form of this document amounted to a representation, as to which there was possibly room for doubt, there must be proof that the plaintiff believed the representation and acted on that belief. In *Raj Bahadur v. Jagrup Pande* (3) the first learned A. J. C., who delivered the leading judgment,

1. A I R 1917 P C 242=45 Cal 320=42 I C 642=44 I A 236 (P C).

2. (1908) 11 O C 176.

3. (1917) 20 O C 249=42 I C 37.

expressed the opinion that unless the transaction was really one which gave rise in law to a right of pre-emption no such right could be obtained by means of an estoppel. We are clearly of opinion that there is no estoppel where all that is proved is that the transaction in dispute was in form a sale and that the plaintiff treated it as a sale for the purpose of bringing a suit for pre-emption which he would not otherwise have been entitled to bring.

On the evidence it is abundantly clear that the facts are as stated above and as they have been found by the learned Subordinate Judge. The evidence has been so fully discussed in his judgment that, agreeing as we do with the view which he has taken of it, there is very little which it is necessary for us to add. The correspondence between Ram Singh and Baldeo Singh leaves no doubt as to the real nature of the transaction. On 18th September 1913 Ram Singh writes to Baldeo Singh, saying that he agrees to the proposal made by the latter to advance money on Rudauli on the execution of a sale-deed which would subsequently be returned, since he urgently requires money for the redemption of Mauza Sunda and if this proposal is not accepted he will be unable to redeem the property. Ram Singh however promises to execute a sale deed of Mauza Rudauli for Rs. 9,000 and asks Baldeo Singh in return to execute what he describes as "an ordinary agreement," promising that when Ram Singh repays the money he will restore the village. The money to be recovered will be strictly spent in instituting the case, and not in extravagance as Baldeo Singh had evidently feared. This letter, Ex. A-2, was produced by Baldeo Singh at the first hearing. In reply to this Baldeo Singh writes on 22nd September (Ex. C-1), saying that he accepts the proposal to advance Rs. 9,000 but that as some Rs. 200 or Rs. 250 will be spent in sending his men backwards and forwards in connexion with the advance he will return only Rs. 8,775. In the end however the sale-deed also was executed for Rs. 8,775 only.

Along with this letter Baldeo Singh sent an agreement on plain paper, Ex. C-2, saying that being in a Native State he cannot obtain a Government stamp, but that if Ram Singh desires he

will execute a fresh agreement on stamped paper when he comes to Ram Singh's house on leave. He asks Ram Singh to complete the sale-deed and states that he has fixed three years as the period for reconveyance, because he cannot wait indefinitely if Ram Singh should delay in instituting the Sunda case. Ram Singh should institute the case and get back his sale-deed within that period. In the meanwhile he must pay 12 annas per cent per month interest and repay the principal and any unpaid interest at the end of three years, otherwise the sale will become absolute. The accompanying agreement, Ex. C-2, has been rejected by the learned Subordinate Judge as requiring registration. Whether it required registration or not, depends on whether it is treated as a document creating an actual right to the property or as merely a personal contract to execute a reconveyance under certain circumstances. The point is not very material, as the agreement can certainly be looked at for the collateral purpose of discovering what the real nature of transaction between the parties was. On 17th October of the same year Ram Singh wrote again to Baldeo Singh disclaiming any desire for a stamped agreement, but protesting once more that the period of three years was insufficient. This communication was on a post-card bearing the Sandila post-mark of 18th October and the Kotah delivery post mark of 23rd October. A month after the execution of the sale-deed Ram Singh wrote a further letter, Ex. A-6, promising, in reply to exhortations of Baldeo Singh to pay interest, that it should be regularly paid every three months. We have evidence that interest was paid on two occasions. Ex. C 4 is a post-card from Baldeo Singh to Ram Singh dated 18th April 1914 acknowledging payment of Rupees 197-7-0 on this account.

The appellant has endeavoured, on altogether insufficient grounds, to throw doubts on the genuineness of this correspondence, chiefly on the ground that some of the letters were not filed on the first day of hearing. This matter has been sufficiently disposed of by the learned Subordinate Judge. Several of the communications are in the form of postcards as to the genuineness of which no doubt is possible and the whole cor-

respondence bears internal evidence of being genuine. It has been suggested by the appellant that these letters are clearly not documents creating any right in immovable property. Two other circumstances which go strongly to support the respondent's case are : (1) that Ram Singh remained throughout in possession of the property, and (2) that the ostensible sale price bears no sort of relation to the value of the property.

As to the first point the evidence is so overwhelming that the appellant has not attempted to controvert it but has taken up the position that because mutation of names was duly effected and possession acknowledged at the time of mutation therefore Ram Singh's possession must be treated as being on behalf of Baldeo Singh. This argument proceeds on a misconception. If we were dealing with a dispute between Ram Singh and Baldeo Singh as to the ownership of the property, we might well say that the mutation proceedings and Ram Singh's conduct were conclusive against the latter, but when we are endeavouring to find out as against a third party the real state of affairs, the fact that Ram Singh remained throughout in possession and performed all acts of ownership is of immense importance. The previous mortgage in favour of Baldeo Singh, though in form usufructuary, was in fact treated as a simple mortgage. Ram Singh paid interest on it and he continued to give leases to tenants and filed suits in his own name just as if no mortgage was in existence. The same thing continued after the execution of the sale-deed. Ram Singh's conduct was not that of an agent in possession of property on behalf of another, but of an owner in possession on his own behalf. As regards the value of the property it is amply proved that the property which Ram Singh purported to sell for Rupees 8,775 was actually worth not less than Rs. 14,000 or Rs. 15,000. The appellant wishes us to disregard this fact on the ground that properties were frequently sold much below their real value, but in the circumstances of this case we cannot but regard it as a fact having an important bearing on the true nature of the bargain between the parties. Not only was the advance made by Baldeo Singh far less than the value of the property, but as the correspondence shows,

it was made without any reference to the value of the property. Ram Singh required Rs. 9,000. Rs. 9,000 were therefore advanced deducting only a sum of Rs. 225 to cover the costs incurred by the lender in connexion with the transaction. The appeal fails and it is accordingly dismissed with costs.

B.V./H.K. *Appeal dismissed*

A. I. R. 1918 Oudh 213

STUART, A. J. C.

Partab Bahadur Singh — Plaintiff — Applicant.

v.

Badlu and another—Defendants—Opposite Party.

Misc. Appln. No. 144 of 1918, Decided on 16th August 1918, against decree of First Addl. Judicial Commissioner, Oudh, D. 17th December 1917.

Civil P. C. (5 of 1908), O. 47, R. 1 — Rent appeal—Judicial Commissioner of Oudh can review his own decision—Oudh Rent Act (22 of 1886), Ss. 120-A and 135.

The Court of the Judicial Commissioner of Oudh has power under the Code of Civil Procedure to review its own decision given in a rent appeal. This power is not affected by the provisions of S. 120-A, Act 22 of 1886, which gives authority to the Board of Revenue to review its decisions. (P213 C 2)

Zahur Ahmad—for Applicant.

Iftar Ghouse Das—for Opposite Party.

Judgment.—This is an application for review of my decision of 17th December 1917. The learned counsel on the other side has taken a preliminary objection that I cannot review this decision under the provisions of Ss. 120-A and 135, Act 22 of 1886. This objection cannot be supported. S. 120-A gives power to the Board of Revenue to review its orders. No Revenue Court could have a power of review under the Act except what was given by the Act. But the principle could not possibly apply to this Court. It has a power of review under the Code of Civil Procedure, which is not inconsistent with any of the provisions of Act 22 of 1886. I therefore proceed to hear the application.

When this second appeal first came before me, I was under the impression that part 3 of Local Act 5 of 1894 had come into operation in the Partabgarh Tahsil on 22nd January 1895. If such had been the case, the order of the Settlement Commissioner of 21st December 1896 would have undoubtedly covered the point before me, and I should not

have permitted any re-arguing of the question. But it has since been brought to my notice that part 3 of Local Act 5 of 1894 did not come into operation in the Partabgarh Tahsil till 1899. I was not in a position to know that fact at the time, and was misled by the circumstance that it had come into operation in a portion of the Partabgarh District and not in other portions. As it is now settled that part 3 did not come into operation till 1899, I agree with the learned counsel for the applicant that Mr Hooper's order can have no bearing on the question of rural police rate, and in so far as a rural police rate is concerned, the matter must be decided irrespective of anything that Mr. Hooper decided in his order.

It is an admitted fact that the predecessor-in-interest of the respondents in the appeal did, as under-proprietor of the village, undertake to pay the whole charges of supporting the village Chaukidar in 1874, and that from that year onwards he allowed the Chaukidar rent free land for his support until 1899, when part 3 of Local Act 5 of 1894 came into operation. Local Act 5 of 1894 laid down no clear provision as to the person from whom such police rates should be recoverable, but that omission is cured by the repealing Act, Local Act 2 of 1906, which laid down in S. 14 that the rural police rate should be recoverable, in whole or in part, by the landlord from an under-proprietor or permanent lessee, who was bound by law, decree or contract to provide wholly or in part for the maintenance of rural police. That Act has also been repealed. It has been replaced by Local Act 1 of 1914, and in that Act the same provision has been enacted in S. 8. We thus have it that the predecessor-in-interest of the respondents was liable to support the Chaukidar in full and that, when the Government took over the support of the Chaukidar recovering the expenses by a local cess, the liability was transferred by Statute to the respondents and that no portion of that liability remains to the superior proprietor. In these circumstances I rescind my former order and decree the appeal. The respondents will pay their own costs and those of the appellant in all Courts.

B.V./R.K. Application allowed.

A. I. R. 1918 Oudh 214

LINDSAY, J. C.

Mt. Saiyedunnisa—Plaintiff—Appellant.

v.

Maiku Lal and others—Defendants—Respondents.

Second Appeal No. 278 of 1917, Decided on 5th February 1918, from decree of District Judge, Sitapur, D/- 11th April 1917.

(a) *Transfer of Property Act (1882), S. 80*—Tacking—Both must be of same kind and nature—Possession of trespasser and his mortgagee cannot be tacked.

In cases where the tacking of possessions is allowed, it is essential that the adverse possessions which are to be tacked must be of the same or of an identical nature. Thus, a mortgagee from a trespasser cannot, as against the true owner, tack his mortgagee possession to that of his mortgagor, the reason being that the latter is a trespasser on the proprietary right, whilst the mortgagee holds adversely merely to the extent of his mortgagee interest. [P 216 C 1]

(b) *Transfer of Property Act (4 of 1882), S. 41*—Principle involved is based on doctrine of estoppel—Transferee from trespasser cannot benefit from mere silence of real owner and avail of trespasser's possession.

The legal principle which is embodied in S. 41 is based upon the doctrine of estoppel, and the mere circumstance that the real owner kept silence and advanced no claim for a long time cannot be treated as evidence of such an implied consent on his part to the continuance of the trespasser's possession during that time, as can be profitably availed of by a transferee from the trespasser. [P 216 C 2]

Gokaran Nath Misra, Zahur Ahmed and Harkaran Nath Misra—for Appellant.
Mohammad Wasim—for Respondents.

Judgment.—The facts of this case are a little complicated and require to be set out in some detail. The suit was brought by the plaintiff-appellant *Mt. Saiyedunnisa* for recovery of 1-anna 1-3/11 pies share in a property described as Chak Naya Gaon. The defendants in the case, *Maiku Lal and others*, are in possession of this property under a mortgage which was executed in their favour in the month of May 1904; and they resisted the plaintiff's claim on various grounds which will be presently noticed. The plaintiff *Mt. Saiyedunnisa* is the daughter of a man named *Fakir Bakhsh*, who died in the year 1898. This man left the plaintiff and another daughter and also four sons *Aziz Bakhsh*, *Amir Bakhsh*, *Sultan Bakhsh* and *Sattar Bakhsh*. After *Fakir Bakhsh's* death the four sons took possession of the property to the exclu-

sion of the plaintiff and her sister. Mutation was effected in their names in equal shares. After this in the year 1899 one of the sons, Aziz Bakhsh, executed a deed of gift in favour of his wife Mt. Khurshed Qadar Begam, by which he purported to transfer to her a 6-annas share in Chak Naya Gaon. Later on Aziz Bakhsh and his three brothers joined in executing a sale deed of the whole 16-annas of Chak Naya Gaon in favour of Baldeo, Bahari and others. After this took place a suit was brought by Mt. Khurshed Qadar Begam to recover the whole 16-annas of Chak Naya Gaon. From a reference to the proceedings in this previous litigation it would seem that Khurshed Qadar Begam never got possession of the property which her husband Aziz Bakhsh had transferred to her by gift. It is also clear from the revenue records that no mutation was ever made in Khurshed Qadar Begam's favour after the deed of gift had been executed by her husband. In her suit Khurshed Qadar pleaded that she was entitled to a 6-annas share of Chak Naya Gaon by virtue of the deed of gift executed by her husband, and she claimed to be entitled to the other 10-annas by right of pre-emption. The case was fought out to this Court and was eventually settled by a compromise.

The result was that Khurshed Qadar Begam was given a decree for the whole 16-annas. She was to get 6-annas under the deed of gift and was to pay a sum of Rs. 5,800 for the purpose of pre-empting the remaining 10-annas. In order to enable her to raise the money which she was required to deposit in Court in satisfaction of the pre-emption decree, Khurshed Qadar Begam mortgaged the entire 16-annas to defendant 2 in this suit, Prag Dat, on 23rd May 1904. She borrowed a sum of Rs. 6,000 and deposited the necessary amount in Court retaining the balance for herself. The mortgage was a mortgage with possession and it is under this mortgage that the defendants now claim. In the year 1909 the present plaintiff Saiyedunnisa and her sister sued their brothers and Khurshed Qadar Begam and certain other persons who were alleged to be transferees, for the purpose of recovering their shares of the estate left by their father Fakir Bakhsh. Those cases were also fought out to this Court and in the

end the claim of Mt. Saiyedunnisa was decreed. Her sister's suit failed on the ground that it was barred by limitation. After obtaining a decree from this Court, Saiyedunnisa applied to the Revenue Court for mutation. She was resisted by the present defendants who pleaded that they were in possession and the result was that mutation was refused. She has therefore brought the present suit for the purpose of recovering her share of the property from these mortgagees.

In para. 5 of the written statement, the defendants set up their title as mortgagees under the deed of 23rd May 1904. In paras. 11 and 12 of the written statement, reference is made to the facts which have been set out above regarding the history of the dealings with this property since the time of Fakir Bakhsh's death. In para. 13 of their statement of defence, the defendants pleaded that their mortgagee Khurshed Qadar Begam was the owner in possession of the entire 16 annas of Chak Naya Gaon, and they claimed that they were entitled to hold possession, being the mortgagees from the absolute owner. As an alternative plea to this they pleaded that at any rate Khurshed Qadar Begam was the ostensible owner and that they were in possession as mortgagees in good faith and for consideration. In para. 14 it was pleaded that the suit was barred by limitation and in para. 15 the defendants stated that in any event the plaintiff was not entitled to recover possession without redemption of the mortgage of 23rd May 1904. The Court of first instance dismissed the suit and its decree has been affirmed on appeal by the learned District Judge.

In second appeal two pleas are raised. In the first place it is argued that the Courts below were wrong in applying the provisions of S. 41, T.P. Act, for the purpose of holding in favour of the defendants that they were transferees in good faith and for valuable consideration. The other plea is that the Courts were wrong in holding that the suit was barred by limitation. In my opinion both these pleas must be allowed.

To deal first with the question of limitation, it is obvious from what has been stated that the case for the defendants is that they are the mortgagees in

possession claiming under a deed which was executed in their favour on 23rd May 1904. They obtained possession under this deed, and as the present suit was brought on 29th January 1916 the suit, as a suit for possession, is clearly within time. It seems that these defendants imagine that they are entitled to join on to the period of their own possession as mortgagees the period during which Mt. Khurshed Qadar Begam and her predecessors, who were trespassers, were in possession. But the learned counsel for the respondents had to concede in the course of the argument that this possession was not open to him. If the case for the defendants is that by virtue of adverse possession they have acquired the right of mortgagees, then the answer is that their possession in this capacity has not extended over the full statutory period of 12 years; and for the purpose of resisting the plaintiff's claim to possession of the property, it is not possible for them to say that they are entitled to the benefit of the period during which Khurshed Qadar Begam or her predecessors were in possession. In cases where the tacking of possessions is allowed, it is well established that the adverse possessions which are to be tacked must be of the same or of an identical nature. A mortgagee from a trespasser cannot, as against the true owner, tack his mortgage possession to that of his mortgagor, the reason being that the latter is a trespasser on the proprietary right, whilst the mortgagee holds adversely merely to the extent of his mortgage interest. It is plain therefore that the defendants cannot be heard to say that they have acquired the rights of usufructuary mortgagees by prescription as against Saiyedunnisa, and no case is or can be set up on their behalf that they are in any way entitled to possession as absolute owners. So much for the plea of limitation.

There remains the other question of the applicability of S. 41 to the transaction of mortgage relied upon by these defendants. I have already mentioned that in para. 13 of the written statement the defendants set up a plea that Khurshed Qadar Begam was "at any rate the ostensible owner of the Chak Naya Gaon" at the time she made the mortgage in the defendants' favour. For the purpose of S. 41, T. P. Act, it is not

sufficient for the defendants to say that Khurshed Qadar was the ostensible owner of the property. It was also necessary for them both to plead and to prove that Khurshed Qadar was the ostensible owner with the consent, express or implied, of Mt. Saiyedunnisa. In this respect it seems to me that the defendants' case has failed entirely. No such consent on the part of the present plaintiff as is required by S. 41 has been established. All that has been made to appear is that from the time of Fakir Bakhsh's death up till the time when Saiyedunnisa brought the suit against her brothers and Khurshed Qadar, she never attempted to make any claim with respect to her share of the inheritance. In dealing with this question, the learned Judge of the Court below has made the following observations:

"It has been argued that the plaintiff did not consent to the ostensible ownership of Khurshed Qadar. It seems to me that the argument that she afterwards claimed that she had been dispossessed, does not help her. If a person on being dispossessed of property, does not take immediate action to recover possession, it seems that until such action is taken, the person must be said to be consenting to the continuance of the possession."

In the first place this is not a correct statement of the facts in this case. It is quite clear that Saiyedunnisa never obtained possession of this property after the death of her father Fakir Bakhsh. It was not until she brought her suit against her brothers and Khurshed Qadar that she got a decree for possession. She had not been in possession before that time; and again it is not in my opinion a correct statement of the law to say that mere acquiescence on the part of Saiyedunnisa, that is to say her failure to come forward and assert any claim to the property, can be treated as evidence of consent in law. I may mention here that it was proved in the previous case, and the fact is practically admitted, that at the time when her father died, Mt. Saiyedunnisa was not more than 15 or 16 years of age. The property was seized by her brothers immediately after the death of her father and no question of consent on the part of Saiyedunnisa can arise in these circumstances. Being a minor, she was incapable in law of giving any consent. Again it is not sufficient in a case of this kind to prove that the real owner

of the property merely kept silence and advanced no claim.

The legal principle which is embodied in S. 41, T. P. Act, is based upon the doctrine of estoppel, and unless the defendants can point to some positive conduct on the part of Saiyedunnisa from which an implied consent could be inferred, they cannot be allowed to avail themselves of the provisions of the section. No express consent is, of course, pleaded in the present case. There is nothing whatever to show that Saiyedunnisa took any steps for the purpose of deceiving persons who were dealing with the property. She did not stand by or encourage the dealings of the defendants with her property and it cannot be said that she was under any duty to the present defendants to come forward and tell them at any time that she had a claim to the property, even if we are to suppose that a lady in her position had the means of knowing that her property was being alienated. On the facts it would be difficult to assume that she had any knowledge of what was going on. Silence or acquiescence on the part of the owner only amounts to deception where there is a duty to speak. All that the defendants can point to here is that Mt. Saiyedunnisa never came forward to claim the property between the date of her father's death in 1898 and the year 1908 or 1909 when she brought her suit against her brothers and Khurshed Qadar Begam.

If the view of the law accepted by the lower appellate Court is recognized as correct there is an end to the doctrine of adverse possession, for, if, as the learned Judge supposes, a person, who is dispossessed of property, must be deemed to be consenting to the continuance of the possession of trespasser during the interval he remains quiescent and does not advance any claim, it necessarily follows that the possession of the trespasser is not adverse possession but possession with the consent of the true owner. Another point which has been raised on behalf of the appellant is that the defendants also failed to show that in taking this mortgage they had acted with reasonable care for the purpose of ascertaining that their mortgagor had power to make the transfer. As regards this, it seems to me unnecessary to discuss the matter, for in view of what I have said,

it must be held in the appellant's favour that there was no proof whatever that she consented either expressly or impliedly to Khurshed Qadar's posing as the ostensible owner of Chak Naya Gaon S. 41 therefore did not apply to this case. The result is that I allow the appeal, set aside the decree of the Court below and direct that the plaintiff's claim be decreed with costs in all three Courts.

R.V./R.K.

Appeal allowed.

A. I. R. 1918 Oudh 217

LINDSAY, J. C.

Harpal Singh—Plaintiff—Appellant

v.

Mt. Sukhrani and others—Defendants—Respondents.

First Appeal No. 96 of 1917, Decided on 31st July 1918, against decree of Sub-Judge, Unao, D. 19th July 1917.

(a) Registration Act (16 of 1908). S. 17—Compromise deed settling family dispute—Deed mere acknowledgment from each of parties of title pre-existing and not fresh creation of rights—Registration is not necessary.

The question whether or not a document in the nature of a compromise requires registration depends upon whether or not it purports to create a fresh title in favour of any of the parties to it. Where there is in reality no creation of a fresh title but merely an acknowledgment from each of the parties of a title pre-existing in the others, the compromise does not require to be registered.

[P 220 C 2]

(b) Civil P. C. (1908), O. 32, R. 7—Compromise in mutation proceedings on behalf of minor without leave of Court is not bad—Provisions of Civil P. C., are not applicable en bloc to proceedings under U. P. Land Revenue Act (17 of 1876).

The provisions of the Civil Procedure Code do not apply en bloc to proceedings in Courts constituted under the Land Revenue Act.

[P 220 C 2]

A minor was represented in certain mutation proceedings by his elder brother, who bona fide entered into a compromise with the other party. The leave of the Court as required by O. 32, R. 7, Civil P. C., was however not obtained for this settlement.

Held: that the compromise was not bad merely for want of such leave.

[P 220 C 2]

Mumtaz Husain and Puttu Lal—For Appellant.

Bisheshar Nath Srivastava and Rudra Datta Sinha—For Respondents.

Judgment.—This appeal has sprung out of a suit brought by the plaintiff Harpal Singh, the object of which was to set aside a certain compromise or arrangement which had been arrived at in the beginning of the year 1907. The

suit was filed on 15th September 1916. In order to explain the matters in issue it is necessary to refer in the first instance to the pedigree attached to the plaint. There were two brothers who, according to the finding of the Court below, were members of a joint Hindu family. This finding is not now in dispute, although in the Court below the plea was taken on behalf of the defendants that Lal Singh and Sheoraj Singh were separate. Sheoraj Singh died first without having any issue. He left a widow, Mt. Phul Kuar, who was impleaded in the suit as defendant 2. It is proved beyond all reasonable doubt that before his death Sheoraj Singh executed a will by which he left his interest in the property to his brother Lal Singh, with the exception of 10 bighas of *sir* land which he appointed by way of maintenance for his wife Mt. Phul Kuar. On the finding that Sheoraj Singh and his brother Lal Singh were joint it necessarily follows that this will could not have any operation in law, but in view of the questions in issue between the parties it is of some importance to notice the fact that Sheoraj Singh did make a will. Lal Singh died about a year after his brother leaving two sons Harpal Singh and Sheopal Singh, and a widow Mt. Sukhrani.

This lady is the step-mother of the two sons whose names have just been mentioned. At the time her husband died she had two daughters, Mt. Beti and Mt. Bitti, the latter of whom has since died. The documentary evidence on the record shows that a dispute arose between these various parties after the death of Lal Singh as to the manner in which mutation should be made. It is clear that Mt. Phul Kuar, the widow of Sheoraj Singh put forward a claim on her own behalf. She desired to have mutation made in her favour in respect of all the property which had belonged to her deceased husband. This claim of course was based on the assumption that Sheoraj Singh was separate from his brother. Then again there seems to have been a dispute between Mt. Sukhrani and her stepsons regarding mutation. The sons and Mt. Sukhrani both of them put forward allegations for the purpose of showing that Lal Singh before his death had made an oral disposition of his property. Mt. Sukhrani insisted

that under this will she was entitled to have mutation of a one-third share of the whole property. Sheopal Singh on the other hand put forward two versions of the oral will made by his father. One of these versions agreed with the story told by Mt. Sukhrani; the other did not. In the end however Sheopal Singh seems to have made common cause with Mt. Sukhrani, and he and Mt. Sukhrani, filed a petition in Court by which they agreed to have mutation made in the manner suggested, that is to say, a one-third share entered in the name of Mt. Sukhrani and two-thirds in favour of the sons.

At the time these mutation proceedings were going on, the present plaintiff Harpal Singh was a minor and was represented in the proceedings by his elder brother Sheopal Singh, who is defendant 3 in the case. After the statements of the parties had been recorded before the tahsildar, the case finally came up for disposal before an Assistant Collector. He passed an order which was not exactly in accordance with the agreement just referred to, for it allotted to Mt. Phul Kuar a one-fourth share in one of the mahals of a village called Dewara in which Sheoraj Singh and Lal Singh had a share. The rest of the property was divided as arranged in the compromise between Mt. Sukhrani on the one hand and Sheopal and his brother on the other. It may be mentioned that Mt. Sukhrani was to have no powers of alienation over the property and that it was agreed that after her death the property should devolve upon Sheopal Singh and his brother Harpal Singh. All this took place in the year 1907. The present suit has arisen by reason of a claim made by Mt. Sukhrani in the rent Court. In the month of August 1916 Sukhrani filed a suit for profits against the plaintiff and defendant 3 in respect of the share which stands recorded in her name. This act has led the present plaintiff to bring a suit, which was framed originally as a suit for declaration asking the Court to declare that Mt. Sukhrani had no proprietary interest in the property. Put shortly, the case for the plaintiff-appellant is that he is not bound by the compromise which was filed in the revenue Court in the year 1907. He mentions the fact (which may be taken to be proved) that he was

a minor at the time, and he says he is not bound by the act of his brother Sheopal Singh who purported at the time to be his guardian. The learned Subordinate Judge has dismissed the claim, holding that on the evidence before him the proper view to take is that there was in the year 1907 a family settlement between all the parties interested in the property. This settlement according to the Subordinate Judge was a reasonable settlement of a genuine dispute between the parties to the present case, and consequently he has held that the plaintiff is not now entitled to avoid it. He has found that ever since the year 1907 all these parties have been living together amicably and that this arrangement which was come to in the mutation Court has been accepted all along up till the year 1916, when Mt. Sukhrani thought fit to bring a suit for profits.

The question therefore which I am called upon to decide is, whether the lower Court was justified in holding that the dealing between the parties after the death of Lal Singh amounted to a family arrangement, and if the finding is that there was such a settlement then the plaintiff, although he was a minor at the time, would in my opinion be bound. It is not denied, I may mention, that Sheopal Singh was only the adult member of the family left after the death of his father Lal Singh and the family being joint, the presumption must be that he was the managing member and was in a position to represent his brother Harpal Singh in the mutation proceedings. The learned counsel for the appellant has attacked the decision of the Court below on various grounds. He argues in the first place that there was no bona fide settlement of a family dispute, that there could not have been in fact any bona fide claim put forward by the widows and then when Sheopal Singh made statements in the mutation proceedings (a copy of which is Ex. A-1) he was only admitting a claim which he and everybody else knew to be a false claim. After a perusal of the evidence I am not prepared to take this view of the facts at all.

It is quite true that Sheopal Singh made conflicting statements which were recorded by the tahsildar. As already mentioned, he stated in the first place that his father Lal Singh had made an oral will by which one-third of the pro-

perty was to go to Mt. Sukhrani, while the remaining two-thirds was to go to himself and his brother. Subsequently he altered this statement by saying that his father had directed that a one-fourth share in one of the Mahals of Dewara Kalan should be given to Phul Kuar. Mt. Sukhrani on the other hand was pressing the case that her husband had made an oral will in favour of herself and his two sons. It may be noted here that while these proceedings were going on and after the document of compromise had been filed, the present plaintiff Harpal Singh attempted to intervene. He put a petition into Court saying that he repudiated the compromise to which his brother had agreed. He claimed to be of full age and to be entitled to be heard on his own account. The Court before which the proceedings were pending asked him to produce some reliable evidence to show that he was of full age. He was unable to do so and the consequence was that his petition was rejected. Subsequently he expressed his assent to the arrangement into which his brother had entered. I have already mentioned the fact that Mt. Phul Kuar was also putting forward a claim these mutation proceedings and it is noteworthy that when Harpal Singh put in his first application it was by way of supporting Mt. Phul Kuar's claim.

To say that there was no bona fide claim on the part of Phul Kuar or of Mt. Sukhrani because it is now proved that Sheoraj Singh and Lal Singh were members of a joint family, seems to me an argument which cannot be accepted. While it has now been made to appear that as a matter of fact Sheoraj Singh and his brother were joint, there still remains the fact that Sheoraj Singh before his death executed a will, a fact which was altogether inconsistent with his status as a member of a joint family and it may very well be that Mt. Phul Kuar, who is Sheoraj Singh's widow, may have thought that Sheoraj Singh was as a matter of fact separate from his brother by reason of his having made a disposition of his property by will. As for the position of Mt. Sukhrani she, as I have already stated, was relying upon an oral will of her husband. The question as to whether or not Lal Singh made an oral will was put in issue in this case. The Subordinate Judge has

found that it was not proved that Lal Singh did make an oral will. It seems however from the judgment that this part of the case was really not pressed and so far as I can see the Subordinate Judge seems to have thought that it was quite possible that Lal Singh did make an oral disposition of his property. Be that as it may, the fact remains that Mt. Sukhrani was the second wife of Lal Singh and that she had two daughters by her husband. She was certainly entitled to look to the estate for maintenance for herself and her two daughters and if she put forward a claim in the mutation Court, I am not prepared to hold that it was not a bona fide claim merely because her husband was a member of a joint family. In short the situation appears to me to be this: that Phul Kuar on the one hand and Mt. Sukhrani and her two daughters on the other were persons who had claims on the estate left by Lal Singh. In these circumstances it appears to me perfectly natural that the parties should have come to an agreement by which the rights of these ladies were recognized. I must dismiss altogether the argument that these ladies were putting forward claims for which there was no foundation at all and, I think, the Subordinate Judge was quite justified in coming to the conclusion that there was before him a clear case of a family settlement in which each of the disputing parties had a case and in which there was a reasonable and proper decision of all the conflicting claims. As he points out, there is no allegation of any fraud or collusion in the matter and the evidence clearly establishes that ever since the mutation was made the parties have been all living together as members of a joint family. Another point which he makes is that there is no evidence to show that Phul Kuar is now in possession of the 10 bighas which her husband purported to leave her by will, and so there is reasonable ground for thinking that the share of Mauza Dewara which was allotted to her in the year 1907 was given to her in lieu of the maintenance which her husband had desired her to have.

The next argument is that the compromise embodied in the document required registration. This argument cannot, I think, succeed. The question whether

or not a document in the nature of a compromise requires registration depends upon whether or not it purports to create a fresh title in favour of any of the parties to it. Here I think the reasonable interpretation of the document is, that there was in reality no creation of a fresh title but merely an acknowledgment from each of the parties of a title pre-existing in the others. The last point which has been raised is that inasmuch as one of the parties to the case was a minor, the compromise required the sanction of the revenue Court, and in this connexion S. 462 of the old Civil P. C., is referred to. With regard to this all I need say is that it has not been made to appear to me that the provisions of the Code of Civil Procedure apply en bloc to proceedings in Courts constituted under the Land Revenue Act. There is in my opinion no force in this contention.

It has been pointed out that Mt. Phul Kuar was no party to the compromise to which assent was given by Sheopal and Mt. Sukhrani. That is so. On the other hand there was evidence before the Subordinate Judge to show that the other parties accepted the arrangement by which Mt. Phul Kuar was put in possession of a small share in Mauza Dewara. It is proved by documentary evidence on the record that subsequent to the year 1907 Mt. Phul Kuar mortgaged this share to one Sheoratan Lal and that subsequently the mortgage was redeemed by Sheopal and his brother Harpal. I think the Subordinate Judge was entitled to rely upon this fact for the purpose of showing that although Mt. Phul Kuar was not formally a party to the compromise proceedings, nevertheless the order for mutation which was made in her favour was accepted by the brothers and acted upon for a considerable period after the date on which it was made. To sum up, my conclusion is that the Subordinate Judge was right in holding that there was before him a genuine case of family settlement in which bona fide claims had been put forward. The settlement is in every way a reasonable one and must be given effect to. Affirming the judgment of the Court below I direct that this appeal be dismissed with costs.

B.V./R.K.

Appeal dismissed.

A. I. R. 1918 Oudh 221

LINDSAY, J. C.

Kunj Bihari Prasad — Defendant—Appellant.

v.

Basdeo Prasad — Plaintiff — Respondent.

Second Appeals Nos. 367 and 392 of 1916, Decided on 16th April 1918, from decrees of Dist. Judge, Gonda, D/- 3rd August 1916.

(a) Civil P. C. (5 of 1908), S. 100 — Court failing to consider evidence—Finding of fact is not binding.

The High Court is competent to determine a point of fact in second appeal if it appears from the judgment of the lower appellate Court that it failed to consider all the evidence on the record relating to that point. [P-222 C 1]

(b) Tort—Trespass — Chhajjas (cornices) over other's house constitute trespass.

Erection of chhajjas (cornices) in a house so as to project over a neighbour's land, constitutes a trespass on that land. [P-223 C 2]

John Jackson and Aditya Prasad — for Appellant.

Ram Chandra and A. P. Sen — for Respondent.

Judgment. — These are cross-appeals arising out of a suit which was filed in the Court of the Munsif of Utrala in the Gonda District. The plaintiff was a minor, one Mahant Basdeo Prasad, and the two defendants were Kunj Bihari Prasad and Jagdish Prasad. The allegations upon which the plaintiff came into Court were that the defendants, who are owners of a house situated on a plot No. 727, situated in the village of Chhapiya, had encroached upon an adjacent plot of land No. 728, which belongs to the plaintiff, by extending their house to the south. It was stated that by reason of this encroachment, which the plaintiff said had been made within two years from the suit, a certain road, leading from the north to the south past the corner of the defendants' house, had been narrowed so as to interfere with the free passage of persons going backwards and forwards to the temple of which the plaintiff is the Mahant. A further allegation was to the effect that along the east and south sides of the house the defendants had erected chhajjas or cornices which projected over plot No. 728 and which constituted a trespass on the plaintiff's property. A third complaint was that the defendants had opened new doors on the east and south sides of their house and that they were in the habit

of causing obstruction on the plot No. 728 by placing various articles outside these doors and by tethering cattle and by doing similar other acts. The plaintiff therefore prayed for removal of so much of the building of the defendants as encroached upon his plot No. 728. He also prayed for the removal of the chhajjas or cornices and for the closing up of the new doors which the defendants had opened.

The main defence in the case was that the alleged encroachment was no encroachment at all. The defendants stated that the new portion of the house regarding which the plaintiff was complaining had been built some 6 or 7 years before the suit upon the site occupied by old walls. They further claimed that the chhajjas constituted no encroachment or trespass on the plaintiff's land and they also denied that any new doors had been opened. They pleaded in any case that the plaintiff was not entitled to have the doors closed. On the main question in the case, namely, whether the house of the defendants had been so built as to encroach on plot No. 728, the Court of first instance came to a finding in favour of the plaintiff. The Munsif however did not think it necessary to order removal of the entire portion of the defendants' building which encroached upon the plaintiff's land. He ordered a corner of it to be removed so as to remove any obstruction to the road leading from the north to the plaintiff's temple. He held that the chhajja on the east side of the defendants' house interfered with the convenience of passengers and he ordered its removal accordingly. As for the chhajja on the south side of the house he was of opinion that it caused no inconvenience and he refused to make any order for its removal. As for the case about the doors he gave directions that the doors should be closed.

The defendants went in appeal to the District Judge and the plaintiff filed cross-objections. The result was that the learned Judge, differing from the Court of first instance, found that there had been no recent encroachment on the plaintiff's land No. 728. He reversed the order of the first Court directing the removal of a portion of the defendants' building. As regards the chhajjas he affirmed the order of the first Court. As for the case about the doors he was of

opinion that the defendants were entitled to open as many doors in their house as they chose and consequently he set aside that portion of the first Court's order which directed the doors to be closed. Both parties come here in appeal and I deal first with the appeal of the plaintiff No. 392 of 1916.

The main question for decision here is with respect to the encroachment alleged to have been made by the defendant on plot 728. It is argued that the judgment of the lower appellate Court is wrong in this respect and that the order of the first Court ought to have been allowed to stand.

Referring to the map which was prepared during the trial in the first Court by a commissioner, Babu Sant Bakhsh, the portion of the defendant's premises which the plaintiff alleges to constitute an encroachment on his land is an oblong delineated in pink on the map and running lengthwise from east to west between the letters D and E. The amount of the encroachment is alleged to be about eight feet. *Prima facie* the finding of the learned District Judge that this portion of the defendant's house is not a fresh encroachment upon the plaintiff's land is a finding of fact which cannot be disturbed in second appeal. It is argued however that the learned Judge has not referred to certain important pieces of documentary evidence on the record, which were relied upon in the Court of first instance and which it is argued the learned Judge ought to have dealt with in his judgment, especially as he proposed to interfere with the finding arrived at by the Munsif. For the purpose of arriving at his decision the learned Judge relied principally upon two statements: one of these was the statement of a commissioner, Babu Satish Chandra, who was appointed to inspect the site. According to his statement the portion of the defendants' house, which is marked pink upon the map, was not a new building, that is to say, Babu Satis Chandra was of opinion that the walls, although new, had been erected upon old foundations. The learned Judge says that to his mind the statement of Babu Satish Chandra on this point is conclusive.

He also relied very strongly upon the evidence of an old Qanungo, named Dhanpat Rai, who gave evidence in the

case on the defendants' behalf. His story was that in the year 1884 he had been ordered to prepare a map of the boundaries on the plaintiff's plot 728. A copy of the map which was prepared by him in that year together with a copy of the khasra which he prepared by way of explaining the map were on the record and the originals were also summoned from the revenue Court. I have no doubt that if the statement of the Qanungo Dhanpat Rai can be accepted in its entirety, the decision of the learned Judge is correct. The Court of first instance thought the evidence of the Qanungo was unreliable, but the learned Judge, as he was perfectly entitled to do, took the opposite opinion. It is however the fact that although the learned Judge in the opening portion of his judgment sets out that he has considered all the oral and documentary evidence in the case, he does not in his judgment discuss certain documentary evidence which it is claimed supports the case of the plaintiff. I have been referred in this connexion to three documents. One of these is a map of the abadi of Mauza Chhapiya which was prepared at the time of the Settlement in 1901.

This map is relied on by the plaintiff for the purpose of showing that at the time when it was prepared the road at the south-east corner of the defendant's house was some 13 odd feet wide. According to the commissioner's map prepared during the trial in the first Court the road is now only 7½ feet wide, and so it is claimed that this constitutes clear evidence of the fact that the original boundary of the defendant's house has been advanced to the south so as to narrow the width of the road to about half of its previous extent. Another map to which I am referred is Ex. 4, a partition map which was prepared in the year 1892. If we accept the measurements shown on this map, the total length of the eastern wall of the defendants' house from north to south was at that time only about 82½ feet. According to the map now prepared by the commissioner the total length would be 92 feet, thus showing that the southern boundary had been advanced by a distance of over 8 feet. This latter map was examined by the Munsif.

He was not prepared to rely on it exclusively as proof of the encroachment,

saying that he could not trust a map of such a small scale for the purpose of coming to a definite conclusion in the plaintiff's favour. So far as the Settlement Map of 1901 is concerned, I have to observe that it is on a very small scale and that it would be practically impossible to hold that it proves conclusively that the space between the width of the road at the south-east corner of the defendants' house was 13 feet odd. Being on a small scale the minutest error in making a copy of the map or in taking measurements by it would lead to false conclusions. The difference of a pin's point in making a measurement would correspond to an error of perhaps 8 or 10 feet on the ground. As regards the partition map of 1892 it supports to a certain extent the case of the plaintiff. It is a map on a larger scale than the map which was prepared in 1901. At the same time there is this much to be observed that the road regarding which the complaint is now made is not delineated upon this particular map. The corner of the tank which faces the south east corner of the defendants' house is not shown on this map. On the other hand, it seems to me that the statement of the Qanungo which the learned Judge has accepted is entitled to preference as against these pieces of evidence. We have the fact that the Qanungo was deputed for the purpose of defining the boundaries of plot No. 728 which is the plaintiff's property.

We have it also that he prepared a map, that he set up boundary pillars and that he had prepared a khasra explaining the map. These documents were before the Qanungo at the time he gave his evidence. The result of the Qanungo's statement is that in the year 1881 the southern boundary of the defendants' house extended south of the pillar No. 15 which he set up on that occasion. He states quite clearly that this particular pillar was not at the south-east corner of the defendants' house but was some distance north of that corner. Another important fact to which he deposes is that according to the correct measurements the north-west corner of plot No. 728 was found to be inside the defendants' house; in other words, in the year 1881 an encroachment had already been made and a por-

tion of plot No. 728 had been built over by the defendants. He explains that for the purpose of marking the north-west corner of plot No. 728 he set up a pillar No. 1 at a spot outside the defendants' house and one gathia south of the correct spot, the reason being that he was unable to set up a boundary pillar inside the defendants' premises. He has further stated in his evidence that the line between pillar No. 15 and pillar No. 1 ran due east and west. If this be so, then it seems to me that comparing his statement with the map of the commissioner which I have now before me it must be held that the portion of the defendants' house delineated in pink was in existence, though possibly, not in the same form, in the year 1881.

I have given all this evidence my careful attention and the conclusion I arrive at is that the plaintiff failed to establish that the portion of the defendants' house delineated in pink constituted a fresh encroachment which he was entitled to have removed. I think the proper conclusion is that the encroachment had taken place so far back as the year 1881. The judgment of the lower appellate Court on this point must, I think, be supported. The next question I have to deal with is that of the chhajjas, it is fairly obvious that these chhajjas, which admittedly are of recent construction, constitute a trespass on the plaintiff's land No. 728. The learned Judge concedes that the maxim "*cujus est solum, ejus est usque ad coelum*" applies to the case and if that be so, it seems to me to necessarily follow that the chajja on the south side of the defendants' premises constitutes just as much a trespass as does the chhajja on the east side, though it may be the fact that it does not cause so much inconvenience. It is not to be doubted that the plaintiff is entitled to relief in respect of this chajja on the south side, for as the learned counsel observes, if this chhajja is allowed to remain for a period of 20 years, the defendants will acquire a right of easement. The question was not to be determined merely upon considerations of convenience. Once it was found that the trespass had been committed and that the effects of the trespass could be removed it was the duty of the Courts, I think, to give the plaintiff relief; and

I am therefore, of opinion that the Courts below should have passed an order for the removal of the chhajja on the south side.

Lastly there remains the question of the doors. The learned counsel for the plaintiff-appellant admits that he is not entitled to ask that the doors should be closed, but he says that he is entitled to an order restraining the defendants from using these doors for any purpose other than those of ingress and egress and from using the land outside their house for the purpose of tethering cattle or causing any other obstruction to the free use of the land by the plaintiff. It seems to me that this argument cannot be controverted and I think the plaintiff was entitled to this relief. So much for the plaintiff's appeal. The appeal of the defendants (No. 367 of 1916) relates to the eastern chhajja the demolition of which has been ordered by the Court below. As to this my opinion is, for the reasons already given above, that the defendants have no case at all. The chhajja undoubtedly constitutes a trespass and the plaintiff is certainly entitled to have this erection removed.

The result therefore is that I allow the appeal of the plaintiff-appellant in part and order the decree of the lower appellate Court to be varied by the insertion of a direction for the removal of the chhajja along the south side of the defendants' house within three months from the date of this decree. I further give the plaintiff-appellant an injunction restraining the defendants from using the doors of their house for any other purposes than ingress and egress and directing the defendants not to use the ground on the east or south side of their house for the purpose of tethering cattle or to cause any other obstruction to the free use by the plaintiff of the land in question. As for the defendants' appeal I order it to be dismissed. I have the parties to bear their own costs.

B.V./R.K. *Order accordingly.*

A. I. R. 1918 Oudh 224

KENDALL, A. J. C.

Ajodhia Bank, Fyzabad Ltd.

v.

Abdul Ghani and others.

F. A. No. 54 of 1915, D/-31-5-1916.

Mortgage — Interest — Contractual rate from date fixed for payment till realisation should ordinarily be allowed in decree—Rate is however discretionary.

The rate of interest which a Court can allow in a mortgage decree from the date fixed for payment to the date of realisation, is in its discretion. In exercising its discretion, however, the Court will ordinarily refer to the contractual rate, if it be a reasonable one. [P 224 C 2]

Har Narain Dass—for Appellant.

Judgment.—The suit out of which this appeal has arisen, was brought on a registered mortgage deed for Rs. 3,500. Interest at 10 per cent. per annum was provided for in the deed. The suit was undefended. The lower Court decreed principal and interest to the date of suit and costs. Six months were allowed for payment; and for that six months the lower Court decreed the contractual rate of interest, but decreed it only upon the principal sum. It further decreed interest at 6 per cent. per annum from the date of payment till realisation, but this again only on the principal sum of Rupees 3,500. Hence this appeal. Respondents have not appeared. There was no reason whatever why the contractual rate of interest should not have been decreed upon the decretal amount from the date of the decree to the date of payment. The rate of interest which the Court can allow from the date fixed for payment to the date of realisation, is in its discretion. In exercising its discretion the Court will ordinarily refer to the contractual rate, if it be a reasonable one. It was laid down by Lindsay, J. C., in *Al-lahabad Bank, Limited, Lucknow v. Rani Suraj Kuar* (1) that according to the practice of this Court, the interest at the contract rate can be awarded in cases of this kind up till the date of realisation, provided the rate is deemed to be reasonable. I do not find that the rate of interest in the present case can be termed unreasonable. I, therefore, allow this appeal and pass a decree for Rupees 5,629, 13-6 and costs. If this amount with interest at the rate of 10 per cent. per annum be not paid within a further period of 3 months of this date, the mortgaged property shall be sold, future interest being allowed to the date of realisation at the contractual rate. Appellant may have his costs of this appeal.

B.V./R.K. *Appeal allowed.*

1. A I R 1914 Oudh 239=26 I C 177.

A. I. R. 1918 Oudh 225

STUART AND KANHAIYA LAL,
A. J. Cs.Lal Tribhawan Nath Singh—Plaintiff
—Appellant.

v.

Deputy Commissioner, Fyzabad and
others—Defendants—Respondents.First Appeal No. 11 of 1917, Decided
on 4th March 1918, from decrees of Addl.
Judge, Fyzabad, D/- 19th October 1916.(a) Hindu Law—Adoption—Putrika-Putra
son is recognized by Mitakshara.Per Stuart, A. J. C.—Although the practice
of bagettigra putrika-putra son has fallen into
disuse, it is nevertheless recognized by the Mitak-
shara law. [P 243 C 2](b) Oudh Estates Act (1869), S. 22 (4)—
Talukdar dying issueless and intestate—
Succession goes to his heirs and not to
maternal grandfather.Where a person succeeding to a taluka under
the provisions of S. 22, Cl. 4, died issueless and
intestate, the taluka goes to his heirs, and not to
those of his maternal grandfather. [P 249 C 1](c) Evidence Act (1872), S. 159—Memoran-
dum written by witness is admissible.Where a witness, on being asked if he has had
an interview with a particular person and what
the purport of that interview was, replies that he
has had such an interview and had noted the
purport of it at the time in a written memoran-
dum, and produces that memorandum, the me-
morandum is admissible in evidence. [P 250 C 2](d) Evidence Act (1872), Ss. 123, 124—
Courts cannot call for confidential State
Papers.In view of the provisions of Ss. 123 and 124,
no Court of justice is entitled to call for and ex-
amine the secret archives of the State in order to
satisfy itself of their confidential nature. [P 241 C 1](e) Will—Revocation must be proved by
clear and satisfactory evidence.A will duly executed is not to be treated as re-
voked, either wholly or partially, by a will which
is not forthcoming, unless it is proved by clear
and satisfactory evidence that the later will con-
tained either words of revocation, or dispositions
so inconsistent with the dispositions of the
earlier will that the two cannot stand together.
It is not enough to show that the will which is
not forthcoming differed from the earlier will, if
it cannot be shown in what the difference con-
sisted. [P 245 C 2](f) Will—Construction—Power to adopt
held legal.Where under a will a talukdar gave to his
second wife in supercession of his first wife a
life-estate in the taluka and a power to adopt a
son, and further stipulated that the adopted son
would after her death succeed as full proprietor
in the manner contemplated by S. 22, Cl. 8,
Oudh Estates Act, and the second wife then
adopted a son:Held: (1) that "Cl. 8" in the will was merely
a clerical error "for Cl. 9"; [P 247 C 1, 2]

(2) that the adoption was valid, inasmuch as

the talukdar could give to his second wife the
power to adopt a son in exercise of the will and
as the intention of the talukdar under the will
were substantially carried out, for the estate
taken by the adopted son retained the character-
istic of a taluka. [P 248 C 1](g) Oudh Estates Act (1869), S. 22—Rules
of Hindu law are not applicable to adoption
under S. 22.An adoption under the provisions of S. 22,
Oudh Estates Act, is merely a selection which
need not be according to the conditions and the
restrictions found in the personal law applicable
to the persons making the adoption. [P 248 C 2](h) Hindu Law—Adoption—Adoption not
vitiated by payment of price for adopted son.Under the Hindu law adoption is not viti-
ated by the payment of a price for an adopted
son. [P 251 C 2](i) Hindu Law—Adoption—Change of
gotra.A son adopted under the Mitakshara law can
only change his gotra on adoption. [P 244 C 1](j) Hindu Law—Adoption—Son affiliated
in putrika-putra form is valid substitute for
son.Per Anand Lal, A. J. C.—According to
the Mitakshara, a son affiliated in the putrika-
putra form is a valid substitute for a son. The
law with which a son could be obtained by
adoption was held to effect in the course of time
of rendering affiliation in the form of putrika-
putra more or less synonymous, but it has by no
means become absolute and effect cannot legiti-
mately be refused to an affiliation in the putrika-
putra form if it is made. [P 255 C 1; P 256 C 1](k) Oudh Estates Act (1869), S. 22 (4)—
Talukdar dying intestate—Succession does
not go to his natural line, but goes to the
line of person who affiliated him and treated
him as son.The succession to a person, obtaining a taluka
under the provisions of S. 22, Cl. 4, Oudh Estates
Act, and dying intestate, goes, in the absence of
any male lineal descendant, to the line of the
person who affiliated him and treated him in all
respects as a son, and not to his natural line. [P 259 C 2](l) Will—Revocation—Subsequent will
not forthcoming—Original will is not re-
voked.A will duly executed cannot be treated as re-
voked, either wholly or in part, by a will which
is not forthcoming, and the contents of which
cannot be definitely ascertained. It is not
enough to show that the will which is not forth-
coming differs from the earlier one, if it cannot
be shown in what the difference consists. [P 264 C 2](m) Hindu Law—Adoption—Supply of
clothes or ornaments or money to adoptee's
father—Adoption is not invalid.The supply of clothes or ornaments to the
parents of the boy to be adopted or the payment
of money therefor in anticipation of the adoption
cannot invalidate the adoption or be taken to in-
dicate that it was made from sinful or improper
motives. [P 266 C 2](n) Hindu Law—Adoption—Adoptive
father and adoptee belonging to same gotra
—Ceremonies can be dispensed with.The performance of requisite ceremonies for
adoption can be dispensed with, if the adoptive

S. N. DAR, B. A., LL. B.,

Vakil High Court,

SRINAGAR (Kashmir)

father and the adopted boy belong to the same gotra. [P 265 C 2]

(o) Oudh Estates Act (1869), S. 22 (8) — Junior wife of talukdar adopting son in pursuance of will—Will providing estate for life to widow and after her death to adopted son—Adoption held valid.

Where the junior wife of a talukdar validly adopted a son in pursuance of a will made by the talukdar, under which the latter bestowed a life-estate upon her and gave her the power to adopt a son and further directed that the adopted son would take possession of the taluka only after her death, under the provisions of S. 22, Cl. 8, Oudh Estates Act:

Held: that the adoption was good, as it did effectuate the intention of the talukdar as expressed in his will and as the taluka could not lose its character of impartibility in the hands of the adopted son. *Case-law on all points discussed.* [P 267 C 1]

Wazir Hasan and Aditya Prasad—for Appellant.

W. Wallach, Rai Nagendra Nath Ghoshal, Lal Mohan Banerji, Durga Charan Banerji, Mahadeo Singh and Nagendra Nath Datt—for Respondents.

Stuart, A. J. C. — This appeal relates to the succession to the taluka of Ajudhia. The nucleus of the property comprised in this taluka was acquired by Raja Bakhtawar Singh before the annexation of Oudh. He was the eldest of five brothers named Bakhtawar Singh, Shiva Din Singh, Darshan Singh, Incha Ram and Debi Prasad. Their father Purandar Ram was not a man of eminence, and there was no estate in the family, until this acquisition was made by Bakhtawar Singh. Raja Bakhtawar Singh died in 1855. He was succeeded by his nephew Hanuman Singh, better known as Man Singh, the youngest of the three sons of Darshan Singh, brother of Bakhtawar Singh. The names of the three sons were Ramadhin, Raghubir Dayal and Man Singh. The taluka was then known as the Mahdauna taluka. The name was subsequently changed to that of Ajudhia. The estate was held by Man Singh after annexation, and re-conferred on him in 1858 after confiscation; it was then considerably augmented. Man Singh made a will on 22nd April 1864, under the terms of which he devised his estate to his wife Maharani Subhao Kuar with power to nominate a successor. Man Singh was raised to the dignity of a Knight Commander of the Star of India in 1869. He died on 11th October 1870, having attained the position of one of the most considerable land-holders of Oudh. His nearest relatives at the time of his decease were the Maharani Subhao Kuar,

a daughter Brij Raj Kuar, who was married to Narsing Narain Singh, and Pratab Narain Singh, son of Brij Raj Kuar. Maharani Subhao Kuar succeeded to the estate under the terms of the will.

On 16th August 1872 she executed a document nominating as her successor Triloki Nath, son of Raghubir Dayal, brother of Man Singh. On 21st November 1872 Pratap Narain Singh, who was then of the age of 17 years instituted a suit through his mother, who described herself as his sister and guardian, in the Court of the Deputy Commissioner of Fyzabad. He claimed in this suit declaration of title to his taluka. The plaintiff (Ex. 1) asserted that the execution of the will of 22nd April 1864 had been obtained by undue pressure exercised by Government officials, that the will in question had been revoked by Sir Man Singh, and that Sir Man Singh had died intestate. It continued that Pratap Narain Singh had been selected in 1867 at the age of 12 as a successor by Sir Man Singh, that his gotra had in the same year been changed from that of his natural father to that of Sir Man Singh, that he had been treated by Sir Man Singh in all respects as his own son, and was thus entitled to succeed to the estate under the provisions of Cl. 4, S. 22, Act 1 of 1869. It appears from certified copies of certain proceedings in the Court of the Deputy Commissioner (Exs. A-15 and A-16) and from the judgment itself (Ex. A-12) that in the course of hearing a plea, which had not been asserted in the plaint to the effect that Pratap Narain Singh was an adopted son of Sir Man Singh, was first asserted and then abandoned. Reliance was placed in support of the plaintiff's case on the evidence of a Mr. Carnegy, who deposed to an oral revocation of the will by Sir Man Singh. Mr. King, the Deputy Commissioner, dismissed the suit on 28th July 1873, finding that the will was a valid document and that Mr. Carnegy's evidence taken with the other evidence was not sufficient to establish that revocation had taken place. He found that Pratap Narain Singh had been treated in all respects as a son by Sir Man Singh. An appeal was filed to the Court of Mr. Capper, Commissioner of Fyzabad.

Mr. Capper found on 24th December 1873 (judgment Ex. A-13) that the will was a valid document which had not been

revoked, and that Pratap Narain Singh had not been treated in all respects as a son within the meaning of Cl. 4, S. 22, Act I of 1869. Pratap Narain Singh appealed to their Lordships of the Privy Council. They decided in 1877: *Maharajah Pertab Narain Singh v. Maharani Subhao Koor* (1), that Mr. Carnegie was a reliable witness to the fact that Sir Man Singh revoked orally the will of 1864, that such a will of a Hindu could be revoked by parol, and that the testamentary disposition had thus no effect. They held that Pratap Narain Singh had been treated in all respects as a son by Sir Man Singh and was entitled to succeed under the provisions of Cl. 4, S. 22, Act I of 1869. They declared Pratap Narain Singh to be entitled to the taluka of Ajellua, but not to the *perdani* or *mantalekleri* property of Sir Man Singh. Pratap Narain Singh obtained possession of the estate from the Court of Wards, who were in charge of it, on the strength of the declaratory decree in his favour. In 1878 Triloki Nath petitioned their Lordships of the Privy Council to rehear the appeal. They dismissed his petition *Pertab Narain Singh v. Subhao Koor* (2) but permitted him, if he so desired, to open by suit in India the question whether he had been properly represented in the previous litigation in the Indian Courts. Triloki Nath then instituted fresh proceedings on 3rd June 1879 in the Court of the Additional Judge, Fyzabad, against Pratap Narain Singh, to have declared his right to the taluka in virtue of his having been appointed under a power of appointment given by the will of 1864.

The Court of first instance held that party Triloki Nath had not been made a to the former suit or represented therein, and that he was not bound by proceedings of 1877 in regard to the question of revocation of the will of 1864. The trial Judge found, however, that that will had been revoked. Triloki Nath appealed to the Judicial Commissioner. The Judicial Commissioner held that the Maharaja's estate was not so completely represented by the widow in the former suit, that Triloki Nath was bound by the decisions against her. He was of opinion that the Maharani divested her estate by the execution of the instrument appointing

Triloki Nath in 1872. He found that Triloki Nath took as successor of the Maharaja, not of the widow, and that his interests vested on 16th August 1872. He found further that the will of the Maharaja had not been revoked. Pratap Narain Singh appealed to their Lordships of the Privy Council, who decided in July 1884 [*Pertab Narain Singh v. Trilokinath Singh* (3)] that their previous order was binding on Triloki Nath.

They decreed the appeal and dismissed the suit. Before their Lordships had decided the appeal in Triloki Nath's previous suit, Triloki Nath had filed another suit on 15th August 1882 in the Court of the District Judge of Fyzabad for possession of the estate. The District Judge decreed the suit on 25th September 1882. An appeal was filed to the Judicial Commissioner on 8th October 1882. The latter deferred decision till receipt of the decision of their Lordships of the Privy Council in the previous case. On receipt of that decision he allowed the appeal and dismissed the suit on 26th November 1884. An appeal was filed to their Lordships of the Privy Council, which was dismissed [*Triloki Nath Singh v. Pertab Narain Singh* (4)]. In their decision their Lordships interpreted their previous order of 1877 in certain particulars. At p. 811 they say with regard to their previous order.

"Their Lordships, therefore, merely declared Pratap Narain Singh's title to the taluka and whatever descended under Act I of 1869. As to other property which was not included in that Act, Pratap Narain would not have been the heir to the Maharaja during the lifetime of the widow. She would have taken the widow's estate in all property except that which was governed by Act I of 1869."

Raja Pratap Narain Singh remained in possession of the taluka till his death. Like his predecessor, he attained a high position in Oudh. He was first created a Maharaja, and subsequently raised to the dignity of a Knight Commander of the Indian Empire. He died on 9th November 1906. He had married Maharani Suraj Kumari in 1868, and is stated by the defendants in these proceedings to have married Maharani Jagdamba Devi in 1888. The latter was aged between 10 and 11 on the date of her marriage. He had no issue by either wife. He executed a will on 17th July 1891, which was registered on 20th July 1891. After

1. (1877-78) 3 Cal 526=4 I A 228 (P C).

2. (1879) 4 Cal 184=5 I A 171 (P C).

3. (1885) 11 Cal 186=11 I A 197 (P C).

4. (1888) 15 Cal 808=15 I A 118 (P C).

his death he was succeeded by the junior Maharani, Jagdamba Devi. The estate was taken under the management of the Court of Wards. On 12th February 1909 Maharani Jagdamba Devi adopted as successor under the terms of the will of 1891 Dukh Haran Nath Singh, son of Adika Nath, a descendant of Incha Ram who was a younger brother of Darshan Singh.

On 11th February 1915, Tribhawan Nath Singh, son of Kashi Nath Singh, son of Ramadhin, the eldest brother of Sir Man Singh, instituted a suit in the Court of the Subordinate Judge, Bara Banki, against Maharani Jagdamba Devi, Dukh Haran Nath Singh, the Deputy Commissioner of Fyzabad as in charge of the estate under the Court of Wards, and Maharani Suraj Kumari. It was alleged in the plaint that the will of 17th July 1891 had been executed by Sir Pratap Narain Singh under undue influence exercised upon him by Maharani Jagdamba Devi, that it had been revoked and that Maharani Jagdamba Devi was not the legally wedded wife of Sir Pratap Narain Singh. It was further alleged that that lady had been guilty of acts of unchastity both during the lifetime of Sir Pratap Narain Singh and after his death and that she was, therefore, incapable of taking benefit or exercising a power of adoption under the terms of the will. It was further alleged that in no circumstances was the adoption of Dukh Haran Nath Singh valid, as (1) it had been made under undue influence, as (2) Maharani Jagdamba Devi, having not been legally married to Sir Pratap Narain Singh and also having been unchaste both during the lifetime and after the death of Sir Pratap Narain Singh, had not the power to adopt under the provisions of the Mitakshara, as (3) Dukh Haran Nath Singh had been purchased from his natural father, as (4) Dukh Haran Nath Singh's natural mother was of the gotra of Narsingh Narain Singh, as (5) Adika Nath was an outcaste, and as (6) the ceremony of adoption had not been properly performed. It was further alleged that the senior Maharani had been guilty of acts of unchastity during the Maharaja's lifetime. The conclusion drawn was that, Sir Pratap Narain Singh having died intestate, the senior Maharani being excluded from inheritance by her unchastity, and the junior Maharani having no title as she was not the legally wedded wife of the Maharaja, and even if

she were the legally wedded wife, being excluded from inheritance by her unchastity, the plaintiff as son of Kashi Nath Singh, son of Ramadhin, in absence of all heirs under Cls. 1 to 10, was entitled to succeed as heir under Cl. 11 to all the immovable and moveable properties of the estate and mesne profits, and in the alternative to a declaration that the will and adoption were void as against him.

The defence was a denial of practically every allegation in the plaint. It was set up that Maharani Jagdamba Devi was the legally married wife of Sir Pratap Narain Singh, that neither the senior Maharani nor she had ever been unchaste, that the will of 17th July 1891 had been duly and validly executed by Sir Pratap Narain Singh unaffected by undue influence, that it had never been revoked and that it had remained in force at the time of his death. It was further set up that it conferred a legal power of adoption on Maharani Jagdamba Devi, which she had legally exercised by making a valid adoption of Dukh Haran Nath Singh. It was further set up that the claim for moveable property was barred by limitation. The defendants asserted in addition that the plaintiff would not have title, even if Sir Pratap Narain Singh had died intestate, as the succession would have then passed to the family of Narsingh Narain Singh. In replication, the plaintiff asserted that the defendants were estopped from setting up the last plea. The suit was transferred for hearing to Mr. Jagat Narayan, Additional Judge, District Fyzabad. It was decided by him on 19th October 1916. He found in favour of the will and the adoption and against the plaintiff's title. He found the allegations against the moral character of the two ladies to be baseless calumnies. He found in favour of the plea that the claim for moveable property was barred by limitation. He, therefore, dismissed the suit. The present appeal is filed against his decree. Practically every point taken in the trial Court is re-asserted by the plaintiff in his grounds of appeal.

The appellant objected to the defendants' disputing his title to succeed on a plea that they were estopped from so doing. His case on this point was as follows: He alleged that, directly after the death of Sir Man Singh, Ramadhin had instructed a pleader to file a suit for possession of the estate, that Narsingh

Narain Singh then brought Pratab Narain Singh to Ramadhin, that Pratab Narain Singh fell at the feet of Ramadhin and protested that he was the putrika-putra son of Man Singh, and that Ramadhin recognizing the sacred nature of Pratab Narain Singh's relationship thereupon abstained from instituting proceedings. P. W. 101, Sheo Charan Lal, was the only witness who deposed to the truth of this story. The learned trial Judge has discussed the value of this plea and the veracity of this witness at pp. 202 to 207 of the judgment. Sir Man Singh died in 1870. He was succeeded by his widow. Pratab Narain Singh did not institute a suit till the end of 1872, and, when he instituted it, he did not assert a title as putrika-putra. The witness Sheo Charan Lal is, as the learned trial Judge found, an unreliable witness. If it were worth the trouble, the reasons for rejecting this plea could be largely increased. I reject it.

The appellant had first to establish his title to succeed Sir Pratab Narain Singh if the provisions of the will were set aside. Sir Pratab Narain Singh having succeeded Sir Man Singh as his heir under the provisions of Cl. 4, S. 32, Act I of 1869, the rule of succession is found in the same sections. Cls. 1 to 10 clearly confer no right on the appellant who comes, if at all, under the provisions of Cl. 11. According to the rule of the Mitakshara law which would govern the case in absence of special circumstances he cannot succeed. It is not alleged and cannot be suggested that Sir Pratap Narain Singh was the adopted son of Sir Man Singh, and Sir Pratap Narain Singh would ordinarily have been succeeded in event of intestacy and failure of heirs under the first ten clauses by the agnates of the family of his father Narsingh Narain Singh. The appellant, recognizing this obstacle, endeavoured to establish his title by an assertion in the plaint that the mother of Sir Pratap Narain Singh was specially appointed, under the practice of constituting in the person of a daughter's son a putrika-putra, to bear Sir Man Singh such a son and that thus the heirs to Sir Pratap Narain Singh under Cl. 11 were the agnates of Sir Man Singh's family. He subsequently raised a plea in argument, which was not taken in the plaint that Sir Pratap Narain Singh should be succeeded in event of intestacy

by the agnates of the family of Sir Man Singh under Cl. 11, owing to the circumstance that Sir Pratap Narain Singh had succeeded under the provisions of Cl. 4. The practice of appointing a daughter, so that she can bear a son who will be treated as her father's son, is recognized by the Mitakshara law. The practice has so far fallen into disuse that only one instance can be found in reported cases, in which a daughter has been so appointed under the Mitakshara law. This case will be found reported as *Kumaran v. Narayanan* (5). There such an appointment of a daughter in Malabar was recognized by the Courts. The disuse of the practice has been commented on in *Narsing Narain v. Bhuttan Lal* (6). *Thakoor Jeeb Nath Singh v. Court of Wards* (7) and *Sri Raja Venkata Narasimha Appa Row Bahadur v. Sri Rajah Suraneni Venkata Parushothama Jagannatha Gopala Row Bahadur* (8). It has not, however, been laid down by their Lordships of the Privy Council that a daughter cannot be so appointed and the law on the point never having been abrogated we should be bound to apply it, if it were established that the mother of Sir Pratap Narain Singh had been so appointed by Sir Man Singh. The law is contained in a passage in the Mitakshara which is quoted in various text-books:

"The son of an appointed daughter is equal to him; that is, equal to the legitimate son. The term signifies son of a daughter. Accordingly he is equal to the legitimate son; as described by Vasishtha: This damsel, who has no brother, I will give unto thee, decked with ornaments: the son, who may be born of her, shall be my son. Or that term may signify a daughter becoming by special appointment a son. Still she is only similar to a legitimate son, for she derives more from the mother than from the father. Accordingly she is mentioned by Vasishtha as a son, but as third in rank. The appointed daughter is considered to be the third description of sons."

Commentary of Hemadri;

The putrika-putra is of four descriptions: The first is the daughter appointed to be a son. She is so by a stipulation to that effect. The next is her son. He obtains of course the name of 'son of an appointed daughter' without any compact. This distinction, however, occurs: he is not in place of a son, but in place of son's son, and is a daughter's son. Accordingly he is described as a daughter's son in the text of Sankha and Likhita: An appointed daughter is like unto a son; as Prachetasa has declared: her offspring is termed son of an appointed

5. (18-6) 9 Mad 260.

6. (1864) W R Gap 194.

7. (1876) 23 W R 403=15 B L R 190=2 I A 68 (P C).

8. (1905) 31 Mad 300.

daughter, he offers funeral oblations to the maternal grandfathers and to the paternal grandfathers. There is no difference between a son's son and a daughter's son, in respect of benefits conferred."

The third description of son of an appointed daughter is the child born of a daughter, who was given in marriage with an express stipulation in this form:

"The child who shall be born of her shall be mine for the purpose of performing my obsequies." He appertains to his maternal grandfather as an adopted son. The fourth is a child born of a daughter who was given in marriage with a stipulation in this form: "The child, who shall be born of her shall perform the obsequies of both." He belongs, as a son, both to his natural grandfather and to his maternal grandfather. But, in the case where she was in thought selected for an appointed daughter, she is so without a compact, and merely by an act of the mind: Ghose's Principles of Hindu Law, Commentaries, Vol. II, Edn. 1 pp. 130 and 131.

The law presents no difficulties. The appellant seems to assert that Sir Pratap Narain Singh was of the third or fourth description of sons. That is his main contention, although he is ready to accept any view of the law that could suit his case. The last sentence of the commentary of Hemadri can obviously only be applied in case where there is distinct evidence of the act of mind of the father. The position of the appellant with regard to this plea is as follows:—In his written statements of claim made to the Deputy Commissioners of Fyzabad and Gonda [Ex. A-129 and Ex. A-129 (a)] he did not assert that Mt. Brij Raj Kuar had been appointed to bear a putrika-putra son to her father. In his evidence he made a disingenuous attempt (which the learned trial Judge has found to be false) to explain this omission. In his plaint he asserted that Mt. Brij Raj Kuar had been married under the putri-karan form and that for this reason Sir Pratap Narain Singh was born a putrika-putra and had, therefore, been treated as a son. In the evidence he carried the matter further. He endeavoured to prove an appointment before marriage as well as marriage in the form, and relied on further evidence of conduct from which he endeavoured to establish a presumption that such an appointment must have taken place. He has called evidence to prove an allegation that Sir Man Singh in the year 1851 after obtaining the permission of Bakhtawar Singh, decided to appoint his daughter to bear him a putrika-putra son, that he sought a husband who would

agree to marry her in the putri-karan form, that Narsingh Narain Singh agreed and married her in this form, and that when she bore Sir Pratap Narain Singh, the latter was considered from his birth to be the putrika-putra son of Man Singh.

In 1851 Man Singh was a man of 31 years of age. He had married twice. His first wife had borne him Brij Raj Kuar in 1839 or 1840. That wife had died. His second wife had borne him a daughter in 1851. That daughter had died. Man Singh was in the prime of life. His second wife had shown her capacity to bear children. He would ordinarily have had every hope of begetting male offspring. What reason then could he have had to be the only person in Oudh known to history who employed a practice by which he set aside his daughter to bear him a male heir? The answer is supplied by P. W. 77 Bandhan. This witness has deposed that, after the death of his second daughter, Man Singh went to Bakhtawar Singh and stated that he had expected a son to continue his line, that no son had been born to him, that his daughter was dead and that he was helpless, that Bakhtawar Singh then consulted pandits who examined Man Singh's horoscope and declared that he would never beget a son, that Man Singh then sought Bakhtawar Singh's permission to marry Brij Raj Kuar by the putri-karan ceremony, and that Bakhtawar Singh agreed. P. W. 11 Ganesh, P. W. 72 Ram Sarup, P. W. 88 Bindeshari, P. W. 95 Brij Lal and P. W. 98 Mahipat Singh gave direct evidence upon the point. Ganesh declared that his father was one of the emissaries sent by Man Singh to procure a bridegroom. Ram Sarup said that he was a member of the wedding party and was told by his father that the ceremony was in the putri-karan form, though he did not himself witness the ceremony. Bindeshari swore that Narsingh Narain Singh agreed in his presence that his first born son should be putrika-putra of Man Singh. Brij Lal gave evidence similar to that of Ram Sarup. Mahipat Singh deposed that he saw the marriage celebrated in the putri-karan form. The learned trial Judge disbelieved all these witnesses. He has given his reasons for so doing at length, except in the case of Ram Sarup and Mahipat Singh. We are informed by the counsel for the respondent that the reason why the trial Judge

did not discuss the evidence of Mahipat Singh was because the plaintiff's counsel in the lower Court laid no stress upon the evidence of that witness. We have, however, been asked by the counsel in appeal to arrive at a finding as to the value of this witness also, and I shall proceed to do so in due course. The reasons of the learned trial Judge for disbelieving these witnesses are in some instances more weighty than in others. More important than his reasoning is the fact that he disbelieved them. The reasons may be varied or supplemented. Bandhan appears an absolute impostor. He has asserted that he was the intimate and favourite of Raja Bakhtawar Singh, one of the most influential noblemen of the King's Court. Thence, according to his own account, he has sunk to the position of a drug-seller hoggar. I disbelieve the account of his past. His story, that Man Singh abandoned all hopes of marriage, because certain pundits pronounced against them after consulting his horoscope, is patently ridiculous. I am not satisfied that a man in the subordinate position held by the father of Ganesh would have been employed to seek a suitable bridegroom for the daughter of Man Singh. Ram Sarup appears an absolutely unreliable witness. His account as to how he came to give evidence is clearly untrustworthy. I need add nothing to the criticisms of the trial Judge on the evidence of Rintesar and Brij Lal. I have examined the evidence of Mahipat Singh and find it equally valueless.

The learned counsel for the appellant relies in addition on the evidence of P. W. 18 Someswar Das which was rightly conceded in the lower Court to be worthless, and on the evidence of P. W. 53 Thakur Prasad, P. W. 4 Kowal Misir, P. W. 5 Ram Sabad, P. W. 146 Patandin, P. W. 152 Hardat, P. W. 130 Ram Narain, P. W. 142 Baidia Nath Singh, P. W. 122 Tribhawan Nath Singh plaintiff, and P. W. 86 Sant Bakhsh Singh. The evidence of these nine witnesses is to the effect that they had heard from relations or others that Pratap Narain Singh was the putrika putra son of Man Singh. It is unnecessary to discuss what the value of this evidence would be if those witnesses had received such information, as I am not satisfied that any one of them was ever told anything on the subject. The learned counsel also refers to the evidence

of P. W. 2 Rodra Nath Singh which adds nothing to the case, and lays stress on the evidence of P. W. 6 Hakimuddin. This witness deposed that he saw Man Singh shortly before his death, and that the latter declared in his presence that Pratap Narain Singh was his putrika putra. This witness has given evidence as to other points in support of the plaintiff's case. His evidence has been rightly disbelieved by the trial Judge. The above evidence was found to be unreliable by the trial Judge, and the whole of it to be false.

Man Singh treated Pratap Narain Singh in all respects as his own son. To use the words of their Lordships in *Maharajah Pratap Narain Singh v. Maharajah Subhao Kober* (1), he

"he exceptionally treated the son of a daughter as so given him in the family the place, consequence, and pre-eminence which would naturally belong to a son if one existed, and would not ordinarily be conceded to a daughter's son, and has thus indicated an intention that the person so treated shall be his successor" (p. 632).

He brought him up in his own house. In 1867 when Pratap Narain Singh was invested with the Brahmanical thread at the ceremony of janso, Man Singh

"took that part in the ceremony which, in the ordinary course of things, would be assumed by the boy's natural father" (p. 633-634).

It is to be noted, however that according to the opinion of their Lordships nothing then was done which operated

"either in law or in fact as a transfer of the boy from his own into the Maharaja's gotra" (p. 634).

At the time of the marriage of Pratap Narain Singh in 1868, Man Singh declared him to be his successor. There was also evidence that, when the provisions of Act 1 of 1893 were under consideration Man Singh suggested and obtained the insertion of Cl. 4 into S. 22. But in the will which he made in 1864 and subsequently revoked, he did not nominate Pratap Narain Singh as his successor and left the selection to the choice of his wife. There is nothing in the evidence in this case which would justify an addition to their Lordships' conclusion that "however uncertain it may be when the notion of making the Dadwa Sahib his successor was first conceived, or when that notion first became a fixed intention, it is established that the Maharaja had that intention as early as the date of Dadwa Sahib's marriage; that, with that intention, he continually treated his grandson in fact as the son of the house would be treated, and not as a mere grandson by a daughter and that,

in order to effectuate his intention by operation of law, rather than by will, he caused the clause in question to be inserted in the Statute" (p. 637).

The question as to whether Pratap Narain Singh was or was not the putrika putra of Man Singh was not before their Lordships. But this circumstance in no way invalidates the finding. The circumstance that Man Singh in 1864 had not declared Pratap Narain Singh to be his successors, that in the letters to Ramdhan father of Maharani Suraj Kumari at the time of her wedding in 1866, while declaring Pratap Narsin Singh to be his heir and successor, he nowhere suggests that he was his putrika putra and that he went out of his way to arrange for the insertion of a clause in S. 22, to ensure the succession of Pratap Narain Singh (surely an act showing most excessive caution if the boy were his son putrika-putra), would go far to meet evidence that Brij Raj Kuar had been appointed to bear Man Singh a son in this form. It is to be noted that, had Pratap Narain Singh been a putrika putra, there would have been no force in the suggestion made by their Lordships at p. 633 that Man Singh in 1864 was

"reluctant to depart from the family custom and offend his relations by allowing the estate to pass out of his own gotra,"

because had Pratap Narain Singh been putrika-putra he would have been Man Singh's heir to the knowledge of his relations and in Man Singh's gotra. The value of the evidence to the contrary is, however, immaterial in view of my finding that the evidence to prove Man Singh's appointment of his daughter is false.

The learned trial Judge had discussed at considerable length the evidence of conduct of Pratap Narain Singh and other members of the family to indicate his or their belief on the point. I consider this portion of the evidence barely material, as we are concerned with what Man Singh did, and not with what any one else thought. The appellant has, however, failed to advance his position here. In the proceedings which culminated in the decision in *Maharajah Pertab Narain Singh v. Maharanee Subhao Koor* (1), it was not asserted that Pratap Narain Singh was the putrika-putra of Man Singh. The case set up in his favour was that he had been treated in every respect as a son. Mr. King stated in his judgment (Ex. A-12):

I must remark that the plaintiff's case underwent a not unimportant amount of modification during the trial, and it appeared to me that the exact position of the plaintiff was not entirely appreciated by his legal advisers, until a good deal of the evidence and counter-evidence had been delivered. The plaintiff at first alleged 'adoption' in the common sense of the word, i.e. that he had been adopted by the Maharaja as a son. This is not distinctly stated in the notes of the plaint taken by the Court, but it was clear from the tenor of the examination of their witnesses by plaintiff's counsel. During the trial, the plaintiff repudiated the adoption in the sense in which this word is commonly used by Hindus in reference to a son."

The respondents had asserted that Pratap Narain Singh's legal advisers had never imagined the possibility of raising the plea that he was a putrika-putra. The appellant controverted that argument in the following manner. A certain Mr. Harrington, who had been Superintendent of the Encumbered Estates in Fyzabad from May 1872 to the middle of August 1875, had in 1872 prepared a statement of the case relating to the Ajudhia succession for the opinion of the Advocate-General. At some date prior to 15th October 1872 Narsingh Narain Singh handed to Mr. Harrington a statement of the case set up by him in favour of his son, Pratap Narain Singh's claims. Ex. 19 is put forward as an English translation of the statement of claim prepared by Narsingh Narain Singh prior to the institution of the suit of 21st November 1872. The appellant endeavoured to put this and another document in evidence. The trial Judge refused to receive them in evidence. The appellant has produced Ex. 19 in this Court but has not produced Mr. Harrington's deposition. I consider that Ex. 19 can be received in evidence. The case so stated to Mr. Harrington is clearly contained in Ex. 19. The form in which it is produced is the ordinary form in which papers are printed for submission to the Privy Council, and Ex. 19 is clearly a translation of these instructions which came on the record of the 1872 case and was subsequently translated for submission to the Privy Council. The actual Ex. 19 is evidently one of the copies taken at the time. The matter is more than 30 years old. Those instructions contain at para. 7 the following plea:

"The Maharaja and the Maharani have both married the Dadwa's mother by putri-karan (the condition, etc., at the time of marriage to the effect that the bridegroom will have nothing to do with the first child and the other children

after the first child will be his, the bridegroom's) and in such case the first child be considered as own son or daughter of the grandfather (nana). 'Putri-karan of Mitakshara, p. 71.' The Maharaja and the Maharani brought up the Dadwa from his infancy as their own son and invested him with the Brahmanical thread 'janeu' in Baisakh 1274 fasli. The Maharaja and the Maharani made the Dadwa's 'juggo pawit', etc., (the ceremony in which the Brahmanical thread is given) and called him of the girg gotra as himself and allowed him (Dadwa) to worship their (the Maharaja and the Maharani's) gods, and the Maharaja pronounced the gayatri munter over him (Dadwa) which is the duty of a father. All the other ceremonies usually bestowed by a father were also performed by the Maharaja in the capacity of a father. The witnesses to the above facts are Pandit Matu Dut, Pandit Ganga Dhar Shastri, and Pandit Dwarka Dut, etc., who have caused all these ceremonies to be performed: many of the talukdars and the officials are well acquainted with all the ceremonies. From the time up to the present the Dadwa's shankalap had been made by 'girg gotra.'

This is sufficient to prove that Narsingh Narain Singh stated to Mr. Harrington the plea that Pratap Narain Singh was the putrika-putra of Man Singh. But this fact, so far from assisting the appellant, tells against him. Taken with the remaining evidence, it establishes that the plea was suggested, and abandoned. We are now asked to find that Man Singh formed a deliberate intention to appoint his daughter Brij Raj Kuar to bear him a son, that this intention was approved by Bakhtawar Singh, that a husband was sought and obtained who agreed to a marriage on this condition, that the pair were married in the putri karan form, and that Pratap Narain Singh was born to them as the putrika putra of Man Singh. Witnesses who have given evidence in these proceedings were then in existence. They now depose in unmistakable terms to the allegations set forth above. If the theory of the appellant be accepted, Narsingh Narain Singh and Brij Raj Kuar were necessarily aware of the conditions of their own marriage. They were instructing Pratap Narain Singh's legal advisers. Yet the plea was abandoned, while a plea of adoption was set up, which had to be abandoned afterwards. It cannot be suggested that this plea, if set up and proved, would have been other than the best plea that would have been taken. Not only was the position of Pratap Narain Singh as a putrika-putra stronger than his position under a clause with regard to the interpretation

of which considerable doubt prevailed in Oudh, but as a putrika-putra he would have obtained the whole of the non-talukdari property valued at Rs. 7,00,000 (Ex. 1) which he failed to obtain under their Lordships' decree.

The abstention to take, or rather the abandonment of this plea in limine, is an eloquent commentary on the theory that Pratap Narain Singh's parents believed him to be a putrika-putra, and further furnishes an additional reason, if one be required, for distrust of the witnesses called on the point in this case. In support of the theory the appellant's counsel has urged the fact that in the plaint Mr. Brij Raj Kuar the mother of Pratap Narain Singh described herself as his sister. This peculiar description does not imply an assertion that Pratap Narain Singh was putrika putra of Man Singh. As their Lordships observed at p. 631, the term was probably used to lend colour to the plea negatived in their judgment that treatment in all respects as a son by a Hindu was tantamount to an adoption in the Hindu law. The next piece of evidence relied on by the appellant was a portion of the statement of Pratap Narain Singh on 5th January 1881 in the proceedings in the case instituted in 1879. The passages in question are as follows (Ex. 34):

'I belong to the Girg gotra, my father belongs to the Bharadwaj gotra. When I married I belonged to the Girg gotra. When I was married I was not the son of Babu Narsingh Narain, but I was the son of Maharaja Man Singh. Darogha Ramdhan was to the best of my belief a son of Maharaja Man Singh's mother's sister . . . I am the only son of my father. I was accounted as belonging to the Bharadwaj gotra till the time of my investiture with the Brahmanical thread . . . Q. Are you adopted son of the Maharaja or are you his daughter's son? A. I do not know if I am an adopted son or only the daughter's son. That is a matter to be decided according to the Shastras. I do not know if the Maharaja really adopted me or not, the pandits have to decide that. I know my gotra was changed at the time of my investiture with the Brahmanical thread . . . Q. After ceremonies of janeo did you understand Bachi Sabeba (the wife of your father Babu Narsingh Narain) as your mother? A. Even before the ceremonies of investiture I looked on her as a sister. I considered her as such since I can remember did not consider Babu Narsingh Narain as a father. I considered him as a stranger, although a relative just as other relatives.'

This statement, which is supported by para. 2 in Pratap Narain Singh's original plaint of 1872 (Ex. 1), so far from supporting the appellant's plea, is against it.

If Pratap Narain Singh were a putrika-putra of Man Singh, he would have been born in the gotra of Man Singh and not, as he asserts, in the gotra of his father. The mass of evidence as to the gotra of Pratap Narain Singh carries the point no further than this — Sir Pratap Narain Singh, after his claim to the estate had been recognized, undoubtedly described himself and considered himself to belong to the Girg gotra, i. e., the gotra of Man Singh, and not to the Bharadhwaj gotra which was the gotra of his own father, Narsing Narain Singh. It is not alleged that he cut himself adrift from relationship to his own father. He is admitted by the witnesses of the plaintiff to have made offerings to Narsing Narain Singh and to have recited his Bharadwaj gotra (see evidence of P. W. 53, Thakur Prasad at o. p. 539). But ordinarily he retained the position, which he asserted in his deposition of 5th January 1881, namely, that he had changed his gotra at the age of twelve when he was invested with the sacred thread. In addition he worshipped the family gods of Man Singh. He usually went into mourning when members of Man Singh's family died, and observed ashouch by abstaining from eating meat, acts of worship, and shaving on such occasions.

From these circumstances it cannot be deduced that Pratap Narain Singh changed his gotra. A male Hindu under the Mitakshara law can only change his gotra on adoption, and it cannot be, and is not, alleged that Pratap Narain Singh was adopted by Man Singh. Pratap Narain Singh was born in the Bharadwaj gotra and, never having been adopted, remained in the Bharadwaj gotra, and the fact that he lived and died in the Bharadwaj gotra would not be affected by his honest belief and the honest belief of all the members of Man Singh's family that he had changed his gotra. Acting under the erroneous though honest belief that he had changed his gotra (he had clearly no authority to decide points of Hindu law as will be seen from his deposition) he naturally worshipped Man Singh's family gods, observed ashouch on the deaths of members of Man Singh's family and performed other acts which would ordinarily be performed by members of the Girg gotra and not of the Bharadhwaj gotra.

A simple explanation can be given of the desire of Pratap Narain Singh to be

considered of the gotra of Man Singh. His father's family, though respectable, was obscure. The family of Man Singh, while of humble origin and of recent elevation, had become illustrious. Man Singh was eventually the most influential nobleman in Oudh. Pratap Narain Singh after a hard struggle, had succeeded in becoming recognized as his grandfather's successor. It was not surprising in the circumstances that he should seek to identify himself in every particular with the maternal grandfather who had treated him as a son and to whom he owed his estate, position, and fame; and, once he had reached the elevation of a premier noble in Oudh, it was unlikely that any of Man Singh's family would gainsay his claims. Before Man Singh's death there had been peculiar differentiations in the treatment of Pratap Narain Singh. Man Singh had on the occasion of Pratap Narain Singh's first marriage performed the functions usually performed by the natural father of the boy. This point was noted by their Lordships and is deposed to by D. W. Tejmani examined on commission (o. p. 6) and D. W. Mt. Lekhraj Kuar examined on commission (o. p. 8). The latter lady has further deposed that at that marriage Maharani Subhao Kuar took the place of the bridegroom's mother and Mt. Brij Kuar took the place of the bridegroom's sister. But this leaves the matter as it was when it came before their Lordships in 1877. Their conclusion is not advanced by the fact that to make the treatment more marked the wife of Man Singh took the place of the boy's real mother, and their daughter, although the boy's real mother, took the place of his sister.

The law upon this point has been taken by me direct from the Mitakshara. It is substantially the law upon which the appellants' learned counsel relied. Applying the law to the findings of fact at which I arrive I decide, agreeing with the learned trial Judge, that the plaintiff-appellant has completely failed to prove that Pratap Narain Singh was the putrika-putra son of Man Singh. The second plea advanced on behalf of the appellant's title will not be found either in the notice of the suit or in the plaint. It was, however, advanced in the arguments before the issues were framed, as it is found in the issue 6, and was according to the judgment strenuously argued at

the trial. It is to the following effect: As Pratap Narain Singh succeeded under the provisions of Cl. 4, S. 22, Act 1 of 1869, as a daughter's son treated in all respects as the son of Man Singh, it is argued that on the principle on which S. 22 is based the estate should not pass out of possession of Man Singh's family in any circumstances. The view suggested is that such a son is in every respect a son of the daughter's father. In *Maharajah Pertab Narain Singh v. Maharane Subhao Koor* (1) their Lordships considered in detail the meaning of the words "treated in all respects as his own son" as they occur in Cl. 4, and explained in the first instance what they did not mean. Their judgment states that "the clause must be construed irrespective of the spiritual and legal consequences of an adoption under the Hindu law. . . . Nor do they suppose that, in passing the clause in question, the Legislature intended to put to the practice (almost, if not wholly, obsolete) of constituting in the person of a daughter's son a 'paricarptra', or son of an appointed daughter. Such an act, if it can now be done, would be strong evidence of an intention to bring the grandson within the Cl. 4, but is not, therefore, essential in order to do so." (p. 631).

They were clear in affirming that the effect of the clause did not change the status of the person treated as a son. It would not subject:

"the grandson to prohibitions as to marriage which would not otherwise attach to him" (p. 631).

To fulfil the conditions of the section: "their Lordships are of opinion that wherever it is shown by sufficient evidence that a talukdar not having male issue has so exceptionally treated the son of a daughter as to give him in the family the place, consequences, and pre-eminence, which would naturally belong to a son if one existed, and would not ordinarily be conceded to a daughter's son, and has thus indicated an intention that the person so treated shall be his successor, such person will be brought within the enactment in question (p. 632)."

Can the fact that a person treated in such a manner has succeeded to a taluka operate to exclude his heirs under personal law from succession to the taluka in event of his intestacy and the failure of heirs under Cls. 1 to 10? For this proposition I can find no support in the words of the section. Should such a person die intestate, his succession as heir of a talukdar is governed by the provisions of S. 22. The succession would go in the first instance to one of his sons or one of their descendants under the provisions of Cls. 1 to 3, then to a daughter's son treated as a son in all respects,

then to an adopted son, then to a brother then to an elder widow for life with remainder to a son adopted by such widow with permission, then to a junior widow for life with remainder to a son adopted by such widow with permission, and then to one of male lineal descendants not being *najib-ul-matnain*. This concludes the first ten clauses. They present no difficulty. Then the succession opens to:

"such persons as could have been entitled to succeed to the estate under the ordinary law to which persons of the religion and tribe of which . . . their . . . are subject."

How can it be said that the agnates of the daughter's father are persons:

"entitled to succeed to the estate under the ordinary law to which persons of the religion and tribe"

of the daughter's son are subject, in a case such as this where the ordinary law is the Mitakshara Law? The peculiar statutory provision contained in Cl. 4—a provision which their Lordships found in *Maharajah Pertab Narain Singh v. Maharane Subhao Koor* (1) was inserted in the Act by Man Singh to suit the identical case of Pratap Narain Singh and which they found would never have been enacted had Pratap Narain Singh not existed—must be interpreted exactly as it stands. In no circumstances should abstruse meanings be read into it. As their Lordships observe, "the clause is perhaps not very clearly or happily expressed" and in its words cannot be found designs to arrange for a succession of persons other than the lineal descendants of the daughter's son so treated. The argument that it is contrary to reason to suppose that the originators of the clause intended invariably to divert the property from the stock of the daughter's father, ignores the circumstance that on the same argument it would be equally contrary to reason to suppose that the originators of the clause intended to make such a diversion in favour of male descendants of such daughter's son. Yet this latter provision is exactly what the clause enacts. A Hindu who chose to treat his daughter's son in the manner described by their Lordships diverted the property from his own adopted son (if any), from his brothers and nephews, removed it from his own gotra and transferred it to another gotra and another clan as long as such daughter's son's descendants existed. Thus a Bais taluka would fall into Amethia

hands and vice versa. As their Lordships point out, a departure would be made from family custom and relations would be offended: *Maharajah Pertab Narain Singh v. Maharanee Subhao Koor* (1). This is the rule to which the framers of the clause deliberately agreed, and in face of that anomalous state which might continue for ever there is little force in the argument that the clause must be interpreted to prevent the continuance of an anomalous state which must continue for ever. Much stress has been laid in the appellant's argument on the circumstance that in Cl. 5 the words are "in default of such son or descendants." The inference that the learned counsel draws therefrom is that from the use of the word "son" it should be held that the daughter's son is equivalent in all respects to the daughter's father's son. The learned counsel would have us read into Cl. 4, in view of the existence of these words in Cl. 5, some such words as "who shall thereby be given in all respects the position of his own son" after the words "his own son." But there is nothing to support this view. The words in Cl. 4 are "treated in all respects as his own son" and the meaning of those words has been settled once for all in *Maharajah Pertab Narain Singh v. Maharanee Subhao Koor* (1), and the words "in default of such son" in Cl. 5 mean nothing more than "in default of such daughter's son."

It is true that in Cl. 6 the words "in default of such adopted son" are used instead of "in default of such son." But variety in the use of the same terms is not unknown in S. 22. To show this it is only necessary to refer to Cl. 7, where the case of a single widow is first considered and then the case of the widow of first marriage is contemplated. In Cl. 8 the distinction is omitted. In Cl. 9 it is re-introduced.

As was laid down in *Debi Bakhsh Singh v. Chandrabhan Singh* (9), a special rule of succession is laid down in Cls. 1 to 10, S. 22, and by Cl. 11 the parties are relegated to the situation in which they would have been found apart from the statute. There that situation was found in the *snad*. Here it is not so. The situation is found in the Mitakshara law, and the appellant would have

us legislate, rather than interpret, by adding words to the statute which do not exist there, in order to correct a suggested anomaly in no way more at variance with what he considers the right rule than the anomaly which admittedly exists, and then utilize the addition, made by our legislative action, to abrogate the Mitakshara rule of succession which binds the members of Man Singh and Nar Singh Narain Singh's family. I find against this plea. I therefore decide that the appellant has in no circumstances title to succeed to Sir Pratap Narain Singh's estate, and might conclude my decision there as he has no right to question, the validity of the will or the adoption. I proceed however to the determination of other points, as my learned colleague and I do not interpret the law as to the appellant's title in exactly the same way.

The case of the appellant as presented in the lower Court with regard to the will of 1891 was: (1) that the will was not executed; (2) that the execution of the will was procured by undue influence; (3) that the will was revoked; (a) by execution of two deeds of 23rd December 1895 and 12th July 1898, (b) by the Maharaja's conduct; (c) by execution of another will shortly before the Maharaja's death; (4) that Maharani Jagdamba Devi have no rights under the will because she was not the legally married wife of Sir Pratap Narain Singh; (5) that if she were the legally married wife of Sir Pratap Narain Singh she had forfeited all her rights under the will owing to misconduct prior to her husband's death; (6) that the terms of the will conferred no right of devise to Dukh Haran Nath Singh. The case of the appellant as presented in the lower Court with regard to the adoption was: (1) that the adoption was invalid, having been procured owing to compulsion and undue influence; (2) that Maharani Jagdamba Devi not being a legally married wife could not make a valid adoption; (3) that Maharani Jagdamba Devi, even if a legally married wife, had by her unchastity both before and after marriage rendered herself incapable of making a valid adoption; (4) that Dukh Haran Nath Singh was purchased from his natural father and that his adoption was therefore invalid; (5) that the adoption was invalid because Dukh Haran Nath Singh and his natural father were both out of caste at the time of the

adoption; (6) that Dukh Haran Nath Singh's natural mother was of the Bharadwaj gotra, that she had entered the Girg gotra, at the time of her marriage and that therefore the adoption was invalid whether Pratap Narain Singh belonged to the Girg gotra or the Bharadwaj gotra; (7) that the legal forms of the adoption not having been followed the adoption was invalid; (8) that on the interpretation of the terms of the will Maharani Jagdamba Devi had no power to adopt Dukh Haran Nath Singh.

If the appellant had been able to succeed in setting aside the will and the adoption and destroying the claims of Maharani Jagdamba Devi, he could not succeed under the provisions of Cl. 7, S. 22 Act I of 1869, during the lifetime of Maharani Suraj Kumari. To meet this difficulty he set up a plea that that lady had forfeited all her rights on account of her having "acted against the duties of a wife." I take these pleas in order.

The execution of the will was not denied in the plaint but was denied before the learned trial Judge in argument. In the argument before us the execution was not denied and I do not understand the appellant to suggest now that the will was not executed. But it is advisable to have a finding on the point. I find that the will was validly executed. I am in accord with the decision of the learned trial Judge at o. pp. 400 to 401 of the judgment upon this point. The appellant in his notices of claim [Ex. A-129 and Ex. A-129 (a)] despatched on 13th October 1914 and 17th November 1914 asserted that Maharani Jagdamba Devi had prior to July 1891 an adulterous intrigue with Adika Nath, a descendant of Incha Ram. This Adika Nath is the father of Dukh Haran Nath Singh, the boy subsequently adopted. The appellant next asserted that the Maharaja had executed a will on 14th July 1891, by which he gave Maharani Jagdamba Devi the power to adopt an heir from the family of Darshan Singh, that Adika Nath, discovering this fact and wishing to divert succession to one of his own descendants, exercised undue influence on the Maharaja, and that the Maharaja as a result of this influence executed the will of 17th July, which was prepared by Adika Nath. According to this allegation Maharani Jagdamba Devi was given as a result of the afore-

said undue influence authority to adopt a boy from Adika Nath's own family and exercised that authority by adopting Dukh Haran Nath Singh.

The suggestion approached the ludicrous. In July 1891 Adika Nath was 13 or 14 years of age, Maharani Jagdamba Devi was 18 years of age. The Maharaja was 35 years of age. Dukh Haran Nath Singh (the boy subsequently adopted) was not born till 1901-1905. The story was that a boy, the son of a poor distant relative, had been carrying on a precocious intrigue with the girl-wife of the head of the family, who was one of the greatest noblemen in Oudh, that this youth, coming to hear that that nobleman had made a will, under the provisions of which this wife might adopt a boy from one branch of the family under certain conditions, formed an idea of using undue influence to cause that nobleman to cancel that will and make another will, which would permit the lady to adopt a possible son of the intriguer—a son who on the story was not born till 13 years afterwards. The story continued that he worked this nobleman, who was a grown man of mature intellect, round to his purpose in three days, and during this period drafted a will to secure his objects and compelled his dupe to sign it.

In the plaint which was filed on 11th February 1915 a completely different story was told. It is there asserted that a will was executed on 14th July 1891 by the Maharaja, which gave Maharani Jagdamba Devi maintenance for life and power to adopt a successor from the Darshan Singh branch and that Maharani Jagdamba Devi (not a word is said about Adika Nath) by refusing food and threatening to commit suicide induced the Maharaja to alter his dispositions. The appellant's attempt to reconcile these inconsistencies is the subject of the finding of the learned trial Judge at o. pp. 103 to 121 of the judgment. I agree with that finding. We have first an assertion that a will was executed on 14th July 1891. As the appellant contended that this will was revoked, he introduced the allegation apparently to add colour to the plea of undue influence, the suggestion being that the will of 14th July would not have been revoked, unless undue influence had been used. The plea will be examined. The evidence to prove the

execution of a will on 14th July is as follows: P. W. 6 Hakimuddin deposed that he drafted this will and that it was signed in his presence by the Maharaja and two attesting witnesses. P. W. 17 Suraj Bakhsh supported this story. The Maharaja subsequently executed two deeds of endowment of property for religious and charitable purposes (Ex. 2, dated 23rd December 1895, and Ex. 3, dated 12th July 1898). In both these deeds he referred to his will of 14th July 1891.

I have already discussed the evidence given by Hakimuddin on the plea that Pratap Narain Singh was the putrika putra of Sir Man Singh. I have found his evidence unreliable on that point. It is equally unreliable on this point. Suraj Bakhsh is also an unreliable witness. I add nothing to the comments of the learned trial Judge on their evidence at p. pp. 386 to 397 of the judgment. The reference in Exs. 2 and 3 to a will of 14th July 1891 is thus the remaining evidence as to the existence of such a will. That evidence is obviously insufficient to prove that such a will existed, in view of the circumstance that there exists a genuine registered will which was signed on 17th July 1891 and registered on the 20th. If there had been a will of 14th July 1891 it stood revoked by the latter will, and Pratap Narain Singh would not have referred to the terms of a revoked will in Exs. 2 and 3. There is nothing in the terms of Exs. 2 and 3 really inconsistent with the terms of the will of 17th July 1891. I therefore concur with the finding of the learned trial Judge that the references in Ex. 2 and Ex. 3 were meant to be to the will of 17th July 1891 and that the 14th was inserted by a clerical error.

The finding is thus, that there was only one will executed at that period, namely, the will of 17th July 1891. The evidence to show that its execution was obtained by exercise of undue influence is that of Hakimuddin alone. It is unnecessary to discuss whether his evidence, if believed, would establish that the execution of the will had been obtained by undue influence, as I do not believe his evidence. I therefore find that the execution of the will of 17th July 1891 was not obtained by the exercise of undue influence. I now come to the plea of revocation. The will could only be revoked under the provisions of S. 57,

Act 10 of 1865, read with S. 19, Act 1 of 1869. The first point urged is that the action of the Maharaja in executing the two deeds, Exs. 2 and 3, shows that he revoked the will. Under the terms of the will the testator had declared that he was dedicating property yielding an annual profit of Rs. 12,000 for religious and charitable purposes, whereas by Exs. 2 and 3 he dedicated property of an annual profit of about Rs. 18,000 for these purposes. There is no real inconsistency in this. He intended in 1891 to dedicate property for religious and charitable purposes. Later he considered it desirable to dedicate property of a greater value. In no circumstances could his later acts amount to a revocation of his will. An even weaker plea is raised in the plaint. The Maharaja got the sons of his old opponent Triloki Nath admitted into the Colvin Talukdars School and paid the expenses of their education. It was asserted that this act amounted to a revocation of the will. The pleas in support of revocation up to this point are untenable to a degree.

The next plea taken was that Sir Pratap Narain Singh revoked his will of 17th July 1891 shortly before his death by executing a subsequent testamentary instrument which has not been produced. The appreciation of the value of this plea will be assisted by a statement with dates (when available) of certain facts which are established by the evidence on the record. In the year 1906 Mr. R. E. Hamblin, who is proved now to be dead, was Commissioner of the Fyzabad Division. Mr. F. J. Pert was Deputy Commissioner. Mr. Pert went on six months' leave in April of that year. Mr. D. C. Porter officiated as Deputy Commissioner during his absence. The headquarters of the Commissioner and the Deputy Commissioner are in Fyzabad, within a few miles of Ajudhia. Sir Pratap Narain Singh was in financial difficulties, and was negotiating for a Government loan. He was discussing the question with the Commissioner who proposed in the alternative the placing of the estate under Court of Wards' management—the course which was adopted after the Maharaja's death. The Commissioner saw the Maharaja from time to time on this matter, and had also to see him in connexion with the bestowal of the title of Mahamahopadhyaya which had been recently con-

ferred by the Government on Sir Pratap Narain Singh. The Maharaja towards the end of the year found himself in failing health. His illness took a turn for the worse, and he died at the end of the year. In October the Maharaja communicated with Mr. Butler, Deputy Commissioner of Lucknow (who is now Sir Harcourt Butler), subsequently Lieutenant-Governor of Burma. Sir Harcourt Butler was an intimate friend of the Maharaja. He visited the Maharaja at Ajudhia on 14th October 1906. The Maharaja's health was then in a precarious condition and he had made arrangements for medical attendance by a leading Bengali practitioner of the Ayurvedic School. This gentleman, Kaviraj Dwarka Nath Sen, arrived in Ajudhia on 16th October. At some date between 20th and 26th October the Maharaja received a visit from Sir Muhammad Ali Muhammad Khan, the Raja of Mahmudabad. On 29th October Mr. Pert resumed charge of his duties on return from leave. Shortly afterwards the Maharaja received a visit from Thakur Harihar Bakhsh Singh, Talukdar of Saraura. On 4th November Mr. Hamblin wrote to the Maharaja (Ex. 79), in reply to a letter not produced, stating the information he would require before he could present proposals to Government for the improving of the financial condition of the estate.

On 6th November the Maharaja wrote to Mr. Hamblin (Ex. A-351) asking for information as to the distinctive dress of holders of the title of Mahamahopadhyaya, as he wished to obtain it to wear at a Durbar to be held in the following January. He was evidently not dangerously ill to his knowledge when he wrote that letter. On 8th November Mr. Pert wrote to Mr. Hamblin (Ex. A-358) that the Maharaja was seriously ill and asked what he was to do if the Maharaja died? Mr. Hamblin wrote to the Secretary of the Board of Revenue (Ex-A 390) conveying this information of Mr. Pert and adding other remarks. On 9th November the Maharaja died. Mr. Hamblin communicated the fact to the Secretary to the Board of Revenue by telegram (Ex. A-395). He wrote subsequently to the Secretary to the Board letters dated 10th November, 13th November 13th November and 15th November (Exs. A-391, of Revenue A-392, A-393 and A-394) the contents of

which will be discussed later. To prove the plea of specific revocation the appellant called P. W. 136 Hakim Ismail Khan. This man is a petty medical practitioner, who asserts that he was first in the employment of the Maharaja and latterly pensioned by him. His story is that he had attended the Maharaja in a medical capacity for four or five months up to the date of his death. He deposed that some 2½ to 3 months before his death, i. e., in August 1906, he found a paper lying on the Maharaja's bed. I proceed to give his evidence in his own words—o. pp. 1891 to 1893.

"I guessed it might be a will. I began reading it attentively. The Maharaja asked me what I was reading. I told him that the paper was in very neat writing and as I started reading it. He told me to read it first myself and then to read it out to him. I did so. I read it out to him. He asked the Bengali Vaid also to listen to it. I told him he had already made a will and what sort of will this was. He replied it was the cancellation of the former will. I enquired from him the reason of the cancellation. He explained that the acts for which he had deprived the senior Rani of the estate were committed by the junior Rani also. He then signed the neatly written paper himself and requested me and the Vaid to sign the same as witnesses. We both signed it. This was 2½ or 3 months before the death of the Maharaja approximately. It is an old affair. The Maharaja died on 25th day of the Vaid's treatment but he had arrived at the Maharaja's some months before his death."

Later on he stated what the content of this alleged will were.

"Q Did the Maharaja say anything else after you had attested the will? A I do not recollect. I do not recollect the full contents. I remember something of it. Probably it provided for a maintenance of Rs. 600 to the senior Rani and monthly maintenance between Rs. 500 and 600 to the junior Maharani and Rs. 100 a month to the Mahabrahmin who was in the keeping of the Maharaja. I do not remember anything else. It perhaps also provided that during his lifetime he was at liberty to adopt anybody he pleased but in case of his death a successor be appointed to him out of the senior line of Raja [Darshan Singh's descendants]". o. pp. 1293 to 1294.

This witness's story is this, that in August 1906 the Raja had had a will drafted by which he revoked all former wills. Under the terms of this latter will he assigned maintenance to his widows and bequeathed his estate to a successor to be appointed out of the senior line of Darshan Singh's descendants (that is to say, to the appellant or one of his sons who are the sole representatives of that senior line), that he signed this will in the presence of Kaviraj Dwarka Nath Sen and the witness, and that the two latter

signed as attesting witnesses. Passing over the minor improbabilities that such a small dependent as Hakim Ismail Khan would have the impertinence to take up a private paper of Sir Pratap Narain Singh and read it in front of him, and that the Maharaja would condone such impertinence, the first fact that gives the lie to this story is that Kaviraj Dwarka Nath Sen did not reach Ajudhia till 16th October.

The gentleman is now dead. The date of his arrival is proved beyond doubt partly by the evidence of his son D. W. 77, Kaviraj Jogendra Nath Sen, a respectable Ayurvedic practitioner, who has deposed to the best of his knowledge that his father left Calcutta for Ajudhia about the middle of October, and by the statement of Nirodh Chandra Ghoshal P. W. 56 (a witness whose main evidence is absolutely discredited, but whose admission here is important against the appellant) that he was sent to fetch the Kaviraj in October, but mainly by a letter from the Kaviraj (Ex. A-359) requesting payment of his bill for attendance. The charge which he made was accepted and paid. The daily fee was Rs. 500. The fact that he received fees of this amount completely disposes of the suggestion made by Hakim Ismail Khan that the Kaviraj would have been content to remain in Ajudhia for two months or more before he commenced medical attendance on the Maharaja, doing and receiving nothing. It is superfluous to consider the other reasons why Hakim Ismail Khan's evidence should be disbelieved, but it is advisable to do so as in appeal great stress has been laid on this man's evidence on behalf of the appellant. Sir Harcourt Butler was examined by commission on interrogatories. He was asked six questions:

"1. Was Your Honour acquainted with the late Maharaja Sir Pratap Narain Singh of Ajudhia? 2. If so, on what terms were Your Honour and he? 3. Has Your Honour ever visited him? 4. If the answer to question 3 is in the affirmative, please state when Your Honour visited him last and kindly state fully all that passed between Your Honour and him at the last interview? 5. On or about the date of the interview did Your Honour make a memorandum of the same? 6. If so and if it is in Your Honour's possession, kindly produce it."

He replied to these questions together (o. p. 3352)—

"I am the Lieutenant-Governor of Burma. I used to be a member of the United Provinces

Civil Service. I was acquainted with the late Maharaja Sir Pratap Narain Singh of Ajudhia. We were on very friendly terms. I visited the Maharaja Sahib on 14th October 1906 for the last time. I understood he died shortly afterwards. On my return to Lucknow the same day I made a record of the interview which I produce. I wish it to be sent. It need not be returned. I found it amongst my private papers."

He put in at the same time the record Ex. A, which is as follows:

"I visited the Maharaja of Ajudhia to-day. At the end of the interview he informed me that he had made a will in favour of second Maharani which was registered with Colonel Currie, and he committed the Maharani to my care. The Maharani was behind the parda and I asked no question as to the terms of the will, whether it gave her power to adopt or not (I mention this as Mr. L. C. Porter, Deputy Commissioner of Fyzabad, on whom I called afterwards, asked me if I knew whether the Maharani had been given power to adopt). The Maharaja laid the Maharani's hand in mine and I told her that I would be a true friend to her as I was to her husband. The Maharaja was in perfect possession of his faculties and we discussed some public affairs; he said he hoped to be well in December and to take up and push on the High Court question. He could walk and gave me 'pan' and scent and garlanded me before my departure."

The evidence of Sir Harcourt Butler is very valuable. In this Court the learned counsel for the appellant confined himself to contesting that Ex. A was inadmissible in evidence. That contention cannot be supported. The witness was asked in effect—Did you have an interview with the late Maharaja and what was the purport of that interview? He replied that he had had such an interview, that he noted the purport of it at the time in a written memorandum and he produced the memorandum. He could have read out the contents of the memorandum to refresh his memory. This evidence is admissible. D. W. 66 the Raja of Mahmudabad gave the following evidence as to his interview with the Maharaja—that the Maharaja asked other persons who were present to go away and that the witness had some conversation with him in private, when they had gone the Maharaja told the witness that he did not hope to survive the disease he was suffering from and that he wanted to make a testamentary bequest; the Maharaja then told him that, according to the terms of a draft which he had shown to the Raja at Lucknow about a year or a year and a half before, he had made a will in favour of Maharani Jagdamba Devi, proviso 1 of which was that the Raja of Mahmudabad should

always assist the Maharani in every way, proviso 2 of which was that the management of the estate should be under taken by a European manager under the supervision of the Local Government, the control of the Court of Wards being avoided if possible, and proviso 3 of which was that the Maharani should not be permitted to adopt a son from the family of Trileki Nath. I have given the purport of this witness's evidence, as the Commissioner's translation of the vernacular is both ungrammatical and inaccurate. The next witness is D. W. 54 Thakur Harihar Baksh Singh. His account of his last interview with the Maharaja contains following statements:

"He also stated that in case he died I should support the junior Maharani as much as I respected him, and that I should help her as he had executed and registered a will in her favour in which he had given her full powers after him." (a. p. 24077).

I shall revert later to the value of the evidence of the Raja of Mahmudabad as proving revocation, apart from the revocation alleged by Hakim Ismail Khan. At this point it is sufficient to state that Hakim Ismail Khan deposed to the execution of a document in August 1906 by which the bequest to Maharani Jagamba Devi made in 1891 was cancelled and she was given a bare right of maintenance and that three gentlemen of high position have deposed that they were told independently by the Maharaja on dates subsequent to August 1906 that he had made a will devising his estate to Maharani Jagamba Devi. The manner in which Hakim Ismail Khan came to give his evidence was as follows: He said that between 10.30 and 11 a. m. on a day between 11th and 16th February 1916 he met the appellant in Ajudhia on the road and that he asked the appellant if the will which he had seen had been registered and acted upon. They had no previous conversation on the point, and according to the witness he put the remark out of mere curiosity. The appellant said that it was not registered but did not give any definite reply. They were both in a hurry, and they passed on. About that hour on 11th, 12th, 14th, 15th, 16th, 17th and 18th February the appellant was giving evidence in Fyzabad a few miles away. On 13th February which was a Sunday, Hakim Ismail Khan on his own showing was at Partabgarh.

On 20th February which was also a Sunday he was on his own showing in Allahabad. He gave his evidence on 21st February. The appellant, when under cross-examination on 17th February, was asked what his evidence was to the revocation of the will and he made no reference to the fact that he proposed to produce Hakim Ismail Khan and made no assertion as to a pending revocation. I find Hakim Ismail Khan's evidence utterly unreliable. His statement is a shameless fabrication. This was the view taken by the learned trial Judge.

The next witness on whom the appellant relies is P. W. 56 Nirodh Chandra Ghoshal. This witness is now in the employment of a printing press at Allahabad on a small salary. He says that he was once a wealthy man, but has now admittedly no private means. He has been on his own showing a participant in champertous litigation and has speculated on the result of civil suits. For some years he was in the confidence of Sir Pratap Narain Singh. He was employed by the Ajudhia Estate before the latter's death and assisted in administrative and secretarial work. He was in Ajudhia at the time of the Maharaja's death, and he remained there for some time afterwards in the employment of the Court of Wards. His story is that on 26th October 1906 he made a draft of a letter for Sir Pratap Narain Singh, that he failed out the draft, and that Sir Pratap Narain Singh signed the fair copy which was then sent to Mr. Hamblin by mounted messenger. He produced what he asserted was the draft which he said he found in October 1915 amongst his private papers. The learned trial Judge refused to admit this draft in evidence, holding that it was a fabrication. It is raised in appeal that this is a genuine draft. I proceed to consider its contents. It was filed as Ex. 76. It is a pencil draft written on the back of an old used envelope. It is as follows:

"26th October 1906,

My dear Mr. Hamblin,

Just a line to repeat, as I told you the other day, that none of my former wills stands, all three having been cancelled. My last will I spoke to you about, has now been executed, and I hope to be able to meet you shortly in connection therewith. In case I am unable to stir about, I must, of course, ask you to take the trouble to come over.

I am much as usual, though my Calcutta physician has great hopes of my ultimate recovery.

Yours faithfully,

Maharaja.
R. E. Hamblin, Esq.
Commissioner,
Fyzabad."

The object of proving this alleged letter from Sir Pratap Narain Singh was apparently to corroborate the evidence of Hakim Ismail Khan as to the execution of the alleged will of August 1916. The letter as it stands could not operate as revocation under the provisions of S. 57, Act 10 of 1865, and as the evidence of Hakim Ismail Khan has been rejected on its merits as absolutely false, it is really immaterial to decide whether the alleged draft is genuine or not. But as the appellant's learned counsel has argued at great length in support of the genuineness of the draft, I shall decide the point.

The circumstances attending the alleged writing, preservation, and production of this draft are sufficient in themselves to justify the finding of the learned trial Judge that the draft has been fabricated for the purposes of this case. The witness is a man possessed of some education. He has considerable knowledge of affairs. He asserted that he was not an ordinary servant of the estate and alleged that he was in the confidence of the Maharaja. If such were the case, he was in a position to realise both before and after the Maharaja's death the consequence of the revocation of the will of 17th July 1891. Once the Maharaja was dead the position would have been very clear to the witness. If the cancellation stood alone, the estate passed under the provisions of Cl. 7, S. 22, Act 1 of 1869, to Maharani Suraj Kumari for life. It is the "last will" to which reference is made in the draft, were a valid and enforceable testamentary disposition, the estate passed under its terms—terms of which the witness was admittedly ignorant. It was his obvious duty in his position to inform the manager of the Court of Wards, into whose service he passed on the Maharaja's death, of the facts. On his own showing he informed no one and did nothing and watched silently the succession of Maharani Jagdamba Devi. He has given as the reason of his inaction that grief for the death of the Maharaja drove all re-

collection from his memory. He supplemented this lame explanation while under re-examination by an equally lame explanation to the following effect:

"The Maharaja was very particular that the matter of the revocation of the will should not leak out and the Commissioner knew all about it, and so I did not see any necessity for disclosing it to anybody. I also did not disclose it after his death, as the will which he had executed was a waste paper not being signed by Mr. Hamblin, nor even registered." (o. p. 634.)

I next take his explanation as to how he came to discover the draft. The witness stated that his mind remained a blank as to the existence of this letter from November 1906 to September or October 1914, that is to say, for eight years. The appellant called on him in September or October 1914 and asked him whether the Maharaja had ever written to any person in authority about the revocation of his will. A glimmer of recollection then came to the witness, and he said that there might be such a letter. He commenced looking among his papers a year afterwards in October 1915 and eventually found the draft. When the appellant called on him again in October 1915, he told him the purport of the draft but refused to give it to him. He produced it in Court on 17th December 1915. On the above facts I find the witness's story absolutely unworthy of belief but more has to come. It is the appellant's case that Mr. Hamblin received the letter as he would ordinarily have received a letter sent by messenger. On 4th November 1906 Mr. Hamblin wrote to the Maharaja (Ex. 79) a letter in which he referred to a previous meeting and discussed in detail the conditions precedent to Government action for the relief of the financial condition of the estate. He made no reference to a revocation of a will nor to the execution of a new will. On 6th November 1906 the Maharaja wrote to Mr. Hamblin the following short letter (Ex. A-351):—

"My dear Mr. Hamblin,

"I am told Government bestows certain special dresses as well as distinctive medals on the recipients of the title of Mahamahopadhyaya. I shall be highly obliged if you will kindly make enquiries and obtain the same for me. I should like to have the dress and medals before the Durbar at Agra in January next, if possible.

Yours Sincerely,

"Pratap Narain Singh. Mahamahopadhyaya,
"Maharaja of Ajodhya."

Mr. Hamblin made the following endorsement on the letter.

"Ask Government in sequence to the letter about my conferring title.

R. E. H."

"C-11-05".

There is no reference to Mr. Hamblin failing to acknowledge or reply to the letter of 26th October. The witnesses alleged that Mr. Hamblin called on the Maharaja on 6th or 7th November but that the Maharaja was too ill to receive him. On 8th November Mr. Port wrote to Mr. Hamblin Ex. A-338. It is as follows:

"My dear Hamblin,

"On my return from leave I find that the Maharaja of Ajodhya has been seriously ill and at the present moment is far from well. He is not being attended by Colonel Peart, so I cannot say definitely what is the matter with him. In the event, however, of a fatal termination to his illness I should be much obliged if you would give me instructions as to what steps, if any, I should take; as far as I know, the Maharaja has left a will in favour of his young Maharani. She is hardly fit to be possibly to manage this large and seriously indebted estate, and I think we should be prepared to recommend. There has been some talk of a loan of 60 lakhs to the Maharaja, but I have no correspondence before me by Post beyond his letter of 16th August regarding the Maharaja's memorial.

"Yours sincerely,

"W. J. Port.

"8th November 1906".

Mr. Hamblin wrote on the same date Ex. A-339 to the Secretary of the Board of Revenue. He quoted Mr. Port's letter and continued:

"Port had spoken to me and I had said we should take under the Court of Wards, but later the matter seemed so big that I thought he should write so that I might get the Board's instructions. I also am told the Maharaja has made a will in favour of the junior Maharani. The difficulty in taking over on his death would be as to whether the estate was not hopelessly involved, but if the Board agrees I could now have inquiries made as to the income and debts from Deputy Commissioner. The necessity for this may not arise, but you know the dilatoriness of men in the Maharaja's position. He has applied to the Government about the rents of his *adaka* being unduly low, and as to a loan of Rs. 60 lakhs being advanced him by Government to pay off his debts and replace them by a loan at a lower rate of interest, he proposed this loan should be a mortgage. The Government ruled the former, and as regards the latter said that Court of Wards' management is necessary, this was on 6th September but the Maharaja has not yet replied. I have seen him and he has told me he wishes to make conditions with Government before he agree to accept Court of Wards' management.

I have said he should let me have the list of his conditions and then I would ask the Board; I have said that when he lets me have the details of his position I will have them tested D. O. by Deputy Commissioner, he does not want the fact of his Court of Wards negotiations till orders can issue. When he lets me have the conditions and his statements of accounts I will forward the former to you and ask D. C. to verify the latter so as to save time."

"His Honour has been told by me of the state of the Maharaja's health. Yours sincerely,

R. E. Hamblin."

From this letter it would appear that Mr. Hamblin had not called on the Maharaja on the 6th or 7th November, though he had seen him on an earlier date as the contents of Ex. 79 disclosed. The Maharaja died next day. On 10th November 1906, Mr. Hamblin wrote to the Secretary of the Board of Revenue (Ex. A-341). He there said:

"It will be ascertained as soon as possible who is the heir under the will; it is at present believed the junior Maharani will succeed and that she has been given power to do so."

On the 13th November he wrote to the Secretary again in Ex. A-392 giving an abstract of the terms of the will of 17th July 1891, and on the same date wrote a second letter Ex. A-393 containing information as to the wishes of Maharani Jagadamba Devi and giving the date of the will (he made a mistake in the date, for he gives it as 16th July 1891). On the 15th November he wrote to the Secretary of the Board of Revenue (Ex. A-394), requesting orders as to the future management of the estate on the understanding that Maharani Jagadamba Devi was entitled to possession for life. These letters show the late Mr. Hamblin to have been a careful and competent officer, whose desire was to have the management of the estate placed on a satisfactory basis and to carry out the wishes of the Maharaja. D. W. 31 Mr. Hailay, the Secretary of the Board of Revenue to whom the above letters were addressed, and D. W. 60 Mr. Port have given evidence which shows Mr. Hamblin in the same light. What then was the situation if the witness Nirodh Chandra Ghoshal is believed and the appellant's suggestion be accepted that Mr. Hamblin had received the letter of the 26th October or had been previously informed by the Maharaja of his revocation of his will? Mr. Hamblin, having reason to

believe that the Maharaja had revoked all his wills and executed a new will, made no attempt to ascertain the fact in the Maharaja's lifetime and after the Maharaja's death refrained from disclosing his information to his superior officers with the result that the estate passed under the will of 17th July 1891, which he had reason to believe was revoked to Maharani Jagadamba Devi.

If all wills stood revoked by a valid testamentary disposition, Mr. Hamblin had to ascertain the terms of that disposition. According to the witness Mr. Hamblin did not do so and concealed his knowledge on the point. If the wills stood revoked without a valid testamentary disposition, the estate passed to the senior Maharani. On this hypothesis Mr. Hamblin would have been party to a fraud. One of two conclusions must be drawn. If the witness he believed, Mr. Hamblin was guilty of most improper conduct. The other conclusion is that the witness is not telling the truth. The latter conclusion is the conclusion of the learned trial Judge. It is also my conclusion. I shall here decide an objection of the appellant embodied in the third ground of appeal. The appellant had applied on 19th and 27th July 1915 in two applications, Exs. 74 and 75, direct to the Commissioner of Fyzabad and not through the Court, asking permission to search the Commissioner's office for documents which might be favourable to his case. The Commissioner passed certain orders on these applications. On 8th December 1915 the appellant applied to the Court for the production of 13 documents from the office of the Commissioner of Fyzabad. The learned trial Judge refused to send for one document. The appellant withdrew his application for the production of another. The Court eventually directed the production of 11 documents. The first two documents summoned were the original applications Exs. 74 and 75, which the appellant asked should be returned to him with all the proceedings therewith. The fourth document summoned was the original of the alleged letter of 26th October 1906. The Commissioner sent the first two documents with portions of the margin cut off. He explained that after he had received the documents he had written notes of a confidential character on the margins

and that as he refused to let those notes be seen, he had cut the margins off before despatching the documents. He replied that there was no letter despatched by Maharaja Pratap Narain Singh to the Commissioner of Fyzabad declaring his intention to cancel or cancelling the will of 17th July 1891. The learned trial Judge was then asked by the appellant to compel the Commissioner to produce the marginal notes which were stated to be confidential. The Judge by an order of 20th December 1915 refused to take such action. The appellant then attempted in his evidence on 11th February 1916 to prove what he stated were the marginal endorsements by oral evidence—o. p. 1231. He was not permitted to do this. On 16th February 1916 (o. pp. 1305 to 1309) the trial Judge was asked to revise his order of 20th December 1915. He refused to do so.

The position of the appellant on this point is as follows: He sent two applications to the Commissioner, not through the Court, asking permission to search the Commissioner's office at his will, to see if he could find anything to help his case. The request showed the same assurance which has distinguished the conduct of the case throughout. The Commissioner, instead of replying as he well might have replied, by a short negative, permitted the appellant to examine three files. On the applications he made certain endorsements which he says were confidential. The appellant has deposed (o. p. 1231) that he read those endorsements. No explanation has been vouchsafed, as to how he obtained possession of them. He clearly could not have done so by legitimate means. While making an intense grievance of the matter, he has refused to file an affidavit as to purpose for which he requires to prove the endorsements, or as to their contents. In this Court, we gave him the opportunity to file such an affidavit. His learned counsel were equally reticent. One suggested that endorsements might contain a reference to the alleged letter of 26th October 1906. Another suggested that they might contain a reference to an alleged file as to an inquiry into the pregnancy of Maharani Jagadamba Devi after the death of Sir Pratap Narain Singh. As the Commissioner had denied that either such a letter or such a file was in his possession these allegations, if they

mean anything,—allegations that are unsupported by affidavit or any evidence—were that the Commissioner was not telling the truth. The case is very clear. Certain documents were called from a certain officer. He says that no such documents are in his possession. He is asked to produce certain private notes of his own. He refuses saying that they are confidential. His refusal settles the matter. The provisions of Sec. 123 and 124, Act I of 1872, are clear—

"No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit. No public officer shall be compelled to disclose confidential information made to him in official confidence, when he considers that the public interest would suffer by the disclosure."

The words in these sections can only be interpreted to show that the officer's refusal to disclose is final. It was not the intention of the legislature that a Court of Justice (from that of a third class Magistrate upwards, for all would be alike) should be entitled to call for and examine the secret archives of the State in order to satisfy itself of their confidential nature. This proposition has been laid down clearly in *Nandraya Pillai v. Secy. of State* (10) and *Jhanger v. Secy. of State* (11).

As a result, I find Ex. 76 to be a fabricated document and the evidence of Nirodh Chandra Ghoshal completely false. This was the view taken by the learned trial Judge. The next witness on whom the appellant relied is P. W. 139 Babu Mohini Mohan Chatterji. In October 1906 he was Assistant Surgeon at the District Hospital, Fyzabad. He deposed that he saw Sir Pratap Narain Singh between 20th and 27th October 1906. He was not treating him as a physician. His allegation is that he saw him as a friend. This is his deposition on the point:

"The Maharaja was suffering from dropsy and was rather anxious about his health and asked me to state frankly what I thought about his illness as some of his doctors said one thing and some other. I asked him why he was so anxious about it and tried to comfort him. He said he had some very important business to finish. I said what. He said concerning the will. I said every one knows that you have made a will in favour of the junior Maharani. He hesitated and seemed as if he did not like the question. But after a short time he said that

she is not worthy of it or does not deserve it. I changed the topic immediately and assured him that he would remove (a. p. 1240)."

It is difficult to see why this evidence was introduced. So far from supporting Hakim Inayat Khan it contradicts him. It would show that the will had not been revoked before the 20th October. The evidence introduced has no foundation in law. The learned trial Judge has dismissed this witness's evidence contemptuously but not too contemptuously (a. p. 373). I find the witness absolutely unreliable. The last argument on behalf of the appellant on the point of revocation is that the evidence of the Rāy of Mahesabād established revocation of the will of 17th July 1891. This gentleman's evidence on the point has already been noted. It does not establish revocation. At the best it would be secondary evidence of the contents of the alleged revoking will and it is not shown that secondary evidence is admissible. But taking the matter on a broader reasoning and examining the value of the witness's evidence it is to this effect: He says that Sir Pratap Narain Singh had told him that he had made a fresh will. Sir Pratap Narain Singh may have meant no more than that he had prepared a draft which was with his approval. It cannot be taken from this evidence that Sir Pratap Narain Singh said that he had executed a will which he had signed in the presence of two attesting witnesses as required by law. In any circumstances such evidence would not be sufficient to establish the revocation of the former will. According to the witness the Maharaja had stated that he had made his fresh will in favour of Maharani Jagdamba Debi, subject to conditions slightly different from those prevailing in the will of 17th July 1891. Their Lordships of the Privy Council laid down in *Sahib Mirza v. Umda Khawara* (12):

"It is well settled that a will duly executed is not to be treated as revoked either wholly or partially by a will which is not forthcoming unless it is proved by clear and satisfactory evidence that the later will contained either words of revocation or disposition so inconsistent with the dispositions of the earlier will that the two cannot stand together. It is not enough to show that the will which is not forthcoming differed from the earlier will if it cannot be shown in what the difference consisted. It is also settled that the burden of proof lies upon the person who challenges the will that is in existence. These propositions have been established in this

10. (1916) 29 Mad 304=26 I C 72B.

11. (1931) 6 Bom L R 131.

12. (1892) 19 Cal 444=19 I A 83 (P C).

country both in this tribunal and in the House of Lords. . . . and as they are founded on reason and good sense they must be regarded as of general application."

I therefore find that the will of 17th July 1891 was duly executed, was not executed under undue influence, and that it was never revoked. It remains to consider the appellant's last plea on the point of the will, to the effect that as it stands it is unenforceable or at the best devises nothing more than a life-estate to Maharani Jagdamba Devi and maintenance to Maharani Suraj Kumari and that the succession to the remainder devolves as in intestacy.

The will (Ex. A.318) is not a perfectly worded document. Para. 1 revokes all previous wills. Para. 2 recites the fact that the testator has two married wives, Maharani Jagdamba Devi, being the second married wife. Here the appellant makes his first criticism. His argument is that if he succeeds in showing that Maharani Jagdamba Devi was not the legally married wife of Sir Pratap Narain Singh all bequests to her are void. As I shall subsequently show, the marriage of Maharani Jagdamba Devi is absolutely established, but the point is bad in any circumstances, for on the appellant's own case, if Maharani Jagdamba Devi were not a legally married wife of the testator, the fact was known to the testator, and the bequest was then to her in her individual capacity and not in the capacity of wife under the Mitakshara Law. Para. 3 laid down that if he had any male issue from his second wife the said issue and their descendants should inherit. The portion of the paragraph relating to subsequent succession is unenforceable. Para. 4 laid down that in case there was no such issue and his second wife bore a daughter, the descendants of the second wife's daughter should succeed one after another. Here again the attempt to lay down a rule as to succession is unenforceable. These facts in no way invalidate the value of the will, for the contingencies have not arisen. Para. 5 devised, in absence of issue from his second wife or male issue from a daughter of the second wife, a life-estate to Maharani Jagdamba Devi without power of alienation. This devise, as I read it, was not conditional on her good conduct. But the point is unimportant as the accusations of unchastity against her are found by me, as I will subsequently show, to be absolutely un-

founded. Para. 6 refers to the contingency of a daughter being born to his second wife. Para. 7 is the important paragraph. It may be rendered into English as follows:

"In event of failure of issue from my second wife and of heirs mentioned in paras. 3, 4, 5 and 6, and in event of my not having formally adopted a boy by registered instrument during my lifetime, my second wife is authorized to adopt a boy from my paternal or maternal family. Any such adopted son shall after her death succeed as full proprietor to my moveable and immovable property in the manner contemplated by Cl. 8, S. 22, Act I of 1869, but shall not be entitled to possession until after my second wife's death. She shall not have power to deliver him possession of the said property during her lifetime."

The contents of the remaining paragraphs are immaterial. Para. 7 is undoubtedly badly worded. The contingency of the failure of an heir under para. 5 is clearly not contemplated, for it is the heir under para. 5 who is to exercise the power of adoption. The reference to Cl. 8, S. 22, Act I of 1869, cannot be read as it stands, for the power to adopt under Cl. 8, S. 22, is given to the elder wife only. It is under Cl. 9, S. 22, that the power to adopt is given to a junior wife. Further the succession of adopted son under S. 22 is intestate succession, whereas the succession of the adopted son here is by testamentary disposition. A Court should be guided in interpreting a will by certain well-known rules which were summarized in 1913 by their Lordships of the Privy Council in *Venkata Narasimha Appa Row v. Parthasarathy Appa Row* (13):

"In all cases the primary duty of a Court is to ascertain from the language of the testator what were his intentions, i. e., to construe the will. It is true that in so doing they are entitled and bound to bear in mind other matters than merely the words used. They must consider the surrounding circumstances, the position of the testator, his family relationships, the probability that he would use words in a particular sense and many other things which are often summed up in the somewhat picturesque figure: 'The Court is entitled to put itself into the testator's armchair.' Among such surrounding circumstances which the Court is bound to consider none would be more important than race and religious opinions, and the Court is bound to regard as presumably (and in many cases certainly) present to the mind of the testator influences and aims arising therefrom. But all this is solely as an aid to arriving at a right construction of the will, and to ascertain the meaning of its language when used by that particular testator in that document. So soon as the construction is settled, the duty of the Court is

to carry out the intentions as expressed, and none other. The in Court in a case justified in adding to testamentary dispositions. If they transgress any legal restrictions, they must be disregarded. If they leave any eventuality unprovided for, the estate must, in case that eventuality arises, be dealt with according to the law which provides for succession of property in the absence of testamentary directions applying thereto. But the Court never adds to a will anything which needs to be done by testamentary disposition. In all cases it must loyally carry out the will as properly construed, and this duty is universal, and is true alike of wills of every nationality and every religion or rank of life."

The contention of the appellant resolves itself into this: He urges that the will gives Maharani Jagdamba Devi only the power to adopt a boy who would succeed as a son adopted under Cl. 8, S. 22, Act I of 1869, and that in event of such succession not being open to such boy the power of adoption cannot be exercised. He thus derives his conclusion that the will confers at the best only a life estate on the junior widow and maintenance to the senior. He argues that authority to adopt under Cl. 8 cannot be treated as authority to adopt under Cl. 9. He suggests that under S. 15, Act I of 1869 (which on the argument that he had a vested interest in 1906 is not affected by the Amending Act) succession to an adopted son succeeding under the will would be as though he had bought the property and that the estate would cease to be impartible and would cease to bear the characteristics of a taluka. From this he argues that as it cannot be held to be the intention of the testator to take away the characteristics of impartibility from the estate, adoption cannot be permitted.

The introduction of the figure 8 may be more than a clerical error. It is possible, that the person responsible for the drafting (who on the face of it was not a trained conveyancer) argued that inasmuch as the claims of Maharani Suraj Kumari had been superseded by those of Maharani Jagdamba Devi, the latter would take the position of senior widow, and that the provisions of Cl. 8 would operate in her favour, should the testator die intestate after giving her authority to adopt. Be that as it may, the Maharaja had the power to give Maharani Jagdamba Devi authority to adopt under the provisions of Cl. 9 while refusing to give Maharani Suraj Kumari authority to adopt under the provisions of Cl. 8.

That is how I interpret the words of Cl. 9 after consideration. They justify that conclusion, and any other interpretation would be repugnant, involving, as it would, the deprivation of a Hindu of his right to authorize his junior wife to make an adoption, while refusing such authority to his elder wife. The Maharaja had thus the power to give Maharani Jagdamba Devi such authority. He gave her that authority, but by error (clerical or other) referred to Cl. 8 instead of Cl. 9. Can that error invalidate the authority? I do not consider that it can possibly do so. To continue the remarks of their Lordships of the Privy Council in the decision previously quoted—(pp. 222, 223 of 37 *Mad*).

"That native testators should be ignorant of the legal phrases proper to express their intentions, and the legal steps necessary to carry them into effect, is one of the most important of the surrounding circumstances which the Court must bear in mind, and it is justified in refusing to allow defects in expression in these matters to prevent the carrying out of the testator's true intentions. But those intentions must be ascertained by the proper construction of the words he uses, and once ascertained they must not be departed from."

This conclusion disposes of the last objection. The words authorising Maharani Jagdamba Devi to adopt can be taken out of the will. So taken out they constitute a power to adopt in event of intestacy. Authority for that proposition will be found in *Indar Kunwar v. Jai-pal Kunwar* (14), and *Bhaiya Rabidat Singh v. Indar Kunwar* (15), a sequel to the former case. There the senior Maharani of Sir Digbijai Singh, K. C. I. E., Maharaja of Balrampur, succeeded on his death to a life estate under the provisions of an unregistered will. She would have succeeded in event of intestacy under the provisions of Cl. 7, S. 22, Act I of 1869, to a similar life estate. She made an adoption. At I. L. R. 16 Cal. 562, their Lordships say:

"In the next place, it was contended that the adoption was invalid, and the bequest to the adopted son of no effect, so far at any rate as regards the Talukdari property, because the adopted son was not a person who could take the Talukdari property under an unregistered will. It is obvious that this objection assuming it to be well-founded, would not better the position of the appellant if the senior widow had authority in writing to make the adoption, and did in fact make the adoption in the manner prescribed by the Act of 1869. The adopted son would not take until the widow's death, but still

14. (1888) 15 Cal 725=15 I A 127 (P. C.).

15. (1889) 16 Cal 556=16 I A 53 (P. C.).

he would take to the exclusion of the appellant. Their Lordships, however, are of opinion that the objection is not well founded. In order to make the objection good, the appellant has to establish the proposition that the adopted son is not within the exception contained in S. 13, sub-S. 1, of the Act, that he is not a person who, under the provisions of the Act or under the ordinary law to which persons of the testator's tribe and religion are subject, would have succeeded to the Talukdari estate or to an interest therein if the Maharaja 'had died intestate.' The appellant endeavoured to support that proposition by arguing that if the Maharaja had left no will, there would have been no authority to adopt in existence. And then, in regard to succession to the estate, Udit Narain Singh would have ranked as the son of Guman Singh. But the word 'intestate' in sub-S. 1 evidently means intestate as to his estate that is, his estate, as that expression is defined by the Act, the Taluk or immovable property to which alone the Act is declared to extend. This is plain on consideration of S. 13, taken by itself, but it is made still plainer, if possible, by reference to S. 22, which is closely connected with S. 13, and which expresses what otherwise would necessarily be implied, and qualifies the word 'intestate' by the addition of the words 'as to his estate.'"

Such being the case, such an adopted son would be a person who would have succeeded to the provisions of this Act according "to the estate. . . if the. . . testator had died without having made the transfer and intestate"—S. 14, Act I of 1869. The rule of succession laid down in Act I of 1869 would apply in this case and the property taken by him retains the characteristics of a taluka. The appellant cannot succeed on any view of the case. If the devise to an adopted son is a good devise the adopted son succeeds under that devise. If it is a bad devise the adopted son succeeds under Cl. 9, S. 22, Act I of 1869. Thus effect is given to the desire of Sir Pratap Narain Singh, which is disclosed by the contents of the will read as a whole, to retain the property as a Taluka in the hands of the adopted son. The whole of the controversy has actually turned on the use of the figure 8 instead of the figure 9 in para 7.

I, therefore, decide that under the terms of the will, Maharani Jagdamba Devi succeeded to a life-estate with full power to adopt a boy to succeed to the remainder from the paternal or maternal families of her deceased husband. I now come to the validity of the adoption. The adoption may be viewed in two aspects, either as an adoption under the terms of the will, or as an adoption under the provisions of Cl. 9, S. 22, Act 1 of 1869. On my findings it is an adoption under the

will, but I am ready to consider its validity on either hypothesis. I go further and shall consider its validity under the provisions of the Mitakshara Law, although I am of opinion that an adoption under the provisions of Cl. 9 is merely a selection which need not be according to the conditions and the restrictions found in Mitakshara Law. This appears a necessary consequence of the fact that Mahomedans and persons of other religions can equally with Hindus adopt legally under the provisions of Act, 1 of 1869. But on my decision it is not necessary to relax any restriction. The conditions imposed by the Mitakshara and those imposed under Cl. 9 have all been complied with by the act of adoption made.

Dukh Haran Nath Singh son of Adika Nath, a lineal descendant of Incha Ram brother of Darshan Singh, was adopted in February 1909 by Maharani Jagdamba Devi with all the rites prescribed by the Mitakshara Law. The ceremony was formal and public, attended by a large number of people including gentlemen of the highest position. A mass of evidence has been given to prove the above facts. A deed of adoption, Ex. A-319, was executed on 12th February 1909 by Maharani Jagdamba Devi. This deed was signed by her in the presence of attesting witnesses and registered on 12th February 1909. Neither in the notices nor in the plaint was it suggested that the adoption was had, on an allegation that the deed of adoption was not "executed and attested in a manner required in case of a will and registered," as stated in Cls. 8 and 9, S. 22, Act, 1 of 1869, read with S. 19 of the same Act. The notices attacked the adoption on certain grounds. The plaint attacked it on those and additional grounds. This particular ground was never mentioned. The point was not taken in argument in the lower Court and is not stated in the grounds of appeal. In this Court, however, the appellant, relying on the words "if made" in para. 18 of the plaint, challenged the adoption at the outset, on the ground that there was no evidence that the deed was signed by Maharani Jagdamba Devi in the presence of two attesting witnesses. It is sufficient to refer to the evidence of Indra Dawan Singh (o. p. 2141), one of the attesting witnesses. This is to the effect that Maharani Jagdamba Devi signed the deed in his presence and that afterwards

he signed it. There was also other evidence of due execution. I find the evidence of execution reliable and decide that the deed was duly executed.

The second plea taken was that the adoption was invalid having been procured by undue influence. The learned trial Judge has treated this point at p. pp. 459 to 478 of his judgment. I have little to add to his remarks. It appears that Sir John Hewett, who was then Lieutenant-Governor of the Province, addressed Maharani Jagdamba Devi in a letter of 18th July 1905 (Ex. 276), in which he pointed out the advisability of her proceeding to make an adoption as provided for in the will. On 23rd July 1905 she received a deputation of seven gentlemen amongst whom were some of the leading Talukdars of Oudh. They had been sent to her by Sir John Hewett to advise her to the same effect. On 7th August 1905 she wrote a letter to Mr. Butler (as he then was)—Ex. 266. It is clear from this evidence, which is all the evidence upon which the appellant relies to support this plea, that, while she was advised to adopt a boy, no one attempted to compel her to do so, and that no one exercised any improper influence upon her. The choice of the boy to be adopted was left absolutely to her. She adopted the boy whom she wished to adopt. I agree entirely with the conclusion of the learned trial Judge upon the point and find that no undue influence or compulsion was exercised on Maharani Jagdamba Devi in the matter.

The next plea raised is that Maharani Jagdamba Devi was not the legally wedded wife of Sir Pratap Narain Singh and thus could not make a valid adoption. I propose to consider this plea only on one point. Was she the legally wedded wife of Sir Pratap Narain Singh? In the notices no suggestion was made that the lady was not the legally wedded wife of the Maharaja. In the plaint, para. 8, it was asserted that she was not a married wife and did not belong to the biradari of Sir Pratap Narain Singh. But it was not asserted that she was not a Brahmin and it was admitted that she came from Bhagalpur. The denial of marriage was apparently then based upon a suggestion that the ceremony was void, because it was performed while the Maharaja was alleged to have been in mourning. On 18th August 1915 before settlement of

issues Mr. Mitter stated on behalf of the appellant that the caste of Maharani Jagdamba Devi was not known but that she was of some low caste. The issue framed on this point is:

"Was defendant 1 legally married to and could he and she a wife of Maharaja Sir Pratap Narain Singh?"

In June 1916 at the end of the case the plaintiff examined as a commission in Mattra witnesses 5, who deposed that Maharani Jagdamba Devi was a Vaidya girl called Jhanjhan, who had been kidnapped from her father's house in Mattra in 1881 or 1885 (Maharani Jagdamba Devi was then 7 or 8 years old) on behalf of Sir Pratap Narain Singh to be entertained by him as a mistress. Such evidence of these witnesses as is relevant is a mass of impudent perjuries. In this Court the appellant has placed no dependence upon the evidence of these witnesses, but he challenged the evidence produced to prove the Maharani's marriage and repeated his plea that she was not the wife of the Maharaja. The learned trial Judge has treated the question at length at p. pp. 207 to 292 of his judgment. It will serve no useful purpose for me to go over the same ground as I agree with his conclusions. It is sufficient to note my findings. They are as follows: The evidence to the effect that Maharani Jagdamba Devi was the legitimate daughter of Raghunath Misra, a respectable Brahman gentleman of Bhagalpur whose social standing was at least as high as that of Purandar Ram, father of Darshan Singh, and whose respectability and position were considerably higher than those of the appellant and many of the other living members of Darshan Singh's and Incha Ram's families and that she was married by the rites of the Mitakshara to Sir Pratap Narain Singh, is reliable. The evidence to the contrary is unreliable. The point that Sir Pratap Narain Singh was under a disability at the time of his marriage owing to impurity due to the death of the widow of Raja Darshan Singh is treated by the learned trial Judge at p. pp. 477 to 480 of the judgment. It has been given up in argument before us. I find that Sir Pratap Narain Singh was under no disability at the time that he contracted his marriage.

I, therefore, find that Maharani Jagdamba Devi was the legally married wife

of Sir Pratap Narain Singh and that she was a *libiradari*. The 4th plea is that Maharani Jagdamba Devi forfeited all rights owing to her unchastity before and after the death of Sir Pratap Narain Singh. It is only necessary for my purposes to arrive at a finding on the point of unchastity. With regard to the allegations of unchastity during her husband's lifetime, we have not only the evidence to which I have previously referred of Sir Hercourt Butler, the Raja of Muhmadabad, and Thakur Harihar Bakhsh Singh, but also the evidence of D. W. 78, Sir Prodyot Kumar Tagore. This evidence shows that up to the time of his death the late Maharaja Sir Pratap Narain Singh referred to Maharani Jagdamba Devi in the presence of gentleman of absolute credibility in terms of the sincerest love and trust. In view of this evidence it is astonishing to find that Mr. Mitter persisted in the Court of the trial Judge in arguing strenuously in favour of the credibility of the witnesses who supported the following story. This story was that Maharani Jagdamba Devi, commencing at the age of 12 or 13, carried on during her husband's life with his knowledge a series of adulterous intrigues with seven different men.

She is charged with adultery with Adika Nath, Lakhpat Rai, Rai Ragho Prasad, Mahadeo, Kunj Lal, Narsingh Nath, and Gajadhar Nath. Witnesses were called who deposed that the Maharaja discovering the facts thrashed Adika Nath, Lakhpat Rai, Mahadeo, and Narsingh Nath, and killed Rai Ragho Prasad, thrashing the Maharani on every occasion. Witnesses deposed that the Maharaja was aware of his wife's adultery with the two remaining men. The witnesses who supported these allegations were the scum of the bazar, dismissed servants, or partisans of the appellant. I need not discuss their evidence. The learned trial Judge has discussed it sufficiently at o. pp. 297 to 331 of the judgment. He has not touched therein on the allegations of misconduct with Narsingh Nath and Gajadhar Nath, as I understand, Mr. Mitter withdrew the allegations against these persons during his argument. In this Court the counsel, being better advised than Mr. Mitter, withdrew all allegations of misconduct in the Maharaja's lifetime. The witnesses who deposed in favour of these allegations

are, of course absolutely unworthy of belief.

The appellant, however, maintained the allegation that Maharani Jagdamba Devi was unchaste with a certain Jagannath Das, otherwise known as Ratnakar, after her husband's death. This man was the Maharaja's private secretary and continued to perform the same duties for the Maharani after her husband's death. The evidence in support of this charge is that of P. W. 13 Ram Harakh, P. W. 161 Baijnath Dube, P. W. 159, Dr. Mohini, Mohan Chatterji, P. W. 131, Mt. Brijraj, P. W. 141, Pataadin, P. W. 142, Baidia Naith, P. W. 134, Mt. Bhuri, P. W. 24 Nagmani, P. W. 113, Mt. Mohan Dei, P. W. 144, Kamta Dat, P. W. 118, Gudar, P. W. 2 Rudra Nath, and P. W. 29 Amiruddin. Ram Harakh, the first of these witnesses, is a member of the family of the Incha Ram branch. He used to be employed in a subordinate capacity in the estate but was dismissed for dishonesty. He has been criminally convicted of cheating, and has been declared insolvent. He produced two documents which he alleged he obtained clandestinely from a servant of the Maharani. These, he alleges, support the story that he tells to the effect that Jagannath Das was the Maharani's lover. He says that he surprised them together. The learned trial Judge finds at o. pp. 332 to 341 of the judgment that the witness is not telling the truth. I agree with the learned trial Judge. I find that it is not proved that the documents in question (Exs. 61 and 62) were written by Maharani Jagdamba Devi.

Baijnath Dube deposed that in 1915 (six years after the adoption) he saw the Maharani and Jagannath Das travelling from Kathgudam to Naini Tal in the same tonga. Even if this were true it would not help to prove unchastity before 1909, and the incident in itself would prove nothing. Indian ladies travel by tonga without loss of self-respect or propriety. The driver must necessarily be in the tonga also. If a male attendant sits with the driver and a *parda* be placed between the driver and the lady with another *parda* over the lady no breach of propriety arises. There is nothing, however, to show that Baijnath Dube can be trusted. The learned trial Judge finds his evidence unreliable on the point—o. pp. 363 to 365 of the judgment. I

agree. I have already noted the value of the evidence of Dr. Mohini Mohan Chatterji in connexion with another incident. His evidence on the point under consideration is in my opinion absolutely false. He deposed that he attended the lady medically in the rains of 1907 and that he remained on one side of the parda while she remained on the other. He deposed that Jagannath Das went behind the parda with the Maharani and that he heard them laughing and talking in a familiar and improper manner. The witness showed his bias by a suggestion (most improper in a medical man) as to the cause of an alleged illness of Maharani Jagdamba Devi. I consider him quite unworthy of credit. I have nothing to add to the remarks of the learned trial Judge on the evidence of Mr. (Kishan) Patandri, Raddia Nath, Mr. (Bhai) Nagmani, Mr. Mohan Das, Ram Das, and Gudar, at p. pp. 344 to 362 of the judgment.

The above witnesses are so palpably false that further comment is unnecessary. P. W. Rudra Nath is a member of the Raghunath Dayal branch. He deposed that Maharani Jagdamba Devi had been put out of caste. This statement is disproved by a mass of other evidence and is absolutely untrue. P. W. 29 Amiruddin is a retired Sub-Inspector. He deposed that a certain Preonath, now Police Inspector, was ordered to make an inquiry into the chastity of Maharani Jagdamba Devi. If this were true the fact would prove nothing. Inspector Preonath D. W. G. has, however, denied that he was ever ordered to make such inquiry. I believe Inspector Preonath and disbelieve Amiruddin on the point. The appellant further laid stress on immaterial facts such as removal of certain old servants on the death of Pratap Narain Singh and their replacement by others, which he contended showed an immoral disposition on the part of Maharani Jagdamba Devi. This closes the evidence on the point. Only one conclusion is possible upon it, and that is the conclusion at which the learned trial Judge arrived, to the effect that the charge of unchastity against Maharani Jagdamba Devi after her husband's death is not established. I agree with that conclusion. I consider it necessary to add some comments on the manner in which Maharani Jagdamba Devi has been treated in this case. Upon the evidence

the only findings at which a Court can arrive are that Maharani Jagdamba Devi is a Brahman lady of good family who was married to a nobleman of Oudh and lived with him honourably as his wife for some seventeen years. After his death she has conducted her life and her affairs with propriety and decorum. It is a scandal that she should have been exposed to the capricious and unfounded charges which have been levelled against her in this case. She has been stigmatised as a kept woman and accused of shameless depravity both before and after Sir Pratap Narain Singh's death, and these charges have been based on palpably fabricated evidence.

The appellant set up the plea that Duddi Hiran Nath Singh was purchased from his natural father Adika Nath. He argued that the adoption was invalid for this reason, apart from the fact that there is no authority in Hindu law for the proposition that an adoption is vitiated by the payment of a price for an adopted son, there is no evidence that a price was paid. The decision in *Eshan Kishore Acharjee Chowdhury v. Hrishik Chauder Choudhury* (16) is relied on by the appellant, as showing that the adoption of a son after payment of price is not recognised in the present day. An opinion to that effect was given by the Judges who decided that case. But the point was only incidentally before them and the opinion was based on no authority. The view of the law which I accept is stated in a comparatively recent decision of the Madras High Court in *Murugappa Chetti v. Nagappa Chetti* (17). It is as follows:

"The receipt of money by the natural father in consideration of giving his son and the payment of such by the adoptive father, though illegal and opposed to public policy, do not make the adoption invalid, as the gift and acceptance of the boy is a distinct transaction clearly separable from the illegal agreement and payment."

Thus even if the appellant had proved that a price had been paid he would not have succeeded on the point. He has, however, completely failed to prove the allegation. It is in evidence that when the ceremony of adoption was performed, clothes and jewels were purchased by the estate for presentation not only to Adika Nath but also to other members of the family, and that the unexpended balance of the grant devoted to this purpose was

16 (1874) 21 W R 381.

17 (1906) 29 Mad 161.

subsequently presented to Adika Nath. But this evidence does not show that Adika Nath sold his son or accepted a price in consideration of giving his son in adoption. My finding is, therefore, that Dukh Haran Nath Singh was not purchased from his natural father. The next plea was that Adika Nath was out of caste at the time of the adoption, that this fact placed Dukh Haran Nath Singh out of caste, and that the adoption was invalid. The learned trial Judge has discussed the evidence and stated his finding on this point at o. pp. 299 to 312 of the judgment. I agree with his view of the evidence and findings, and decide that Adika Nath was never put out of caste. The next plea was that the adoption could not be legal, because under the Mitakshara law the male for whom the son was adopted (here Sir Pratap Narain Singh) must have been in a legal position to have married the natural mother of the adopted boy. On the view of the evidence which I take Adika Nath the natural father of the adopted boy belonged to the Girg gotra. Mt. Chandra Kali, the boy's natural mother, originally belonged to the Mahris gotra and passed into the Girg gotra on her marriage, and Sir Pratap Narain Singh belonged to the Bharadwaj gotra. But there would have been nothing in the point, even had Sir Pratap Narain Singh and Mt. Chandra Kali belonged to the same gotra as a marriage in the same gotra is not illegal amongst Sakaldipi Brahmans, I decide against this plea.

The plea that the legal forms of adoption not having been followed the adoption was necessarily invalid, was abandoned in this Court. On the evidence the legal forms of adoption were clearly followed. As I have decided on the question of the interpretation of the will, Maharani Jagdamba Devi had legal authority under the terms of the will to perform the adoption which she actually performed. The suggestion that Maharani Suraj Kumari had forfeited her rights under the will or intestate succession owing to misconduct was abandoned in this Court. The evidence to the effect that the unfortunate estrangement between this lady and her husband was due to her misconduct is discussed at o. pp. 493 to 495 of the judgment. I agree with the conclusions of the learned trial Judge on the point. Maharani Suraj Kumari was married

nearly fifty years ago and is now an old lady. She and Maharani Jagdamba Devi are entitled to the fullest sympathy as the victims of unprovoked and absolutely unfounded charges. The question of limitation can hardly arise on the previous findings. The learned Judge's decision on the point is correct. Their remains the question of costs. Separate Counsel appeared for Maharani Suraj Kumari, Maharani Jagdamba Devi and for the adopted boy, who was represented by the Deputy Commissioner of Fyzabad. The learned trial Judge allowed costs in respect of Counsel's fees to each separately. This was quite correct on principle as each had a separate interest in the proceedings. But the learned trial Judge overlooked the provisions of para. 272, Oudh Civil Digest. Under the provisions of this paragraph no fee to any legal practitioner not appearing for the Crown or Government or the Court of Wards or a local authority as a party shall be allowed on taxation between party and party or shall be included in any decree or order except in the case of an order under para 66, unless in suits and other original proceedings before the commencement of the arguments. . . . there shall have been filed in Court a certificate signed by the legal practitioner certifying the amount of the fee or fees actually paid to him for his own exclusive use and benefit by or on behalf of his client.

Neither the Counsel for Maharani Suraj Kumari nor Maharani Jagdamba Devi filed certificates until after arguments in the lower Court had commenced. These parties were appearing as independent parties. The minor was represented by the Court of Wards. The rule is in my opinion needlessly inelastic, but it must be applied as it stands. As, however, the appellant omitted to make Maharani Suraj Kumari a respondent in this suit, this technical plea against her fails on a technical ground. The order as to costs must, however, be modified by deleting the amount of Rs. 3,000 payable by the appellant in respect of the Counsel's fee of Maharani Suraj Kumari. I wish to put on record my appreciation of the care and ability which distinguished the work of the learned trial Judge throughout these lengthy proceedings. Most of the evidence adduced by the appellant was false. Much was irrelevant. The conduct of the plaintiff's case in the lower

Court was not to the credit of those responsible for it, and the patience of the learned Judge was tried to the utmost. He has in addition written an excellent and well reasoned judgment. It has been suggested in appeal that the criticisms which he has made on some of the witnesses are unnecessarily severe. This suggestion is not established. The learned trial Judge has on the contrary been moderate in his strictures. I now decide formally on the grounds of appeal.

1. The first ground is general. The appeal fails as a whole. 2. The second ground is partly general. No argument was directed in this Court to admission of inadmissible evidence on the side of the defendants. In so far as the argument was directed to this Court to refusal to admit evidence on the side of the plaintiff decision will be final on other grounds. 3. The learned trial Judge rightly refused to issue process for the production of the marginal notes on Exs. 74 and 75, and to allow secondary evidence as to their contents. 4. The learned trial Judge rightly decided the question of limitation. 5. The plaintiff is the nearest male agnate to the late Sir Man Singh. But the point is immaterial. 6. Sir Pratap Narain Singh was not the putrika putra of Sir Man Singh. 7. The practice of appointing a daughter's son to bear a son to a Hindu is permitted by the Mitakshara and is enforceable. 8. The evidence contained in the previous litigations concerning the Raj and in the admissions, statements, and conduct of Sir Pratap Narain Singh and his parents has been correctly appreciated by the learned trial Judge. 9. The evidence as to the statement of Narsingh Narain Singh before Mr. Harrington has now been admitted. 10. Sir Pratap Narain Singh remained in the Bharadwaj gotra all his life. 11. The terms of the will of Sir Man Singh have been considered by the learned trial Judge. 12. The treatment of Pratap Narain Singh by Sir Man Singh does not establish that the former was a putrika-putra of the latter. 13. The ground is irrelevant and was not pressed in argument. The property was acquired by Bakhtawar Singh who devised it to Man Singh. There was no joint acquisition. 14. The learned trial Judge did not arrive at an incorrect decision on the inferences to be deduced from the use of

the word "sister" in the plaint in question. 15. The plea is immaterial. The question has been decided by me irrespective of the evidence adduced by the defendant's documents in question. 16. The contention gives the appellant no point. 17. The evidence as to the performance of the ceremony of putrikarana is false. The evidence taken on a wide area does not establish that any such ceremony was performed. 18. Due weight has been attached to the opinion of members of Sir Man Singh's family and other persons as to their treatment of Sir Pratap Narain Singh. 19. I have decided this point against the appellants. 20. This plea is once immaterial. My decision has preceded on this point. 21. The defendants are not estopped from showing that Sir Pratap Narain Singh belonged to the Bharadwaj gotra. 22. The evidence establishes that Maharani Jagdamba Devi was the legally married and lawful wife of Sir Pratap Narain Singh.

The point as to invalidity owing to the alleged impurity of Pratap Narain Singh at the time of marriage was dropped in argument. 23. The gotra of Sir Pratap Narain Singh has been decided by the learned trial Judge and by me. 24. The appellant has not proved any act of unchastity on the part of Maharani Suraj Kumari or Maharani Jagdamba Devi. Exs. 61 and 62 are not proved to have been written by Maharani Jagdamba Devi and are on the face of them forgeries. 25. This plea was not argued. The evidence in question was admissible. 26. Ram Harakh and Dr. Mohini Mohan Chatterji are unreliable witnesses. 27. It is not proved that the will of 17th July 1891 was revoked. 28. It is not proved that a will was executed on 14th July 1891. It is not proved that the execution of the will of 17th July 1891 was obtained by undue influence. 29. The adoption of Dukh Haran Nath Singh is valid in law. 30. This plea was abandoned before this Court. 31. As it is not proved that Maharani Jagdamba Devi was unchaste, the plea is bad. 32. It is not proved that Dugh Haran Nath Singh was purchased from Adika Nath. The plea is bad in any case. 33. As neither Maharani Jagdamba Devi nor Dukh Haran Nath Singh were out of caste, the plea is bad. 34. This plea has been decided under grounds Nos. 27 and 28.

35. I decide against the appellant on this point. 36. The adoption of Dukh Haran Nath Singh was not caused by undue influence exercised on Maharani Jagdamba Devi. 37. I decide against the appellant on this point. 38 and 39. The points are immaterial on my finding that the appellant had no title to sue. 40. The statement in question is proved. My decision has not proceeded on it. 41. The general conclusions of the learned trial Judge as to the falsity of the evidence and the fabrication of documents are correct. 42. This point was abandoned in argument. 43. The amount of costs must be reduced by Rs. 3,300, the amount awarded as Counsel's fee to Maharani Suraj Kumari.

I have discussed the pleas raised in grounds Nos. 3, 4, 6, 8, 10, 12, 14, 16, 17, 18, 19, 21, 22, 23, 24, 26, 27, 28, 29, 31, 32, 33, 35, 36, 37, 38, 39, and 43, at length in the body of my judgment. I would therefore dismiss this appeal and direct that the appellant pay his own costs of the appeal and those of the respondents. I uphold the decision of the learned trial Judge on all points in issue, but direct that the order for costs be modified by reduction of Rs. 3,000, the amount awarded as Counsel's fee to Maharani Suraj Kumari.

Kanhaiya Lal, A. J. C.—The dispute in this case relates to what is known as the Ajudhia estate, belonging to the late Maharaja Sir Pratap Narain Singh. The estate was founded by Raja Bakhtawar Singh and was bequeathed by him to his nephew and adopted son Maharaja Man Singh. Maharaja Man Singh was also given certain villages by the British Government for services rendered by him during the Mutiny of 1857. In 1859 a sanad in the ordinary form was granted to him in respect of Mahdauna, Bahrauli, Ahlar and Tulshipur properties, and later on a primogeniture sanad was granted to him in respect of the Bishambharpur property, now forming part of the Ajudhia estate. His name was entered at No. 219 List 1, No. 54 in List 2 and No. 36 in List 5, appended to Act I of 1869. Maharaja Man Singh died on the 11th October 1870, leaving a widow, Maharani Subhao Kaur, a daughter by a predeceased wife Mt. Brijraj Kuar, better known as Bachchi Sahiba, and a grandson by that daughter named Maharaja Pratap Narain Singh alias Dadua Sahib. After the death of Maharaja Man Singh, Maharani Subhao Kaur nominated Triloki

Nath, a nephew of the Maharaja, as his successor to the estate after her death. Maharaja Pratap Narain Singh contested the right of Maharani Subhao Kaur and her nominee to succeed to the estate, on the ground that he was adopted by Maharaja Man Singh and was brought up and treated in all respects as a son within the meaning of S. 22, Cl. 4, Act I of 1869. The plea as to adoption was subsequently given up, and he eventually succeeded in establishing his title to the estate under S. 22, Cl. 4 Act I of 1869, and got a decree from the Privy Council on 19th July 1877.

Maharaja Sir Pratap Narain Singh died on 9th November 1906 without issue. He left, according to the defendants, two widows Maharani Suraj Kumari, known as the senior Maharani, and Maharani Jagdamba Devi, known as the junior Maharani. The marriage of the latter with the Maharaja is denied by the plaintiff. On 17th July 1891 he had executed and registered a will, by which he had disinherited the senior Maharani, giving her only a maintenance allowance of Rs. 600 per mensem and bequeathed a life interest in his estate to the junior Maharani, giving her also a power to adopt a boy from his paternal or maternal family. The will further provided that the boy, so adopted by her was to be the successor and absolute owner of the estate after her death, as contemplated by Cl. 8, S. 22, Act I of 1869. On 12th February 1909, Raja Jagdambika Pratap Narain Singh was, it is stated, adopted by the junior Maharani.

The plaintiff asserts that the will of 17th July 1891 was revoked by Maharaja Sir Pratap Narain Singh in his lifetime and that in consequence of that revocation and for other reasons the said adoption, if made, was invalid. He further asserts that both the senior and junior Maharanis forfeited any rights they had in the estate by unchastity, existing from the lifetime of the Maharaja, and that on his death the estate devolved, according to the family custom of primogeniture as also according to the sanad and law, on his father Lal Kashi Nath Singh, who represented the senior line among the agnates of Maharaja Man Singh. Lal Kashi Nath Singh died before the institution of the suit, leaving the plaintiff his sole heir. The ground

on which he seeks to divert the estate from the real or natural agnates of Maharaja Sir Pratap Narain Singh is that the Maharaja was the putrika-putra of Maharaja Man Singh and was brought up in all respects as his own son. The defendants denied the allegations of unchastity made in the plaint and the right of the plaintiff to claim the estate. They controverted the suggestion that Maharaja Sir Pratap Narain Singh had revoked his will of 17th July 1891 or that he was the putrika-putra of Maharaja Man Singh, and asserted that the junior Maharani was the lawfully married wife of Maharaja Sir Pratap Narain Singh and that the adoption made by her was in every respect valid in law. The learned Additional Judge found on almost every point against the plaintiff. He held that Maharaja Sir Pratap Narain Singh was not the putrika-putra of Maharaja Man Singh, that the plaintiff had no right of suit, that the junior Maharani was lawfully married to the Maharaja and that the will executed by the Maharaja in her favour was never revoked. He repelled the various contentions urged against the validity of the adoption.

The first question raised for consideration in this appeal is, whether Maharaja Sir Pratap Narain Singh was the putrika-putra of Maharaja Man Singh and if not, whether the plaintiff has otherwise any right to sue. According to the Hindu law a son affiliated in the putrika-putra form is a valid substitute for a son. This may be done by the special appointment of a daughter to be a son, as if she were a son, or by a special arrangement by the father of the girl with her prospective husband that the son who may be born of her shall be his son. Manu says (9, 127) that he who has no son may make his daughter an appointed daughter by saying "the son born of her shall perform my funeral rites." The son of an appointed daughter, according to him (Manu, 9, 133), takes the whole estate of his maternal grandfather, as if he were his son's son, for:

"between a son's son and the son of an (appointed) daughter there is no difference either with respect to worldly matters or sacred duties, inasmuch as their father and mother (respectively) sprang from the body of the same (man)."

Vashishtha says (17, 16, 17.):

"It is declared in the Veda, 'A maiden who has no brothers comes back to the male ancestors (of her own family); returning, she becomes their

son;' with reference to this the verse is, 'I shall give thee a brotherless damsel decked with ornaments; the son whom she may bear shall be my son.'"

Baudhayana (II, 2, 3, 15), similarly says:

"(The male child) born of a daughter after an agreement had been made is a putrika-putra, otherwise he is a daughter's son."

Gautama (28, 18), also declares:

"A father who has no (male) issue may appoint his daughter, presenting burnt offerings to fire and the lord of creatures, and addressing (the bride-groom): 'For me be (thy male) offspring.'"

He then proceeds to say (28, 19):

"Some declare that a daughter becomes an appointed daughter solely by the intention (of the father)."

Both Vrihaspati and (25, 38) Vishnu (15, 6), seem to consider that a daughter can be appointed to bear a son to her father even otherwise than by an express declaration. Yagnyavalkya (2, 125), declares the son of a putrika-putra (appointed daughter, to be equal to a son, and commenting on that text, the author of the Mitakshara observes:

"The son of an appointed daughter (putrika-putra) is equal to him; that is, equal to the legitimate son. The term signifies son of a daughter. Accordingly he is equal to the legitimate son; as described by Vashishtha, 'This damsel, who has no brother, I will give unto thee, decked with ornaments; the son who may be born of her shall be my son.' Or that term may signify a daughter becoming by special appointment a son. Still she is only similar to a legitimate son, for she derives more from the mother than from the father. Accordingly she is mentioned by Vashishtha as a son, but as third in rank: 'The appointed daughter is considered to be the third description of sons.'"

(Mitakshara, Ch. 1. S. 11, Para. 3). Hemadri enlarges on the same subject, his views as summarized by Colebrook, being:

"The putrika-putra is of four descriptions. The first is the daughter appointed to be a son. She is so by a stipulation to that effect. The next is her son. He obtains of course the name of 'son of an appointed daughter,' without any compact. This distinction, however, occurs: he is not in place of a son, but in place of a son's son, and is a daughter's son. Accordingly he is described as a daughter's son in the text of San-kha and Likhita: 'An appointed daughter is like unto a son; as Prachetasa has declared: her offspring is termed son of an appointed daughter; he offers funeral oblations to the maternal grandfathers and to the paternal grandsires. There is no difference between a son's son and a daughter's son, in respect of benefits conferred?' The third description of son of an appointed daughter is the child born of a daughter, who was given in marriage with an express stipulation in this form: 'The child, who shall be born of her, shall be mine for the purpose of performing my obsequies.' He appertains to his maternal grand-

father as an adopted son. The fourth is a child born of a daughter who was given in marriage with a stipulation in this form: "The child, who shall be born of her, shall perform the obsequies of both." He belongs, as a son, both to his natural grandfather and to his maternal grandfather. But in the case where she was in thought selected for an appointed daughter, she is so without a compact, and merely by an act of the mind." (Ghosa's Hindu Law, Vol. 2, p. 131.)"

"The appointment of a daughter,"

"observe West and Buhler, "appears to have been conceived in two ways. According to the one, the appointed daughter herself took the place of a son, and then her son naturally succeeded her by representation. She was given for inheritance the place of a male, a place as a source of further succession, such as the Vyavahara Mayukha assigns her in the devolution of property not included amongst the special varieties of Stridhana. According to the other conception she was merely the instrument by which an heir to her father could be produced in the person of her son. (West and Buhler's Hindu Law, Edn. 3, Vol. 2, p. 288).

It is not alleged or shown in this case that Mt. Brijraj Kuar was appointed to be a son, so that she might be treated as a son and her son treated as a son's son within the meaning of the first two descriptions. What is asserted is, that there was an express stipulation at the time of her marriage with Narsingh Narain Singh that a son born of her shall belong to her father, as if he were his own son. The evidence on this point consists of the statements of a few witnesses who profess to have been present at the time of the marriage of Mt. Brijraj Kuar with Narsingh Narain Singh or at the time when the marriage was negotiated by Maharaja Man Singh with Narsingh Narain Singh and his father. The learned Additional Judge has disbelieved the evidence adduced on the point and has given satisfactory reasons for discrediting it. Genesh (P. W. 2), the first witness on this point, describes himself as 87 years old and asserts that he and his father were in the service of Maharaja Man Singh, who deputed his father and two others to search a good bridegroom for Mt. Brijraj Kuar who might be willing to stay at the house of the Maharaja after his marriage and to agree that the first son born of such marriage would be the son of the Maharaja. He goes on to say that his father and the other two persons brought Narsingh Narain Singh and his father and the latter accepted the terms of the Maharaja in his presence.

According to his own statement he entered the service of Maharaja Man Singh at the age of 12 or 13 years after the death of his uncle Beni Singh, which occurred 60 years ago. If that statement be accepted, his age at the time of the marriage of Mt. Brijraj Kuar which took place in 1851 could not be more than 7 or 8 years. He asserts that Raja Bakhtwar Singh was dead when the marriage of Mt. Brijraj Kuar was settled, but he is contradicted on that point by Bandhan (P. W. 77), another witness of the plaintiff. He was dismissed by the Court of Wards a month or two after the death of Maharaja Man Singh, and both from his position as the jamadar of the doorkeepers and his age at the time of the marriage of Mt. Brijraj Kuar, the story of his having been present at the time of the alleged conversation or of his having remembered it is extremely improbable.

Bindeshari (P. W. 88) states that he was present at the time of the marriage of Mt. Brijraj Kuar and that Maharaja Man Singh had made an understanding with Narsingh Narain Singh and his father that the first born son of the lady would be the son of the Maharaja. He has made misstatements however about various contemporary events. He says that the mother of Mt. Brijraj Kuar was alive at the time of her marriage, though it is an admitted fact that she had died in 1844. He asserts that his uncle, Rameshurdatt, was the priest of Maharaja Man Singh and had officiated at the marriage, but he admits that Rameshurdatt died 18 or 19 years ago and was 30, 35 or 40 years old at the time of his death, showing thereby that he could not have been alive in 1851. It is admitted by the witness for the plaintiff that a daughter was born to Maharaja Man Singh in the very year in which Mt. Brijraj Kuar was married. His wife Maharani Subhao Kuar was then 19 years old and the age of Maharaja Man Singh was 31 years. It is hardly likely that at that age either Maharaja Man Singh or his wife could have so much despaired of having a male issue as to enter into a special arrangement with Narsingh Narain Singh and his father at the time of the marriage of Mt. Brijraj Kuar to take her first born son from them. The explanation given by Bandhan, P. W. 77, for that arrangement is that after the death of the

daughter born of Maharani Subhao Kuar, Maharaja Man Singh told his uncle Bakhtawar Singh that he had expected a son to continue his line but was disappointed.

He asked him as to the course he should adopt, and it is suggested that Raja Bakhtawar Singh sent for the horoscope of Maharaja Man Singh and consulted several astrologers, who declared that Maharaja Man Singh would have no son, that Maharaja Man Singh then asked his permission to celebrate the marriage of Mt. Brijraj Kuar and to take the son born of her as his son and that Raja Bakhtawar Singh consented to the arrangement. Bindhan is the only witness who has been produced to support this story. He is a professional beggar, addicted to ganja and bhanga and other intoxicating drugs, and his statement is not entitled to any weight. Brij Lal (P. W. 27) has come forward to state that he was present at the marriage of Mt. Brijraj Kuar, and that at the time of *pargahana* or the gift of the daughter the *sankalp* was made in the *putrika putra* form. He however admits that he was not at the place where the marriage ceremony was celebrated, and that the *bedi* or the sacred fire, before which Hindu marriages are consecrated, was inside the *parda*, while he was outside it. His statement that he was 32 or 33 years old when the marriage took place is contradicted by his subsequent assertion that he was 20 or 25 years old at the time of the marriage of Dadue Sahab, which took place in 1868. The manner in which he came forward to give evidence is also significant, for he states that about a month prior to his giving evidence, the plaintiff had met him and told him he should come when he was called, though he professes to have had no conversation with the plaintiff as to what he knew.

Mahipat Singh (P. W. 98) similarly states that he was present at the time of the marriage of Mt. Brijraj Kuar and that he learnt from the priests officiating at the ceremony that Maharaja Man Singh had made a *sankalp* at the time of the marriage that the son born of her would be his son and would come into his got. One of the three priests, from whom he heard, is stated to have died, but it does not appear whether the other two are dead or alive. There was no occasion for the priests to have given the above in-

formation to Mahipat Singh who was then a sepoy in the service of Maharaja Man Singh, aged 18 years. He mentions a conversation between Lachhman Pandit and Bhawani Singh, but Lachhman Pandit is not described by Brij Lal (P. W. 95) as one of the priests who officiated at the marriage of Mt. Brijraj Kuar.

The other evidence adduced in the case consists of the statements, said to have been made to the witnesses either by Maharaja Man Singh or his officials or by their relations, who are described as dead. The learned Additional Judge has discussed their evidence in detail and without repeating what he has said, it might safely be asserted that much of it is concocted and such of it as relates to the statements alleged to have been made by persons deceased is not entitled to any weight. On behalf of the plaintiff reliance is next placed on the plaint in the previous suit (Ex. 1) filed by Maharaja Sir Pratap Narain Singh, in which Mt. Brijraj Kuar, acting as the guardian of the Maharaja, had described herself as the sister of the Maharaja instead of his mother. In the instructions given by Narsingh Narain Singh to Mr. Harrington, the officer in charge of the Court of Wards (Ex. 19), it was mentioned by the former that Maharaja Sir Pratap Narain Singh was the *putrika putra* of Maharaja Man Singh, but that statement was made after a contest had arisen in regard to the estate of Maharaja Man Singh and, even if admitted in evidence, is not entitled to any greater weight than as a statement of an interested party. The statement made by Maharaja Sir Pratap Narain Singh in one of the previous suits on 5th January 1881 (Ex. 34) is open to a similar objection. In that statement he asserted that he belonged to the Girg gotra at the time of his marriage and that he was married as the son of Maharaja Man Singh, but he admitted that he was not in a position to know whether he was his adopted son or only his daughter's son. In the first suit brought on 21st November 1872, the estate was claimed by Maharaja Sir Pratap Narain Singh against Maharani Subhao Kuar and her nominee, Triloki Nath Singh, who were in possession. In the second suit which was filed on 3rd June 1879, the estate was claimed by Triloki Nath Singh under the will of Maharaja Man Singh and was a nominee of his widow.

In the third suit which was filed on 15th August 1882 a similar title was set up. The estate has thus been under litigation since 1872, and any statements made during the pendency of those suits or in connexion with them or by way of a preparation for launching them cannot, therefore, be considered to be of any value. It is next contended on behalf of the plaintiff that even if there was no evidence to prove a marriage in the putrika-putra form, a presumption should be made in favour of such a marriage from the conduct of Maharaja Man Singh and that of Maharaja Sir Pratap Narain Singh and the treatment meted out by the former to the latter. There is a considerable amount of evidence showing that Mt. Brijraj Kuar and Maharaja Sir Pratap Narain Singh lived with Maharaja Man Singh, that Maharaja Sir Pratap Narain Singh was born in his house and was brought up by him from his infancy and that the ceremony of investing him with the sacred cord and his marriage were performed by Maharaja Man Singh, as if he had been his own son. There is also considerable evidence to show that Maharaja Sir Pratap Narain Singh treated himself as belonging to the Girg gotra, that is, to the gotra of Maharaja Man Singh, that he worshipped the family gods of the Maharaja and observed mourning and impurity on the occasion of the death of the Maharaja's paternal kinsmen and acted and behaved throughout as if he was the son of Maharaja Man Singh. Maharaja Man Singh in turn treated him as such and got Cl. 4 inserted in S. 22, Act 1 of 1869 when it was on the legislative anvil, giving to the son of a daughter "treated in all respects as a son" a statutory position much higher than that of an ordinary son of a daughter. In *Maharaja Pratap Narain Singh v. Maharanee Subhao Koor* (1) their Lordships of the Privy Council said :

"So matters stood when the Maharaja, as one of the leading members of the British Indian Association of Talukdars, went down to Calcutta in order to take part in the discussions and negotiations which resulted in the passing of Act 1 of 1869. This must have been in the latter half of 1868. Imtiaz Ali, the vakil concerned in the drafting and preparation of this Act on the part of the Talukdars, has sworn that Cl. 4, of S. 22, originated with the Maharaja; that it was opposed by some of the Talukdars, but finally approved of by the Select Committee of the Governor-General's Legislative Council on the Bill, and passed into law. He also says that he was told by the

Maharaja that his object in pressing this clause was to provide for the Dadwa Sahib."

They then went on to refer to the contradictory evidence adduced on the point on behalf of the other defendants and observed:

"The scale, however, is conclusively turned in favour of the testimony of Imtiaz Ali on this point by the evidence of Mr. Carnegie. Mr. Carnegie, whatever may be the effect of his evidence upon the questions of revocation, which will be hereafter considered, cannot, their Lordships think, be disbelieved as to the fact that a conversation did take place between him and the Maharaja in January 1870, and that in the course of that conversation the Maharaja did make a statement to the effect that he had had a clause inserted in Act 1 of 1869 to suit the identical case of the Dadwa. That statement is very material inasmuch as it shows that the Maharaja considered that he had treated his grandson in all respects as a son. The Deputy Commissioner (Mr. King), speaking possibly in some measure from personal knowledge, says: 'It is not saying too much, the Court believes, to say that if the plaintiff had not existed the clause as it stands would never have been enacted.' Their Lordships, weighing the evidence in the cause, and proceeding on that alone, would come to the same conclusion. It appears, then, to their Lordships that, however uncertain it may be when the notion of making the Dadwa Sahib his successor was first conceived, or when that notion first became a fixed intention, it is established that the Maharaja had that intention as early as the date of the Dadwa Sahib's marriage; that, with that intention, he continually treated his grandson in fact as the son of the house would be treated, and not as a mere grandson by a daughter; and that in order to effectuate his intention by operation of law, rather than by will, he caused the clause in question to be inserted in the Statute."

The question then arises whether from the state of his mind, as indicated by his conduct, and the subsequent treatment, accorded by him, an inference can be drawn that he intended that the son of Mt. Brijraj Kuar was to be his putrika-putra in case no male issue was to be born to him by his wedded wife. There are indications, afforded by the Vedas, that in the earliest times a putrika-putra was constituted by the daughter being merely accorded the position of a son in the family, for a "brotherless female" was described as coming back to her father's family (Ghose's Hindu Law, Edn. 3, Vol. 1, pp. 105 and 107). Manu says:

"Through that son whom (a daughter), either not appointed or appointed, may bear to (a husband) of equal (caste), his maternal grandfather (has) a son's son; he shall present the funeral cake and take the estate."

(Sacred Books of the East, Vol. 25, p. 354), Gautama similarly says:

"Some declare that (a daughter becomes) an appointed daughter solely by the intention (of the father)."

(Ibid. Vol. 2, p. 301). So also Vishnu: "A dimsel who has no brother is also (in every case considered) an appointed daughter, though she has not been given away according to the rule of an appointed daughter."

(Ibid., Vol. 7, p. 62). Other writers, however, took up a more stringent position as to the method in which a putrika-putra was to be constituted. Vrihaspathi gives currency to both the views prevalent in his time and says:

"Gautama has declared that a daughter is appointed after performing a sacrifice to Agni and Prajapati, others have said that she is an appointed daughter (putrika) who was merely supposed to be one by a man having no male issue."

(Ibid., Vol. 33, p. 376). The author of the *Viramitrodaya* observes:

"That a son born of a daughter who is given in marriage without such express declaration may be the putrika-putra is ascertained in the following passage of the *Mitakshara* to the words of Schara: The epithet *viramitrodaya* has been used to prevent the apprehension of the bride's appointment; to this it avers that a daughter may be appointed, though not declared to be so (Sarkar's *Viramitrodaya*, p. 137)."

A mental declaration has thus been accounted by many writers as one of the recognised methods of appointing a daughter and of constituting her son a putrika-putra. The case with which a son could be obtained by adoption has had the effect in course of time of rendering affiliation in the form of putrika-putra more or less uncommon, but it has by no means become obsolete, for the *Mitakshara* gives the putrika-putra the second or predominant position after the legitimate son and treats him in every respect as his substitute. In fact the institution of an illatom son-in-law in vogue in Malabar (*Kumaran v. Narayanan* (5) or *khanafamad* recognised in the Punjab are but relics of the same (Roy's *Customary law*, p. 508, and *Fateh Ali v. Muhammad Hayat* (18)), and effect cannot legitimately be refused to an affiliation in the putrika-putra form, if it is male (Ghose's *Hindu law*, Vol. 1, Edn. 3, p. 738, Sastri's *Hindu law*, Edn. 4 p. 129, Sarvadhikari's *Hindu law*, p. 252, and Sarkar's *Law of Adoption* Edn. 2, pp. 132 and 166-A). How far a mental declaration, not published or made known to others and not accompanied by conduct of an unequivocal character, can be enforced against the husband of the daughter after her marriage may well be

doubted, but in the case of Maharaja Sir Pratap Narain Singh, no such difficulty arises, because after the death of Maharaja Man Singh, his father practically set up a claim on the strength of an affiliation in some such form. In any event, the insertion at the instance of Maharaja Man Singh of a clause in S. 22, Act 1 of 1869 to give statutory recognition to an affiliation by treatment is not without its significance.

Whatever the actual position of Maharaja Sir Pratap Narain Singh may have been under the Hindu law, the statutory recognition extended by S. 22, Cl. 4, Act 1 of 1869 placed him in any case, for purposes of succession to Maharaja Man Singh and for constituting a stock of descent to his line, in the position of a son next only to a legitimate son. As the son of a daughter, his position here for Cl. 4 of S. 22 would have been relegated to Cl. 11 of that section, and it would hardly be consistent to assign to him the position of a son inferior only to a legitimate son for the purpose of obtaining succession and to assign to him the position of the son of a daughter for the purpose of giving succession to the line in which he was affiliated. If the object of the affiliation was to bring him into the stock for the purpose of succession, as if he were "in every respect" a son, that object would be defeated by assigning to him the position of a son of a daughter within the meaning of Cl. 11 of S. 22 and thus diverting the succession from the affliator's line. The son of a daughter treated by a Talukdar or grantee or his heir or legatee in all respects as his own son is described in Cl. 5 of S. 22 as the "son" of such Talukdar, and not as his daughter's son, and if he is to be regarded as a "son" of the Talukdar, the diversion of the succession on his death, if he died without issue, from the paternal line of such Talukdar to the paternal line of the natural father of such son could hardly have been intended. He cannot be treated as a son for the purpose of Cls. 4 and 5 of S. 22 and the son of a daughter for the purpose of Cl. 11. The succession to such a son in the absence of any lineal descendant should, therefore, go to the line of the person who affiliated him and treated him in all respects as a son and not to his natural line. Such a son is a creature of the Statute, and the position which the Statute assigns to him will

regulate the succession after him. The plaintiff represents the senior branch of the family, to which Maharaja Man Singh belonged, and as such he would be entitled to succeed to the estate left by Maharaja Sir Pratap Narain Singh, if the latter be supposed to have died intestate.

The will executed by Maharaja Sir Pratap Narain Singh and the adoption made by his junior widow in pursuance of the will are however insuperable obstacles in the plaintiff's way. The will was executed on 17th July 1891 and registered on 20th July 1891. The plaintiff does not any longer dispute the genuineness of that will. He asserts that it was obtained by the junior Maharani by means of undue influence and that it was subsequently revoked by the Maharaja himself. The story of undue influence, said to have been exerted by the junior Maharani, is not borne out by any reliable evidence.

The suggestion is that on hearing that the Maharaja intended to execute a will by which the Maharani was to get a fixed maintenance allowance, the junior Maharani stopped taking food until a will was executed by the Maharaja conformable to her wishes. Hakimuddin (P. W. 6) states that he was in the service of the Maharaja from 1879 to 1885 or 1886, that thereafter he did other odd works for the Maharaja at different times at Barabanki, Ajudhia and Gonda, that in July 1891 the Maharaja got him to write out a will for him and signed it, and that on the next day he found the Maharaja uneasy and learnt from him that the junior Maharani had given up food and drink since the preceding night, saying that she would not live and give up her life, if he did not leave the estate to her. Hakimuddin then goes on to say that the Maharaja asked him and two other gentlemen stated to be dead and decided in consultation with them to execute another will to put an end to the unpleasantness. The Maharaja had previously executed a will on 8th August 1877 (Ex. 19), which was duly registered, and it is unlikely that he would have executed another will in revocation of the same without getting it registered. Hakimuddin admits that he was heavily indebted to the Maharaja, a decree for arrears of rent having been obtained against him towards the end of 1884, which was several times executed, and in satisfaction thereof his property

had been sold by auction. He was declared an insolvent in 1896 or 1897.

The junior Maharani had also obtained a decree for arrears of rent against him since the death of the Maharaja. A notice of ejectment was issued against him in the year 1319 Fasli. He has about 302 bighas of land in his cultivation. He was not a likely person whose services could have been requisitioned by the Maharaja to have a will faird out by him or whom he would have consulted as to the measures to be adopted to appease the wrath of the junior Maharani. The will of 17th July 1891 makes no reference to any such prior will, and the story of an unregistered will having been executed on 14th July 1891 appears to be an entire myth. Suraj Baksh (P. W. 17) supports Hakimuddin as to a will having been read out by the latter to the Maharaja, who signed it; but he is a man who has been out of employ for some time, having been indebted to the extent of about Rs. 3,000 from 14 or 15 years and adjudicated insolvent in consequence. He professes that he was in the private service of the Maharaja in 1889, but he admits that his pay will not be found entered in the estate accounts. There is, moreover, evidence to show that the Maharaja got a will drafted in consultation with the late Mr. Conlan, Barrister-at-Law of Allahabad, and sent a copy of that draft to the Local Government either for information or for approval. On 2nd October 1890 Sir John Woodburn, the then Chief Secretary to the Local Government, returned the draft, saying that the Lieutenant-Governor had read it and that the Maharaja had done well to take the advice of a practised lawyer like Mr. Conlan (Ex. A-20).

The draft which accompanied that will has also been produced and, except in regard to disinheritance of the senior Maharani and the selection of a boy for adoption either from the paternal or maternal family, is very much similar to the will executed by the Maharaja on 17th July 1891 to which reference has already been made (Ex. A 318). Is it likely that having consulted Mr. Conlan and having obtained the approval of the Local Government to the draft prepared by him, the Maharaja would seek the counsel or assistance of a person of the character and position of Hakimuddin and get a will executed only to be revoked by a will

executed and registered more or less in accordance with the draft, which had been sent to the Local Government several months earlier? In the declaration of trust executed by the Maharaja on 23rd December 1895 (Ex. 2) and another executed by him on 12th July 1898 (Ex. 3) a reference is made to a will of the 14th July 1891. An improper advantage has evidently been taken of the mistaken date there referred to, to bolster up a will of that date. In the declarations of trust aforesaid, the Maharaja stated that he had previously expressed a desire by a will for the dedication of some property to religious purposes but the alleged will of 14th July 1891, a summary of which has been given by Hakimudin (P. W. 6), contained, so far as the version of Hakimudin went, no reference to any such declaration of intention; whereas the will of 17th July 1891, which had been laid out a day earlier and bore 16th July 1891 as the date of its execution, and the draft sent to the Local Government prior to 2nd October 1890, contain paragraphs bearing out such an intention, and expressing a desire to carry it out thereafter. The reference to the will of 14th July 1891 in the place of that of 17th July 1891 in the declarations of trust aforesaid was obviously due to some clerical mistake or to a mistake of memory, and it does not in any way support the theory which the plaintiff has set up.

The alleged revocation of the will of 17th July 1891 by a letter, said to have been written to the Commissioner of the Fyzabad Division on 26th October 1906, is also not borne out by any reliable evidence. The first witness adduced on the point is Hakim Ismail Khan (P. W. 136), who claims to have been in the service of the Maharaja up to four or five years prior to his death. He asserts that about two months and a half or three months prior to the death of the Maharaja, he happened to visit him and found a paper lying neatly written, which he guessed might be his will. He had, according to his own statement, the imprudence to start reading it attentively, and on the Maharaja inquiring what he was reading and finding that it was his will, he was asked by the Maharaja to read it first himself and then to read it out to him. He goes on to say that he read it out to him and asked him what sort of a will it was,

as he had previously made one before. The Maharaja is said to have replied that he wrote it in cancellation of the previous will and explained that the acts, for which he deprived the senior Maharani of the succession in his estate, had been committed by the junior Maharani also. It is said that the Maharaja then signed that paper himself and requested him and his Ayurvedic physician, Dwarka Nath Sen, to attest it as witnesses. No such will has, however, been produced. It is not suggested that it was registered. Kavi Raj Dwarka Nath Sen, before whom the said will is stated to have been executed, is dead, and the falsity of this witness is apparent from the fact that he states that Dwarka Nath Sen was present when the alleged will was executed 2½ or 3 months before the death of the Maharaja, whereas from the letter of the Kavi Raj to the Deputy Commissioner of Fyzabad dated 13th January 1907 (Ex. A. 359) and another to the Special Manager of the Ajudhia Estate dated 29th June 1907 (Ex. A. 360) demanding payment of the bill for his attendance on the Maharaja, it is apparent that he did not visit Ajudhia and start his medical treatment till 16th October 1906, that is, till long after the date of the alleged revocation. It is unlikely that the Maharaja would have taken into confidence a person of the position of Hakim Ismail Khan by talking to him about the misconduct of either his senior or junior Maharani, and it is still less likely that had he intended to revoke his previous will, he would have done so except by means of a registered instrument. The witness appears to have been approached by the plaintiff about 5 or 6 days before he gave his evidence. He pays no income-tax and is a man of no position, and his evidence is not entitled to any weight.

Dr. Mohini Mohan Chatterji, another witness of the plaintiff (P. W. 159), says that in the course of a conversation with the Maharaja, the latter told him that he had an important business to finish in connexion with the will which he had previously executed in favour of the junior Maharani inasmuch as he said "she is not worthy of it or does not deserve it," but apart from the improbability of the Maharaja making such statement to him, his evidence is too vague to be entitled to any weight. According to him, the Maharaja said so to him when he

went to see him otherwise than for his treatment between 20th and 27th October 1906, but Hakim Ismail Khan suggests that a will, revoking the previous one, had already been executed by the Maharaja about two and a half months or three months before his death. The next witness on the point is Nirodh Chandra Ghoshal (P. W. 56), who was in the service of the Maharaja and after his death of the Court of Wards till his resignation in 1913. He claims to have been doing the confidential work of the Maharaja and has produced from his custody the draft of a letter (Ex. 76), which the Maharaja is alleged to have sent to the Commissioner of the Fyzabad Division on 26th October 1906. The draft purports to inform Mr. Hamblin, the Commissioner, that the Maharaja had cancelled all his previous wills, that the last will about which he had spoken to him was not executed and that he hoped to be able to meet him shortly in connexion therewith. It also contained a request that in case he was unable to stir about, Mr. Hamblin might take the trouble to come over.

It is impossible however that any such letter could have been written by the Maharaja or sent to Mr. Hamblin, for on 8th November 1906, a day before the death of the Maharaja, Mr. Hamblin wrote to Mr. Hailey, the Secretary to the Board of Revenue (Ex. A-390), that the Maharaja was reported to be seriously ill and that at that moment he was far from well, that as far as he knew the Maharaja had made a will in favour of his junior Maharani and that in the event of his illness terminating fatally, instructions might be issued as to what steps, if any, he should take. In that letter, he stated that he had seen the Maharaja in connexion with the loan of 60 lakhs, which he asked for from the Government, and the conditions he wanted to make before he accepted the management of his estate by the Court of Wards; and it is unlikely that had he received any letter from the Maharaja of the kind suggested, he would not have referred to it and contented himself with saying that as far as he knew the Maharaja had made a will in favour of his junior Maharani. On 4th November 1906 Mr. Hamblin had written a letter to the Maharaja himself in reply to one of his,

which contained no reference to any such revocation (Ex. 79). In another letter sent by Mr. Hamblin to Mr. Hailey, a day after the death of the Maharaja (Ex. A-391), Mr. Hamblin reiterated:

"It will be ascertained as soon as possible who is the heir under the will; it is at present believed the junior Maharani will succeed and that she has been given power to adopt."

A will of such a character would be entirely inconsistent with what Hakim Ismail Khan and Dr. Mohini Moban Chatterji would ask us to believe. Nirodh Chandra Ghoshal states that Mr. Hamblin called on the Maharaja on 6th or 7th November 1906, after a letter corresponding to the draft (Ex. 76) was sent, but the Maharaja was too ill to meet Mr. Hamblin. The draft does not bear the signature of the Maharaja, and from the evidence of Nirodh Chandra Ghoshal, it would seem that the execution of the alleged last will had not been completed, for the Maharaja had told him that he would have to sign the will and that he could see it then. The manner in which the draft was produced and the stage at which it was tendered also render its genuineness as a draft, dictated by the Maharaja, open to serious suspicion. On 10th November 1906, Babu Balakram handed over the original will of the Maharaja dated 17th July 1891 on behalf of the junior Maharani to Mr. Port, the Deputy Commissioner of Fyzabad (vide the evidence of Mr. Port, D. W. 60, and Ex. A-361). Nirodh Chandra Ghoshal continued in the service of the Court of Wards till 1913. A dispute arose on the death of the Maharaja in the mutation proceeding in consequence of an objection filed by the senior Maharani. The junior Maharani wrote to Rai Sri Ram Bahadur, the legal adviser and friend of the late Maharaja in connexion therewith. Rai Sri Ram Bahadur wrote in reply (Ex. 81) that he was much grieved to hear that the senior Maharani had failed to respect the wishes of the late Maharaja and filed an objection in the mutation proceeding against the entry of the name of the junior Maharani in the revenue register.

On the back of that letter was endorsed a draft in pencil of the reply sent by the junior Maharani to Rai Sri Ram Bahadur, thanking him for his letter and

for the assurance of help and sympathy conveyed to her in her affliction. If the Maharaja had revoked his will of 17th July 1891 in favour of the junior Maharani within the knowledge of Nirodh Chandra Ghoshal, as is now suggested, is it likely that Nirodh Chandra Ghoshal would have remained silent and mentioned to no one that the Maharaja had revoked his will and sent a letter to the Commissioner to that effect?

Nirodh Chandra Ghoshal admits that he had an interview with the plaintiff in September or October 1914, before he had given evidence, and that he did not tell him at the time that the Maharaja had sent such a letter to the Commissioner. He pretends that he did not then remember it and discovered the draft among his papers at Allahabad in October 1915, when the plaintiff asked him again to look for it. He is not a man holding any property, and, according to his own admission, has been connected with a speculative claim to another estate in which his brother was financing the claimant to the extent of 7 1/2 annas share on their joint behalf. His brother had financed another litigation before, and from the past conduct of the witnesses in not having made any mention of the revocation before and his character as a person interested in speculation, the authenticity of the alleged drafts seems to be open to serious doubt. There is, on the other hand, a considerable amount of independent evidence to establish that the Maharaja was passionately attached to his junior Maharani and had earnestly entreated all his friends in position or authority to help her in the event of his death. Sir Harcourt Butler visited the Maharaja on 14th October 1906, and from his evidence and the note of his interview which he made at the time (Ex. A) it is clear that the will in favour of the junior Maharani dated 17th July 1891 was the last will which the Maharaja had executed up to that date. Sir Harcourt Butler states that at the end of the interview the Maharaja informed him that he had made a will in favour of the second Maharani which, as he said, was "registered with Colonel Corrie," or more accurately speaking, attested by him, and, laying the hand of the Maharani who was inside the parda in his, he committed her to his care.

The Raja of Mahmudabad similarly visited the Maharaja about 15 or 20 days

before his death and had conversed with him in private. The Maharaja told him that he did not here to survive the disease from which he was suffering, and his deathbed request to him was that he should help the junior Maharani in whose favour he had already executed a will according to the draft, which he had shown him at Lucknow, and that the Raja should try that his estate should not be put under the management of the Court of Wards in a regular way but might be put under the management of a European manager under the supervision of the Local Government in the event of his death, that he should not let the Maharani adopt a boy from the family of Lal Tripathi Nath Singh and further that he should try as far as possible to save the estate from being sold in lieu of his debt. The Raja says that the draft of that will had been shown to him at Lucknow about a year or a year and a half before the death of the Maharaja and that the Maharaja had shown him several drafts "probably after 1895," all of which were in favour of the junior Maharani. It is possible that the Raja may have had a very hazy idea of the date or period, or that what the Raja describes as a draft was really a copy of the will, which the Maharaja had executed on 17th July 1891.

It is also possible that the Maharaja may have prepared drafts after 1895 with the object of altering that will in certain particulars; but it is extremely unlikely that the Maharaja had executed a will, such as Hakim Ismail Khan suggests revoking that of 17th July 1891 and diverting the bequest from the junior Maharani for the Raja deposes that all the drafts which were shown to him were in favour of the junior Maharani and the last conversation which the Raja had with the Maharani about 15 or 20 days before the death of the latter tended in the same direction. It is not improbable at any rate that the drafts to which the Raja refers may have been shown to him before 1891, for the Raja has no positive recollection of the exact time when he saw them.

Thakur Haribar Bakhsh Singh (D. W. 54), a respectable Talukdar, holding estates in the Sitapur and Bara Banki Districts and paying a revenue of Rs. 54,000 a year, also bears testimony to having seen the Maharaja for the last time 8 or 10 days before the death of the latter,

while he was under the treatment of Kaviraj Dwarka Nath Sen. The Maharaja then told him that in case he died, the witness should respect the junior Maharani as much as he respected him that he should help her because, he said, he had executed and registered a will in her favour in which he had given her full powers after him. Baqar Hussain (D. W. 9), who was one of the attesting witnesses to the will of 17th July 1891, states that he had visited the Maharaja several times during his illness and that Maharaja had told him that he had a mind to adopt a boy of the family and then to lead the life of a sanyasi and that, when reminded of the will he said that this will was the same. Maharaja Prodyot Kumar Tagore (D. W. 78) also states that on the occasion of a visit of the Maharaja to Calcutta the latter told his father, Maharaja Sir Jotindro Mohan Tagore, with whom he was staying that it was not possible for his junior Maharani to visit Calcutta on account of her ill-health and that she was a very devoted wife and used to look after him and nurse him very much in spite of her bad health. He further told him that he had made a will in which he had given the Maharani the power to adopt and also made provision for the future management of his estate. The evidence of these witnesses has not been controverted and leaves hardly any room for doubt that the will of the 17th July 1891 is the last and subsisting will of Maharaja and that the Maharaja intended that the junior Maharani should succeed him after his death.

In any event no will revoking that of 17th July 1891 is forthcoming and in its absence the will of 17th July 1891 must have legal effect. S. 57, Succession Act (10 of 1865), which has been extended by S. 19, Act I of 1869 to the wills of talukdars, lays down that no unprivileged will shall be revoked otherwise than by another will or codicil, or by some writing declaring an intention to revoke the same and executed in the manner in which an unprivileged will is required to be executed or by the burning, tearing or otherwise destroying the same by the testator or by some person in his presence and by his direction with the intention of revoking the same. The original will of 17th July 1891 was in this case not destroyed and its revocation has not been

proved in the manner required by law. In *Lachman Singh v. Umrao Singh* (19), where a will made by a testator was said to have been revoked in a written statement and a plaint filed by him in other case, it was held that such a revocation could not take effect under S. 57, Succession Act. In *Haidar Ali v. Tasadduk Rasul Khan* (20), where a will made by a talukdar was stated to have been revoked by another will executed after Act I of 1869 came into force but not registered in accordance with S. 10 of that Act, it was held by their Lordships of the Privy Council that the latter, being inoperative as to the talukdari estate, could not revoke the previous will, which was not rendered inoperative by any of its provisions. In *Sahib Mirza v. Umda Khanam* (12), Lord Macnaghten pointed out that a will duly executed could not be treated as revoked, either wholly or in part by a will which was not forthcoming and the contents of which could not definitely be ascertained, and that it was not enough to show that the will which was not forthcoming differed from the earlier one, if it could not be shown in what the difference consisted. This observation applies with particular force to the several drafts which the Raja of Mahmudabad says the Maharaja had shown to him. It is also noticeable that the form in which the Maharaja used to subscribe himself in his letters to Mr. Hamblin (Ex. A 351) is different from that in which the draft produced by Nirodh Chandra Ghoshal (Ex. 76) described him. The story of the alleged revocation appears to be entirely unfounded.

In pursuance of the above will the junior Maharani adopted Dukh Haran Nath Singh, the second son of Adika Nath Singh, on 12th February 1909, naming him Jagdambika Pratap Narain Singh after his adoption. The adoption is proved by the evidence of several respectable witnesses, including the junior Maharani, and is also corroborated by the deed of adoption, formally executed and registered by her on that date (Ex. A-139). The fact of the adoption has not been seriously disputed by the plaintiff either in this Court or in the Court below, and it is unnecessary to refer to that evidence in detail. Apart from the alleged revo-

19 (1901) 11 O C 102.

20. (1891) 18 Cal 1=17 I A 52 (P C).

cation of the will of 17th July 1891 by the Maharaja, which has not been established, the plaintiff impeaches the validity of the adoption on several grounds. It was suggested that the junior Maharani was not the married wife of the late Maharaja, that she was unchaste and was not, therefore, qualified to make the adoption according to the Hindu law, that the natural mother of the boy adopted was of the same gotra as the natural father of the late Maharaja, in consequence of which a marriage between the late Maharaja and the natural mother of the adopted boy could not have been legal, that Adika Nath Singh, the natural father of the adopted boy, was an outcaste, that the boy was purchased for a money consideration, and that the requisite ceremonies of adoption had not been performed. It is not now disputed that the junior Maharani was married to the late Maharaja. There is nothing to show that that marriage was not absolutely legal. The evidence adduced to prove the alleged unchastity of the junior Maharani with Adika Nath Singh or other persons has been rightly disbelieved by the learned Additional Judge, and I agree with my learned colleague, who has discussed that evidence in detail, that the imputations made are baseless and without any foundation.

The gotra of Adika Nath Singh was Girg and that of his wife, Mt. Chandra Kali, the mother of the adopted boy, before her marriage, as stated by Bishwa Nath (D. W. 18) and Ramdeo (D. W. 20) and other witnesses, was Mabris. The Maharaja belonged originally to the Bharadwaj gotra and had according to his own statement gone into the Girg gotra by reason of his affiliation by Maharaja Man Singh. In either view the gotra of the natural mother of the adopted boy before her marriage was different from that of the late Maharaja and the validity of the adoption cannot, therefore, be impugned on that ground. The evidence produced by the plaintiff that Ram Sahai, the father of Mt. Chandra Kali, belonged to Bharadwaj gotra is refuted by the evidence of persons belonging to the family of Ram Sahai, and cannot be trusted. There is moreover, evidence to show that among Sakaldipi Brahmans, that is, in the caste to which the Maharaja belonged, marriages can take place between the same gotra. Such marriages are generally con-

demned by Hindu law givers, but where owing to the smallness of the community or other cause, they do take place outside the pale of prohibited degrees, they are apart from custom not necessarily void. The principle of *factum valet* applies to them (Mayne's Hindu law, Edn. 8, p. 103, and Shastri's Hindu law, 14th. 4, Vol. 1, pp. 99 and 100).

The evidence adduced to establish that Adika Nath Singh was enticed by the Maharaja owing to his intrigue with the junior Maharani is also unsatisfactory, and the allegation that the boy was purchased by the junior Maharani for taking in adoption is not borne out by any reliable testimony. The supply of clothes or ornaments to the parents of the boy to be adopted or the payment of money therefor in anticipation of the adoption cannot invalidate the adoption or be taken to indicate that it was made from sinful or improper motives. In *Murugappa Chetti v. Nagaopa Chetti* (17) and *Mahabharat Poudha v. Durgahar* (21) adoptions were upheld, though in each case it was shown that some money had been paid or promised to the natural father of the adopted boy in consideration of his giving his son in adoption. Adika Nath Singh (D. W. 51) states in his evidence that he got a shawl and other clothes on the occasion of adoption, as did the other members of the family of Maharaja Man Singh and Babu Narsingh Narain Singh. Adika Nath Singh was himself a relation of the late Maharaja, and the present of articles of that character to relations at the time of adoption, as in the case of a marriage in the family, is not uncommon. The evidence of Ganesh Dat Shastri (D. W. 13), Lal Adika Nath Singh (D. W. 51) and the junior Maharani (D. W. 53) shows that the requisite ceremonies for adoption were duly performed. In fact, as pointed out by their Lordships of the Privy Council in *Bal Gangadhar Tilak v. Shri Shrinivas Pandit* (22), the performance of ceremonies can be dispensed with, if the adopted father and the adopted boy belong to the same gotra, which would be the case, if the late Maharaja was the putrika-putra of Maharaja Man Singh. It is also contended that the adoption was brought about by the pressure, exer-

21. (1898) 12 Bom 199.

22. A I R 1915 P C 7=29 I C 639=33 Bom 441
=42 I A 185 (P. C.)

cised by the officials of the time and some of the talukdars on the junior Maharani; but the only evidence which has been pointed out in support of that contention is a letter sent by Sir John Hewett, the then Lieutenant Governor of these provinces, to the junior Maharani on 18th July 1906, advising her to adopt a boy in accordance with the wishes of her late husband (Ex. 276), and the statement of the junior Maharani (D. W. 53) in the present case that if she had not been advised to make the adoption, she would have made it after 12 years, so that she might have been spared the disgrace of being dragged into Court by the present suit.

An advice given from the best of motives does not, however, amount to the exercise of undue influence. The letter sent by the junior Maharani to Mr. (now Sir) Harcourt Butler on 7th August 1908 (Ex. 266), which was sent after the junior Maharani had received the letter of Sir John Hewett, and a deputation of some of the leading talukdars, moreover, clearly show that the Maharani had voluntarily agreed to make the adoption, realizing that it was to the interests of herself and her estate that she should do so, so long as her personal comfort, that is the possession of the estate by her for her life, was not interfered with. Throughout the process of selection and the ceremonies which attended the adoption, legal advice was available to her; and however much she may now feel pestered by the suit and the imputations which have been made against her in it, the suggestion that she was induced to make the adoption by undue influence cannot for a moment be entertained. It is next argued that the adoption made did not effectuate the intention of the testator as expressed in his will and that the devise in his favour consequently failed: in other words, it is contended that the intention of the testator was that his estate was to remain impartible and that the adopted son was to succeed to the property on the death of the junior Maharani under S. 22, Cl. 8, Act I of 1869, so as to render the rule of succession laid down in S. 22 applicable to its subsequent devolution. As a general rule, a devise in favour of an undesignated or unascertained person in a particular character may fail, if the person in whose favour the devise was made fails to occupy that character. A bequest

in favour of an adopted son may, as pointed out by their Lordships of the Privy Council in *Fanindra Deb Raikat v. Rajeswar Das* (23) and *Lali v. Murlidhar* (24), fail if the adoption subsequently proves to be invalid and the devisee does not fulfil the character in which the devise was made. But the adoption in the present case is not invalid. The boy adopted by the junior Maharani fulfils the character of an adopted son, though he succeeds to the property as a devisee and not under Cl. 8, S. 22, Act I of 1869.

By Cl. 7 of his will, the testator provided that the junior Maharani shall be competent to adopt a boy from his paternal or maternal family, and that, after the death of the junior Maharani, such adopted son shall, as contemplated by Cl. 8, S. 22 of Act I of 1869, be the successor and absolute owner of all the moveable and immovable properties belonging to him.

The intention of the testator was to emphasize that the son to be adopted by the junior Maharani was not to dispossess her during her life, for in addition to his referring to Cl. 8, S. 22, which empowered a widow making an adoption to remain in possession for her life, he went on to say that the son to be adopted shall not be entitled to possession till after the death of his junior Maharani and that the junior Maharani too shall have no power to give him possession during her lifetime. The junior Maharani was not an heir to the estate within the meaning of Cl. 8, S. 22, because the senior Maharani was alive at the time of the death of the testator. No power to adopt was given to the senior Maharani. The adoption was in fact made by the junior Maharani, and Cl. 8, S. 22 could not, therefore, apply to him. Apart from the devise, the adopted son could have succeeded to the estate only under Cl. 9, S. 22 on the death of both the senior and the junior Maharani; but whether he does succeed to it under the devise or under Cl. 9, S. 22 or under Cl. 11, S. 22, the estate continues to be impartible in his hands. If the Maharaja died intestate after authorizing the junior Maharani by a writing to adopt a son but without making any devise in her or his favour, the son

23 (1885) 11 C.J. 462=12 I.A. 72 (P.C.).
24. (1906) 28 All. 483=33 I.A. 97 (P.C.).

so adopted would have succeeded to the estate after the death of the senior and the junior Maharani or, in other words, to a vested remainder therein under Cl. 9 or Cl. 11; and if so, Ss. 13 and 14 of Act 1 of 1869 are wide enough to keep the estate within the Act. Where property goes to a widow for her life with a vested remainder to another, the combined interest of the former and the latter constitutes the bundle of rights known as the estate within the meaning of S. 2 of Act 1 of 1869 and the interests of the former as much as of the latter may in that sense be regarded as different portions of the same estate.

In *Jadar Kunwar v. Jaipal Kunwar* (14), where a talukdar, who died childless but leaving two widows, bequeathed to the senior Maharani his entire estate and gave her a power to adopt a son to him and at the same time provided maintenance for both his widows after such adoption it was held by their Lordships of the Privy Council that as, if there had been no will, the junior widow would have succeeded to an estate expectant on the determination of the life-estate of the senior, but subject to be defeated by an adoption by the latter, there was an interest which brought her within the meaning of S. 13, para. 1, Act 1 of 1869, so as to make the maintenance bequeathed to her by the will payable out of the entire estate though the will was unregistered. In *Esorga Rabidat Singh v. Jadar Kunwar* (15) it was held that the word "intestate" in S. 13, sub-S. 1, Act 1 of 1869, meant intestate as to the talukdari estate, and that a son adopted under authority conferred in writing by a talukdar was not excluded from the exception contained in that section. The adoption being valid under the Hindu law, the adopted son would in any case succeed to the vested remainder under Cl. 11, S. 22, and it cannot be said that the estate has been excluded from the operation of S. 22 and has become partible in his hands.

In regard to the other points raised in the appeal, I have nothing to add to the judgment of my learned colleague, with whose conclusions I am in entire agreement. I, therefore, agree in dismissing the appeal with costs except in regard to the extra fee of Rs. 3,000 awarded by the Court below to the senior Maharani, which will be expunged from the decree,

inasmuch as it was not certified to that Court before the commencement of arguments as required by the Rules.

H.V./B.K.

Appeal dismissed.

A. I. R. 1918 Oudh 267

LINDSAY, J. C.

Mt. Ganga Dei—Defendant—Appellant.

Gopal Das—Plaintiff—Respondent.

Second Appeal No. 142 of 1917 Decided on 8th November 1917, against the decree of Dist. Judge, Lucknow, D. 12th January 1917.

Hindu Law—Adoption—Omission of datta homam ceremony — Adoption is not invalidated.

Among the regenerate classes the omission of the datta homam ceremony would not per se invalidate an adoption. [P. 268 C. 2]

Zohar Ahmad—for Appellant.

A. P. Sen—for Respondent.

Judgment.—This appeal has arisen out of a suit brought by the plaintiff-respondent for a declaration that he had been adopted by the defendant-appellant Mt. Ganga Dei as the son of her, deceased husband Lala Manchar Das. The Court of first instance dismissed the claim. The learned District Judge has reversed the first Court's decision and has held that the adoption is established. He has given a declaration accordingly.

The main point which has been argued before me is that inasmuch as the plaintiff failed to establish that at the time when the alleged adoption took place the ceremony known as datta homam was performed, it necessarily follows that the adoption was void. The parties are Agarwals Banias and are, therefore, to be treated as belonging to the twice-born classes, being for this purpose Vaishyas. The learned Judge of the Court below in coming to his decision on this point was influenced by the opinion of Mr. Golab Chandra Sarkar expressed in his work on the Hindu Law of Adoption, Edition 1916, at page 381. There the learned author, after mentioning the well-accepted rule that the performance of the datta homam is not necessary in the case of Shudras, goes on to say that it is not essential either in cases where adoption is made by a woman even of the Brahman caste, the reason being that women of all classes, like Shudras, can neither recite the Vedic prayers nor personally perform the homam ceremony. Consequently the learn-

ed author is of opinion that in cases of adoption by a Hindu woman the performance of this religious ceremony can be dispensed with and it is not essential to the validity of the adoption. The learned counsel for the appellant has challenged this view and maintains that the reasoning of the learned author is incorrect. It is pointed out and there is authority for the view that in the case of the regenerate classes the performance of the homam ceremony is necessary in order to transfer the boy adopted from his own gotra to that of the adoptive father.

It is argued that as Shudras have no gotra consequently in their case the performance of this religious ceremony is not required, but it is argued that it must be taken to be essential in cases where adoption is made by persons belonging to the three higher classes. It is also pointed out that among the higher classes where the boy adopted belongs already to the same gotra as his adoptive father the performance of the ceremony is not essential. There has been a good deal of case-law on this subject and it is not easy to reconcile all the decisions which are to be found in the various reports. The learned Counsel for the appellant has relied upon a ruling which is set out as *Lachman Lall v. Mohun Lall Bhaya Gayal* (1), in which it was held that the performance of the datta homam is necessary in cases of adoption among the twice-born classes. I have, however, examined some of the decisions of their Lordships of the Privy Council and it seems to me that it cannot be said that the law on this point has been settled by that Tribunal. I refer to the cases reported as *Indramoni Chowdhurani v. Biharilal Mullick* (2) and *Shoshinath Ghose v. Krishnasunderi Dasi* (3). It has been pointed out by the learned counsel for the defendant (*sic*) respondent that there are two cases of this Court which cover the point in dispute namely, Select Case No. 26 and Select Case No. 116, and in this connexion I may also refer to a ruling of the Allahabad High Court reported at *Ganga Sahai v. Lakhray Singh* (4). There the principles of the Hindu law of adoption were ex-

pounded by Mahmood, J., and his view of the law is as follows:

Adoption amongst Hindus being in the nature of a gift, three main matters constitute its elements apart from questions of form. They are the capacity to give, the capacity to take and the capacity to be the subject of adoption. If any of these three capacities is wanting in any case, the adoption must be held invalid and cannot be supported on the ground of *factum valet*. But where in cases of adoption there are questions of formalities or ceremonies or other points which amount to moral and religious suggestion and which are dealt with by the texts in a directory manner, the doctrine of *factum valet* would undoubtedly apply upon general grounds of justice, equity and good conscience and irrespective of the authority of any texts in the Hindu Law itself, the reason being that such matters do not affect the essence of the adoption but relate only to the *modus operandi*."

This appears to me to be the view which was taken in this Court in Select Case No. 116 to which I have referred. It may be true that where an adoption is made in a family belonging to the twice-born classes the religious ceremony of the datta homam is generally observed; but as was remarked in Select Case No. 116, the omission of this ceremony would not per se invalidate the adoption, but would be treated as a piece of evidence which might lead to the conclusion that an adoption had not in fact taken place. In this state of the authorities I think I ought to act upon the principle of *stare decisis* and follow the rulings of this Court. I do so accordingly and hold that the plea taken by the learned counsel for the appellant and which I have just discussed fails.

Another point which has been argued is that there is no clear evidence on record to show that the boy was taken in adoption as the son of Manohar Das; in other words, it is suggested that if there was any adoption, the widow was adopting him as her own son. I am of opinion that this point is not maintainable. The evidence to which the learned Judge of the Court below refers seems to indicate clearly that if there was an adoption, it was an adoption to the lady's deceased husband and not to herself. Lastly, it has been argued that there is no clear finding of the lower appellate Court on the question of permission given by the deceased for the adoption of this boy. A perusal of the judgment of the Court below satisfies me that the learned Judge did believe the evidence of the witness who deposed to this permission having been given. The

1. (1871) 16 W R 173.

2. (1880) 5 Cal 770=6 C L R 183=7 I A 24 (P. C.).

3. (1881) 6 Cal 581=7 C L R 313=7 I A 250 (P. C.).

4. (1887) 9 All 253.

finding on this point, is in my opinion, clear and definite. These are the only points with which I have to deal and the result is that I find against the pleas taken by the appellant. The appeal is dismissed with costs accordingly.

B.V./R.K. *Appeal dismissed.*

A. I. R. 1918 Oudh 269 (1)

LINDSAY, J. C.

Gudar Singh — Judgment-debtor — Appellant.

v.

Kandhai Lal — Decree-holder — Respondent.

Execution Decree Appeal No. 13 of 1917, Decided on 27th February 1918, against order of Sub-Judge, Bahrsieh, D/- 19th November 1917.

Civil P. C. (1904), S. 102 — Order in execution — S. 102 applies.

No second appeal lies from an order in execution of a decree obtained in a suit of the nature cognizable by a Court of Small Causes where the amount or value of the subject-matter of the original suit does not exceed Rs. 500.

C. Thompson — for Appellant.

Rasuloo Lal — for Respondent.

Judgment. — The facts of this case are as follows: A suit was brought by the decree-holder respondent to recover a sum of Rs. 123 and alleged to be due on a bond debt. The suit was tried by the Munsif who passed a decree and in execution of that decree a share in a certain house was attached by the decree-holder. The judgment-debtor filed an objection in the executing Court containing that the premises were exempt from attachment under the provisions of S. 60, Cl. (c), Civil P. C.; in other words, the plea was that the premises were the property of a person who was an agriculturist and were occupied by him. The Munsif to whom this objection was presented dismissed it; and without taking any evidence he held, on the statements contained in the petition and by reason of admissions made by the judgment-debtor himself, that the premises were not exempt from attachment under Cl. (c) because they were not occupied by the judgment-debtor. Whether or not the Munsif was right in his interpretation of the expression "occupied" in this clause is not a matter with which I am concerned.

The judgment-debtor appealed to the Subordinate Judge who dismissed his appeal; and now he comes here in second appeal and has to meet a preliminary ob-

jection that no second appeal lies. This objection appears to me to be valid and the case is covered by authority. S. 102, Civil P. C. declares that no second appeal shall lie in any suit of the nature cognizable by Courts of Small Causes when the amount or value of the subject-matter of the original suit does not exceed Rs. 500. From the facts which I have stated above it will at once be apparent that the original suit in this case was one of the nature described in S. 102, and consequently no second appeal would have lain against the decree which was passed in the suit. The High Courts are of opinion that the terms of this section also exclude all second appeals against orders passed in execution of a decree obtained in a suit of the nature described in S. 102. I refer in this connection to the following cases: *Shyama Chawan Mitter v. Debendra Nath Mukerjee* (1), *Narain Parmanand v. Nagindas Bhaidas* (2) and *Din Dayal v. Patra Khan* (3). This last ruling is a Full Bench ruling. I am satisfied, therefore, that no second appeal lies in this case. Mr. Thompson has asked me to treat the case as one in revision under S. 115 but it appears to me, after listening to his argument, that there is no ground upon which an application for revision could succeed. The most that could be said, although I do not say so, is that the Courts below have come to an erroneous decision of law. That is not a ground on which an application in revision can be entertained. The appeal is dismissed with costs.

B.V./R.K. *Appeal dismissed.*

1. (1900) 27 Cal 481.
2. (1906) 30 Bom 113.
3. (1906) 13 All 481.

A. I. R. 1918 Oudh 269 (2)

KANHAIYA LAL, A. J. C.

Gauri Shankar and others — Plaintiffs — Appellants.

v.

Abbas Beg and others — Defendants — Respondents.

Second Appeal No. 246 of 1917, Decided on 2nd January 1918, from the decree of Dist. Judge, Sitapur, D/- 20th March 1917.

(a) Civil P. C. (1908) O 41, R. 24 — Power of appellate Court — Appellate Court can base decision on point arising out of pleadings if evidence as regards it is on record although not expressly taken before or covered by issues.

An Appellate Court is quite competent to base its decision upon a point arising out of the

parties, pleadings, if there is evidence on the record as regards the same, although it is neither expressly taken before the Court nor covered by any of the issues framed in the case. [P 270 C 1, 2]

(b) Landlord and Tenant—Abandonment—Mere removal to another house is not sufficient evidence of abandonment entitling landlord to claim right by escheat.

The mere removal of the occupant of a house to another house is not in itself sufficient evidence of an abandonment of a kind which entitles the landlord to claim a right by escheat. [P 270 C 2]

Rajeshwari Prasad—for Appellants.

Ali Mohammad—for Respondents.

Judgment.—A thatched house standing in one of the mohallas of Sitapur was occupied by a prostitute named Mt. Amiran. She died in 1912 leaving, according to the Court below, a sister Mt. Abadi. The plaintiffs claim to be the Zamindars and proprietors of the land on which the house was situated. Their allegation is that Mt. Amiran left no heirs and that according to the custom the house escheated to them. It appears that in 1908 Mt. Amiran had made a gift of the house in favour of Mt. Shubraton whom she had brought up. Mt. Shubraton is now in possession of the house. The Court of first instance dismissed the claim, holding that the custom set up by the plaintiffs was not established. The lower appellate Court upheld that decree but on entirely different grounds. It decided that the gift made by Mt. Amiran in favour of Mt. Shubraton was invalid, because the custom recorded in the *wajib-ul-arz* was wide enough to forbid gifts by tenants of the houses in their occupation, but refused to grant any relief to the plaintiffs inasmuch as it found that Mt. Amiran had left a sister Mt. Abadi who was entitled to her property on her death. The point on which the lower appellate Court proceeded does not appear to have been expressly taken by any of the defendants in the Court of first instance, but the fact remains that the allegation of the plaintiffs that Mt. Amiran had died without leaving any heirs and that on her death the house escheated according to the custom to the plaintiffs as Zamindars was denied by the defendants.

It was for the plaintiffs to have established that Mt. Amiran had died without leaving any heirs and the lower appellate Court was, therefore, justified in constructing what their Lordships of the Privy Council described in *Skinner v.*

Naunihal Singh (1), as the material for a just decision of the true rights of the parties concerned. It is true that no issue was raised on the point, but the plaintiffs were given an opportunity of cross-examining the witnesses who gave evidence about the matter, and it does not appear that any request was made in the Court below that the plaintiffs should be given an opportunity for rebutting that evidence, if the matter was allowed to be raised. It is next contended that Mt. Amiran had abandoned the house in her lifetime, but there is no plea or finding to that effect. Mt. Shubraton alleges that the donor had given her possession of the house in her lifetime and had removed to the house of her sister Mt. Abadi. But the mere removal of a person from one house to another is not in itself sufficient evidence of an abandonment of a kind which would entitle the landlord to claim a right by escheat. Mt. Shubraton has since re-built the house. The appeal fails and is dismissed with costs.

U.V./R.K. Appeal dismissed.
1. (1918) 35 All 211 = (9) L.C. 267 = 40 I.A. 105 (P.C.)

A. I. R. 1918 Oudh 270

LINDSAY, J. C. AND DANIELS, A. J. C.
Chaudar Singh and others—Plaintiffs
—Appellants.

v.

Bakhtawar Singh and another—Defendants—Respondents.

First Appeal No. 97 of 1916, Decided on 11th June 1918, from decree of Sub-Judge, Kheri, D/ 17th May 1916.

(a) *Hindu Law*—Partition—Agreement and declaration of intention to hold property in specific shares constitutes partition without actual division.

Once the members of a joint Hindu family have agreed and declared their intention to hold the joint family property in definite shares, the family is no longer a joint family. It may be that no actual division of the property takes place, but the result of such agreement and declaration is that from the time it is made the parties thereto hold the property not as joint tenants but as tenants-in-common. [P 274 C 1]

(b) *U. P. Land Revenue Act* (3 of 1901), S. 111—Unless Revenue Court refers question under S. 111, Civil Court has no jurisdiction to decide question of title.

A Civil Court has no jurisdiction to determine a question of title with regard to a property under partition before a Revenue Court, unless the latter Court refers the question for decision to the former Court by an order passed explicitly under S. 111. [P 275 C 1]

George Jackson, Barkaran Nath Misra and Brijnath Sharga—for Appellants,
Gokaran Nath Misra and Mohan Lal
 —for Respondents.

Judgment.—This is a plaintiffs' appeal arising out of a suit for partition of certain property described in list A attached to the plaint, which the plaintiffs claimed to be joint family property. The defendants belong to the same family as the plaintiffs, all being descendants from a common ancestor named Phoka Singh, who had three sons Rup Singh, Girand Singh or Gend Singh and Meharban Singh. The latter died without issue. The plaintiffs are the sons and grandsons of Girand Singh, whilst the defendants are, respectively, the son and grandson of Rup Singh. It was alleged in the plaint that the family had remained joint up till just before the time this suit was brought. In para. 5 of the plaint it was stated that a year and a half or two years before the suit a separation was effected between the parties in news and residence but that the family property had not so far been divided. The circumstances which gave rise immediately to the suit for partition was an application filed by the defendants at the end of 1913, or the beginning of 1914, for partition of Mauza Sehauna which is the family property. The plaintiffs alleged that when the application to the Revenue Court for partition was made by the defendants, the latter represented their share in the property to be two-thirds and that of the plaintiffs to be one-third only. The plaintiffs deny this and say that they are entitled to a one-half share of all the family property; and so this suit has been brought for the purpose of obtaining a declaration to this effect and in order to have a partition made upon this basis.

The case for the defendants is that the family is no longer a joint family. It was pleaded that separation took place some 60 or 65 years before the suit was filed, when Girand Singh separated himself from his two brothers Meharban Singh and Rup Singh. The defendants pleaded that after this division Meharban Singh and Rup Singh remained united. It was further pleaded that Meharban Singh made a gift of his one-third share of the family property to Bakhtawar defendant 1 on 6th September 1873. With regard to Mauza Sehauna, the family village, the allegation is that the lands have been actu-

ally divided and that the plaintiffs are in possession of a one third share, which is all they are entitled to. With regard to the items of immovable property specified in the list of A attached to the plaint, the case for the defendants was that this was all self acquired property, having come into the possession of the defendants since the time the partition was made. The principal issues before the Subordinate Judge were therefore whether the family consisting of the plaintiffs and the defendants was joint or separate and whether or not the property described in the list A was joint family property. With regard to the first of these issues the Court below rightly laid the burden of proof upon the defendants. On the pleadings it clearly lay upon them to establish that the family was no longer joint but separate. The defendants called a large number of witnesses and they also produced a considerable volume of documentary evidence. A few witnesses were produced on behalf of the plaintiffs and a few documents were also put into support of the plaintiffs' case.

The result was that the Subordinate Judge held that the defendants had succeeded in proving that the family had become a separate family at a period not less than 40 years before the suit was brought. He believed the oral testimony of the defendants' witnesses and he also relied strongly upon the documents which the defendants put in. In consequence of this finding he reached the further conclusion that the items of immovable property specified in list A, other than the village Sehauna, and two houses situated in Sehauna, were the separate property of the defendants; in short, that items 2, 3, 4, 5 and 6 in the list belonged exclusively to the defendants and that the plaintiffs were not entitled to have any share. He held that the plaintiffs were entitled to have a one-third share in village Sehauna and their share of the family houses. It has already been mentioned that before this suit was brought the defendants had applied for partition of Mauza Sehauna, and the Subordinate Judge has further held that in consequence of those partition proceedings the present suit, in so far as it relates to the division of Sehauna, is not entertainable by a civil Court. The case for the plaintiffs therefore

substantially failed. They now come in appeal and the memorandum of appeal contains eight grounds upon which the findings of the learned Subordinate Judge are challenged. Of these grounds 1, 3, 7 and 8 relate to the status of the family. They all in one shape or other raise the plea that the lower Court was wrong in deciding that the family was separate. Ground 2 attacks the decision of the Court below to the effect that the present suit for partition of Mauza Sehauna is barred. The other grounds relate to the admissibility and weight of the evidence which was before the Court below.

The main issue we have to consider is whether or not the family to which the parties belong was separate at the time the suit was brought. We have been referred to the evidence of 18 witnesses who were called by the defendants. The learned Counsel for the plaintiffs-appellants does not rely upon the evidence put forward on behalf of his clients. The only evidence of the plaintiffs' witness to which we were referred is the statement of Bakhtawar Singh defendant 1, who was examined as P. W. 3. The general tenor of the evidence for the defendants is to show that for many years Girand Singh or Gend Singh lived separate from his brothers. Many of the defendants' witnesses are men of respectable position, zamindars and mahajans, and the lower Court has treated them as reliable and independent witnesses. Their statements vary to some extent; some of them can testify to longer periods of acquaintance with the history of the family than others, for example the first witness for the defendants is a Kalwar whose age is 80. His memory goes back as far as 56 years before the date of the suit. He deposes to the effect that Girand Singh was separate from his brothers and nothing of any importance was elicited in cross-examination to shake his credit. Defendant 2's witness is a Brahman who gives similar evidence.

We have also the evidence of D. W. 5, a Bania who has had money dealings with the parties. It is true that his evidence relates only to a period of some 15 years before the suit. He was able to prove, however, that Chaubar Singh, one of the plaintiffs, had executed a mortgage of his own share in favour

of this witness whose name is Bhagwandin. The mortgage-deed was put in Court and was proved. Then we have an important witness in Ram Nath, D. W. 6. He is a Kayasth and is the Sadar Qanungo in the Kheri District. He knew the parties some time ago because the village used to lie in his circle. He speaks of them as living in separate houses and having separate business, that is to say, separate *sir* cultivation. The eighth witness for the defendants is a Brahman named Baij Nath. He speaks concerning a village called Ghaghpur which was held in mortgage by the defendants, and his evidence was given for the purpose of showing that he had paid rent for lands in his cultivation in that village to the defendant's and never to the plaintiffs. The ninth witness for the defendants is a Kachhi who gave similar evidence. Khanna Chamar who was called as D. W. 10 is an old man who has lived in Sehauna for many years. He deposes to having known the family for over 40 years and he swears that Gend Singh or Girand Singh was separate from his brothers. He also deposes that the land of the village was actually divided by the Patwari Mohan Lal some 20 or 22 years before the suit. Mohan Lal has been called as a witness (D. W. 13). He deposes definitely to the division of the Sehauna village lands. He swears that he himself made the division some 22 or 23 years before the suit was brought, that a one-third share of the village lands was allotted to the plaintiffs while two-thirds was given to the defendants. He swears that even before the actual division of the land was made by fields the parties had been separately collecting their shares of the village income.

In one respect his evidence differs from that of Khanna Chamar, for while the latter deposed that papers were drawn up at the time of partition, the Patwari's story is that he prepared no partition papers at all. Great stress has also been laid upon the statement made by Mohan Lal to the effect that the parties used to live in the same house. We are not inclined to attach very much importance to this statement, for even from what appears from the statements of other witnesses it seems clear that although the parties resided separately for a long period, they lived at any rate for a considerable time inside the same enclosure.

Two witnesses 14 and 15 depose to mortgages of certain lands made in favour of the defendants and to the payment of rent to the defendants. These witnesses say that the plaintiffs never received any rent of the mortgaged properties. We may pass over the other evidence which is in a similar strain, mentioning only the statement of D. W. 18, a Bania named Hazari Sah. His evidence is of considerable importance for it is proved that he has had money dealings with the parties. He deposes that he has known the family all his life and he supports the statements of the other witnesses regarding the separation of Girand Singh or Gend Singh. The witness swears that both the plaintiffs and the defendants had had money dealings with him and he produced his books of account to show that the parties had separate accounts with him. It is hardly necessary to dwell upon the evidence of the defendant Bakhtawar Singh who was examined as a witness for the plaintiff. Bakhtawar supports the case which he set up in his written statement.

It is not to be denied, therefore, that there is a considerable volume of oral testimony to support the case for the defendants and we are not convinced that the Subordinate Judge was wrong in relying upon it. It is not, we think, correct to say that the evidence is vague and to some extent contradictory. We think on the contrary that it is as good evidence as could reasonably be expected from persons who are not actually members of the family and whose only opportunities of judging of the status of the family was derived from their visits and friendly relations with the parties. But the matter is settled conclusively in our opinion by the documentary evidence in the case.

The defendants put in a large number of documents for the purpose of showing that property had been acquired separately by Fateh Singh, the son of Rup Singh, under various transactions beginning with the year 1887. It is also manifest from the copies of the village papers which were filed that at any rate since the time of the recent settlement almost 20 years ago, the parties have been recorded as being in possession of separate pattis of Mauza Sehauna, the plaintiffs' patti representing one-third of the entire village. The appellants rely principally upon

Ex. I, which is a certified copy of the wajibularz of Sehauna prepared in the year 1869. They also rely on a certain copy of the khasra of the village of Sehauna which was prepared in the year 1867. It has been boldly contended on behalf of the appellants that these documents prove conclusively that the family was joint on the dates mentioned, and it is argued that no definite and reliable evidence of a separation since that time having been given, the plaintiffs are entitled to a finding that the whole of the property, both what existed in the year 1869 and what was subsequently acquired, is joint family property. On the other hand the learned counsel for the respondent also relies upon the wajibularz just mentioned and contends that it supports the case of the defendants and not the case of the plaintiffs. After hearing the arguments on this point and considering the language of the wajibularz we are satisfied that it is quite impossible for the plaintiffs appellants to rely upon that document for the purpose of showing that the family was a joint family in the year 1869. The only possible conclusion to be drawn from the language of the document is the other way. The first section of the wajibularz relates to the history of the village, and the only statement we need notice in this part of it is one to the effect that from the years 1256 to 1263 Fasl the village was in possession of Rup Singh the father of Fateh Singh who was lambardar at the time of the settlement, and from a further statement contained in the same part of the wajibularz it is made clear that both the summary settlements of this village were made with Rup Singh. The appellants rely strongly upon S. 11 of the wajibularz and in particular upon the following passage:

"This village is held as joint undivided zamindari and all the cosharers are joint in mess; no cosharer has separated up till the present time. All the lands of the village are held jointly and undivided by reason of the mutual good relations (ittifaq) between the parties and because they live together. All the cosharers are agreed that each of them has a right to have his share made separate according to the entries contained in the khewat. He can do so at any time he pleases and no cosharer can make any objection."

Following upon this statement we have an extract from the khewat, which sets out the names of the cosharers. First we have the share of Fateh lambardar and his brother Bakhtawar. They are des-

cribed as having equal shares in a one-third share of the mauza. Gend Singh brother of Rup Singh is shown as being the owner of a one-third share and Meharban is shown as being the owner of the remaining one-third share. In each case the extent of the share is specified in one of the columns of the statement, and it is further to be noticed that the revenue payable in respect of each one-third share is set out in detail. It seems to us therefore, that it is idle for the appellants to argue upon this document that the family was a joint Hindu family at the time it was prepared. Here we have a plain statement that the parties have agreed to hold the property in definite shares which are specified with all the particularity which is possible, and we have it definitely laid down that at any time a co-sharer pleases he may call for partition, that is actual division of the village upon the basis of the shares so recorded. Once the members of a joint family have agreed and declared their intention to hold the property in definite shares the family is no longer a joint family at all and we deem it unnecessary to cite any authority for a proposition so well established. It may, of course, be that no actual division of the property takes place, but the result of an agreement or declaration such as we have referred to is that from the time it is made the parties thenceforth hold the property not as joint tenants but as tenants-in-common.

There are other statements in this wajibularz which support this obvious interpretation. For example, in S. 111 of the wajibularz, which deals with the collection of rents and the payment of revenue, we have a statement that every co-sharer has the right of realizing his portion of the rents from the tenants and that the collection of rents is not the sole prerogative of the lambaridar. It seems needless for us to pursue this matter any further. The wajibularz entirely supports the case for the defendants and can in no way be treated as evidence for the purpose of showing that in the year 1869 this family was a joint family holding joint family property in the proper sense of the term.

With regard to the khasra Ex. 6 upon which the plaintiffs rely so strongly, all we need say is that it does not appear to us to justify the conclusion that the

family was joint. It is true that in the column describing the owners of the various plots of land in the village all the members of the family are mentioned together and there is no statement regarding the definite shares in which the parties hold. We doubt whether in any case it would be necessary for the purpose of the khasra to set out any definition of shares, but after all what really matters are statements contained in the khewat and the wajib-ul-arz, for these are the documents to which regard must be had for the purpose of ascertaining the proprietary rights of the parties. The khewat is the proprietary register and we have already referred to the extract from that document which is set out in the wajib-ul-arz and which decides the matter conclusively. It has already been stated that in the year 1873 Meharban Singh made a gift of his one-third share mentioned in the wajib-ul-arz to the defendant Bakhtawar Singh, and it is in this way that the defendants between them have come to own a two-thirds share of the village. The fact that such a gift was made so long back is, we think, a very strong proof that the family was separate at that time. We have already mentioned that one of the defendants' witnesses deposed to a mortgage made by the plaintiff Chaubar Singh in his favour. This document is Ex. A-30 and was executed by Chaubar Singh on 16th September 1912. It purports to be a mortgage of Chaubar Singh's own separate share in the village of Sehauna. If anything were needed to settle the matter more conclusively than it has been, we might refer to a document called a tamliknamah which is Ex. A-2.

It is proved that this document was executed by Chaubar Singh, Kalka Singh and Khuman Singh, the father of plaintiffs 3 and 4 on 21st, November 1890. The document was executed for the purpose of securing maintenance to the widow of one Chhattar Singh, who was the brother of Chaubar Singh. It is expressly stated in this document that a one-twelfth share of Mauza Sehauna belonged to the deceased Chhattar Singh and was in his possession. It was further stated that after the death of Chhattar Singh this property came into possession of the executors of the deed. The deed went on to provide for an annuity payable to Chhattar Singh's widow on

her executing a deed of release to any claim to the one-twelfth share of the village held by her husband. These documents knock the bottom out of the plaintiffs' case that the family was a joint family up till the time the present suit was brought. The result is that we have no doubt whatever that the finding of the Subordinate Judge on this issue was perfectly correct. The family is not a joint family and the property in suit is not joint family property, but is proved to have been divided in the sense that the parties agreed to hold it in definite shares. On this part of the case the appeal must fail. We are satisfied also that the Subordinate Judge was right in finding that the items of property Nos. 2, 3, 4, 5 and 6 specified in Part I attached to the plaint were the separate property of the defendants.

There remains only the other point decided by the Court below, namely, that the suit for the partition of Mauza Selmaun is not entertainable by civil Court. We think this decision is correct. What appears to have happened in the Revenue Court was this. An application for partition was made by the defendants in which they stated that their share of the village amounted to two-thirds. Notices were issued to the other co-sharers and the present plaintiffs came in and objected that the khewat had been wrongly prepared and that the shares were not correctly stated. The plaintiffs claimed that they were the owners of a one-half share of the village. They asked the Assistant Collector to stay the partition proceeding until they could apply to have the khewat amended. This application was granted and separate partition was then put in asking that the khewat might be framed in the manner contended for by the plaintiffs. This application was sent for an inquiry to a Naib-Tahsildar, who investigated the matter and reported that the plaintiffs were not entitled to have any correction of the khewat made. His opinion was that the plaintiffs had only a one-third share in the village and he suggested in his report that if the plaintiffs had any case to make out on this ground, they should go to a civil Court for a declaration of their right. This report was afterwards considered by the Assistant Collector, who agreed with the Naib-Tahsildar and dismissed the application. It so

happened that the Assistant Collector who dealt with this application for correction of the khewat was the same officer before whom the partition proceedings were pending. We are unable to entertain the argument that the order of the Assistant Collector disposing of the application for amendment of the khewat can be treated in any way as an order passed under S. 411, Local Revenue Act, requiring the present plaintiffs to go to a civil Court for the purpose of having their title determined. If an order is made under this last-mentioned section by which the question of title is referred for disposal to a civil Court the civil Court has no jurisdiction to entertain any suit for partition. The exclusive right to make the partition is reserved to the Revenue Court. The Court below was right, therefore, in saying that the present suit so far as it regards the division of Mauza Selmaun, is not entertainable.

The result of all this is that the decision of the Court below is affirmed. The appeal fails and is dismissed with costs.

G. V. S. J.

Appeal dismissed.

* A. I. R. 1918 Oudh 275

LANDSAY, J. C.

Parmeshar Din—Applicant—Appellant.

v.

Debi Prasad—Decree-holder—Respondent.

Ex. Decree Appeal No. 41 of 1917, Decided on 23rd April 1918, from decree of Dist. Judge, Gonda, D/- 10th September 1917.

(a) Civil P. C. (5 of 1908), S. 11—Finding not necessary for decision of suit does not operate as res judicata.

Where it appears from the judgment of a Court that the real ground of decision is a particular finding which alone is sufficient for the disposal of the case, and that it has given other findings as well which are not necessary for the decision of the suit, the former finding is the only finding which operates as res judicata, especially when it is found that the judgment has been appealed from and that the Appellate Court has taken into consideration that finding alone.

(D 277 C 1, 2)

* (b) Civil P. C. (5 of 1908), O. 21, R. 58, 60 and 63—Attachment—Objection under R. 58 allowed—Decree in suit or declaration revives attachment.

Where an execution Court allowed an objection under O. 21, R. 58, and referred the unsuccessful decree-holder to a regular suit, but did not pass any order under O. 21, R. 60 of the Code raising the attachment, and the decree-holder thereafter filed a declaratory suit and obtained a decree in favour:

Held: that in view of the provisions of O. 21, R. 68, the result of the decree passed in the declaratory suit was to revive the attachment which had been previously carried out, even if it be assumed that the legal effect of allowing the objection had been to raise the attachment.

[P 278 C 1]

*** (c) Civil P. C. (5 of 1908), O. 21, R. 55—Decree reversed in appeal but restored in second appeal, revives attachment.**

Where the decree of a Court of first instance is reversed in first appeal but restored in second appeal, the result of the decision in second appeal is to revive the attachment which, under the provisions of O. 21, R. 55, Civil P. C., is deemed to have been withdrawn in consequence of the decision in first appeal.

[P 278 C 1]

Ram Bharose Lal for Bisheshwar Nath Srivastava—for Appellant.

A. P. Sen—for Respondent.

Judgment.—The question for decision in this appeal is whether or not an application for execution of a decree made by the decree-holder respondent on the 30th August 1916 is maintainable and whether it is barred by the rule of limitation. The facts of the case must be set out at some little length. In the year 1904 a mortgage of a share of 1 anna in a village called Dahua was executed by one Sheo Narain in favour of the present respondent Debi Prasad. Sheo Narain was the brother of the present appellant Parmeshar Din and died in the year 1910. After the mortgage had been executed, a suit was brought by other members of the family of Sheo Narain for cancellation of the deed of mortgage on the ground that the property mortgaged was joint family property which Sheo Narain had no power to encumber. This suit was decreed in February 1905. The decision was upheld in appeal. Subsequently Debi Prasad brought a suit against Sheo Narain for return of the mortgage money and obtained a simple money decree against him on 18th January 1909 for a sum of Rs. 1,680 odd. It is this decree which Debi Prasad is now attempting to execute.

Having got this money-decree, Debi Prasad proceeded to attach a 2-annas share in Mauzu Dahua for the purpose of obtaining satisfaction in the execution department, and it is admitted that an attachment of this share was actually made at the end of May 1909. An objection was thereupon made to the attachment by two persons, namely, the present appellant Parmeshar Din and his uncle Gaya Prasad. They alleged that the 2-annas share attached was no longer the property of the judgment-debtor. It was

stated that a 1-anna 4-pie share had been relinquished by Sheo Narain in favour of Gaya Prasad. As regards the balance of an 8 pies share, the case set up was that another brother of the judgment-debtor named Sitla Din, had made an oral bequest of this share in favour of Parmeshar Din. These objections were allowed on 19th June 1909 and by an order of the executing Court the decree-holder was referred to a regular suit. No order was passed at the time raising the attachment which had already been carried out. The declaratory suit having been filed, a decree was passed in favour of Debi Prasad in April 1910 declaring that the 2-annas share which had been attached was liable to be taken in execution of the money decree. The Court held that the deed of relinquishment set up by Gaya Prasad and the oral bequest which was put forward by Parmeshar Din were not established. The opinion of the Court was that these transactions were wholly fictitious and collusive transactions, and that the property had never in fact passed out of Sheo Narain's hands. This decree was upheld in appeal by the learned District Judge of Gonda on 1st June 1910 and his judgment was allowed to become final.

Meantime the decree of January 1909 which was passed in favour of Debi Prasad against Sheo Narain was reversed in appeal by the District Judge of Gonda in the month of May 1910. Subsequently in an appeal made to this Court the decree of the first Court was restored by judgment dated 21st August 1911. On 22nd August 1914 the decree-holder having got his money decree affirmed by the decision of this Court made an application for execution, a copy of which is Ex. A-7. In this the whole of the facts were set out. The decree-holder informed the Court that his money decree had been affirmed. He also mentioned in his application that the declaratory suit regarding the liability of the 2-annas share (which had been attached) to be taken in execution had been decided in his favour. He requested the Court to issue a notice under O. 21, R. 22, to Mt. Ram Dei as being the widow and legal representative of Sheo Narain who had died meantime. A further prayer was that after the notice had been issued an order for sale should be made with reference to the provisions of O. 21, R. 66. This application remained pending for a considerable time

and was dismissed on 6th February 1915 for want of prosecution on the part of the decree-holder. Another application was made on 14th June 1915, in which decree-holder again asked for sale of the 2-annas share. In this application it was mentioned that the share was still under attachment, no order having been passed declaring that the attachment had been raised. It was prayed, however, that, if for any reason the Court were of opinion that the previous attachment was not still subsisting, an order for attachment might be made preliminary to the order for sale. On 13th June 1916 this application was consigned to records on a joint application of the parties. It was represented to the Court that the parties were about to enter into a compromise.

Finally we come to the present application which, as I have already stated, is dated 30th August 1916. Mt. Ram Dei having died meanwhile, the present appellant Parmeshar Din has been impleaded as her legal representative on the allegation that the property which Sheo Narain held and which came to his widow for the period of her life has passed by inheritance to Parmeshar Din. I may also mention here that the decree of this Court dated 24th August 1911 was amended on 19th March 1915, it being declared that Debi Prasad would only be entitled to take out execution against such of the assets of Sheo Narain as had come to the hands of his legal representative Mt. Ram Dei, who was at that time alive. Now that the present application for execution has been made, it has been resisted on a variety of grounds by the present appellant. Both the Courts below have dismissed his objections and held that the execution of the decree can proceed. The first plea taken by Parmeshar Din was that as a matter of fact he and Sheo Narain had continued to be members of a joint family until the time of the latter's death. Upon this point both the Courts below have decided against the objector. They have held, and there is, in my opinion, ample evidence to support the finding, that at the time of Sheo Narain's death he was separate in estate from his brothers.

It has been sought to be argued here that this finding of the Court below is wrong in law, the ground taken being that in the declaratory suit which was decided

finally by the order of the District Judge dated 1st June 1910 it was held that Sheo Narain and his brothers were at that time members of a joint Hindu family. There is indeed in the judgment of the first Court which dealt with that suit a statement to this effect. It appears, however, from the judgment that the real ground of decision was that the transfers which were pleaded in that suit, both by Gaya Prasad and Parmeshar Din, were held to be fictitious and fraudulent. That finding was sufficient for the disposal of the case; and it seems to me that any statement or finding in the Subordinate Judge's judgment to the effect that the family was joint was not necessary for the decision of the suit and consequently cannot operate now as *res judicata*. In this connexion it is further to be observed that the judgment which must be looked to for this purpose, is not the judgment of the Subordinate Judge but the judgment of the District Judge, which was delivered on 1st June 1910. There the learned Judge came to a distinct finding that the transfers pleaded by Gaya Prasad and Parmeshar Din were fictitious; and it was upon this ground that it was held that the 2 annas share was liable to be taken in execution of Debi Prasad's decree. This point, however, is really one of minor importance. The principal matter to be decided now is whether or not the attachment of this 2 annas share, which was made in the month of May 1909, ceased at any time to subsist between the date upon which it was made and 22nd August 1914 when an application was made for execution. If it be found that the attachment was never removed, then it does not matter whether Sheo Narain died as a member of the joint family or whether he was separate in estate at the time of his death.

To come now to this principal question, the first argument which has been addressed to me in this connexion is that the attachment ceased to remain in force when the objections of Gaya Prasad and Parmeshar Din to the execution were allowed on 19th June 1909. I have already stated that when these objections were accepted no order was passed removing the attachment. The appellant, however, relies upon the provisions of O. 21, R. 60, and contends that the effect in law of allowing the objections was to release the property from attachment. This argument cannot, I think, be accepted, for it

appears to me from the provisions of O. 21, R. 55, that any order which could have been passed under R. 55 for the release from attachment would have been subject to the result of the declaratory suit which was brought thereafter. In my opinion as soon as the decree-holder Debi Prasad obtained a declaration in his favour that the property was liable to be taken in execution, the attachment which had been previously carried out was revived. If any authority is needed for this opinion it will be found in the case reported as *Ram Chandra Marwari v. Mudeshwar Singh* (1). The next point argued is with reference to the provisions of O. 21, R. 55. This rule lays down that where the decree is set aside or reversed, the attachment shall be deemed to be withdrawn. It also provides for a proclamation announcing the withdrawal of the attachment being made on application made by the judgment-debtor. No such application appears to have been made in the present case. I have already mentioned that the money-decree which Debi Prasad obtained on 18th January 1909 was reversed on the first appeal on 18th May 1910, and it may be argued on the language of R. 55 that the result of this decree was that the attachment made in the year 1909 must be deemed to have been withdrawn.

The further fact remains, however, that the decree of the District Judge which produced this effect was in its turn reversed by a decree of this Court; and it is, therefore, to be considered what was the result of the lower appellate Court's decree having been reversed in second appeal. There is no direct provision of the law on this subject laying down that the result of such a reversal would be the revival of the attachment which, under the provisions of the rule, is deemed to have been withdrawn. But upon principle it appears to me that there is no reason why such a result should not ensue when the decree of an appellate Court is reversed by this Court. I may refer here to the provisions of S. 144, Civil P. C., which lays down the principle that the result of a variation or reversal of a decree of the first Court is to place the parties in the status ante quo, and the section provides that an order for restitution can be made by the Court of first instance on an application made for that purpose by the party

entitled. It could not, I think, be denied that if, after this Court by its decree dated 24th August 1911 had restored the decree of the Court of first instance, the decree-holder had made an application to the first Court for restoration of the attachment, that application must necessarily have been allowed. There is not in terms any application to that effect made by Debi Prasad; but I have pointed out that in his application for execution dated 22nd August 1914, the decree-holder represented all the facts to the Court; and so far as I can see, the Court proceeded with that application on the footing that the attachment was still subsisting. I think that in the circumstances I am entitled to treat this application of 22nd August 1914 as being tantamount to an application to the Court to hold that the attachment previously made was still in existence, I hold, therefore, that the appellant is not entitled to succeed upon the plea based upon the provisions of O. 21, R. 55. The consequence is that if it be held that the attachment still subsisted on 22nd August 1914, it must be taken as having been still subsisting when the present application of 30th August 1916 was made; for in the interval there has been no order of a competent Court to declare that the attachment has been raised. The Courts below were of the same opinion and I agree with them in thinking that the appellant is not entitled to succeed on the ground that the present application for sale of the property is not maintainable on the ground that no attachment was subsisting at the time the application was presented.

It has been conceded that if the Court holds that the attachment continued to remain in force from May 1909 till the date of the present application, then the appellant is not in a position to contend that, even if it were shown that Sheo Narain died as a member of a joint family, the attachment would not taken effect and prevail over the passing of the property to the appellant by the rule of survivorship. Lastly, there is the question of limitation. The appellant seeks to defeat the present application by pleading that it has been made more than three years after the date upon which the obstacle in the way of the decree-holder's proceeding with execution was removed. For this purpose the learned Counsel for the appellant relies upon the judgment of the

District Judge dated the 1st June 1910 in which it was held that Debi Prasad was entitled to bring this 2-annas share to execution for the purpose of satisfying his decree. Obviously this argument is not sustainable for, as has been pointed out, there was another obstacle in the way of the decree-holder, namely, that his simple money decree which he obtained in January 1909 had been reversed in appeal in May 1910. It was not till 24th August 1911, when this Court delivered its judgment, that Debi Prasad's right to this money decree was finally established; and so, although in June 1910 the right of Debi Prasad to bring this property to sale in execution was declared, the declaration availed him nothing so long as the money decree which he had obtained and which he was seeking to execute continued to be set aside by virtue of the appellate order of the 18th May 1910.

It was only when this Court after reversing the lower appellate Court's decree finally decided that Debi Prasad was entitled to this money that the last obstacle to the execution was removed from his path. If, as the learned Counsel for the appellant argues, limitation for an application in execution is to run from the date when the obstacle to execution of the decree is removed, then it is clear that Debi Prasad had three years from 24th August 1911 to apply to the executing Court. It is admitted that he made his application on 22nd August 1914 within three years from that date. I have now dealt with all the questions which are raised in the memorandum of second appeal. In my opinion the pleas which are raised on behalf of the appellant must fail and I decide them against him. The result is that the appeal fails and is dismissed with costs.

B.V./R.R.

Appeal dismissed.

A. I. R. 1918 Oudh 279

LINDSAY, J. C.

Inder Bahadur Singh—Plaintiff—Appellant.

v.

Bechan Singh—Defendant—Respondent.

Second Appeal No. 333 of 1917, Decided on 23rd July 1918, from decree of Dist. Judge Gonda, Df. 12th May 1917.

Deed—Construction—Document described as "Patta qual qaror birt rahni"—Document held lease and not mortgage.

Where a document, which was described as a "patta qual qaror birt rahni," recited that the talukdar had received a certain sum from the grantee and that the latter had been put in possession of the lands described in the document, for which he had to pay a certain annual rent:

Held: that the document was nothing more than a lease and did not create any relationship of mortgagee and mortgagor between the parties. (T 280 C 1)

Ram Chandra—for Appellant.*Gokaran Nath Mishra*—for Respondent.

Judgment.—The only question for disposal in this appeal is whether or not the Courts below should have given the plaintiff-appellant a decree for ejectment of the defendant-respondent from certain lands which were in dispute. The suit arose out of ejectment proceedings which were taken in the Revenue Court. The talukdar, who is the plaintiff-appellant, issued a notice against the defendant-respondent on the footing that he was a tenant who was liable to be ejected by notice. In the Revenue Court the defendant relied upon a document which had been executed in his favour in the year 1901 by a lady, Thakurain Ikhtas Kaur, who was at that time in possession of the taluka for a life estate. This lady died in the year 1911. The Revenue Court cancelled the notice apparently on the basis of entries which had been made in the revenue papers, entries which went to show that the defendant Bechan Singh was a mortgagee of the lands in dispute. The result is that the talukdar has now brought a suit asking for a declaration that the defendant has no proprietary or under-proprietary rights in the lands.

Amongst the other reliefs sought is the ejectment of the defendant. The Courts below have given the plaintiff a declaration that Bechan Singh has no proprietary or under-proprietary rights in the lands in dispute and this finding has not been contested. Both Courts, however, refused to make an order for ejectment, on the ground that the civil Court was not competent to make such an order having regard to the position of the parties. Now in second appeal it is contended that a decree for ejectment ought to have been made on the ground that the defendant is a trespasser, being in possession without title. The whole

question turns upon the nature of the relation now existing between the parties. If it is found that the relation of landlord and tenant exists, then it is obvious that the civil Court has no power to order ejectment. The nature of the legal relation between the parties has to be determined with reference to the document upon which the defendant bases his rights. This document, as I have already said, was executed in the year 1901 by Thakurain Ikhlās Kuar. It is a matter of some difficulty to ascertain what the document really purports to be. In the opening words the document is described as "patta qaul qarar birt rahni." The document then goes on to recite that the talukdar has received a sum of Rs. 300 from the grantees and that the latter has been put in possession of lands described in the document, for which he has to pay an annual rent of Rs. 12-8-0. So far as I am able to see, it is quite impossible to describe this document as a document of mortgage and I have no doubt that the decision of the Revenue Court on this point was erroneous.

The Assistant Collector merely relied upon some entry which was made in the village papers. It is true that the use of the expression *birt rahni* does *prima facie* indicate the creation of some relation of mortgagor and mortgagee, but having regard to the language of the document as a whole, I am unable to understand what the significance of these particular words is. Read in its entirety the document appears to me nothing more than a lease; and it is to be noted that it is also described as a lease or patta. The lessee paid a premium of Rs. 300, and in consideration of this payment he was given a tenancy of the land subject to a rental of Rs. 12-8-0 a year. There is not a word in the document to indicate that the grant was being made by way of security for any loan. There is no undertaking to repay any mortgage money and altogether it seems to me that this document must be construed as a lease and nothing else. In this view, therefore, I must take it that the relation of landlord and tenant exists. It is, of course, the fact that the lease was granted by the lady who had only a life estate in the property, but it is not open to the plaintiff-appellant here to contend that Bechan Singh is a mere trespasser. Once Bechan Singh was admitted to a tenancy,

it follows that his ejectment can only be had in a Revenue Court on one or other of the grounds described in the Oudh Rent Act.

I have heard some argument with reference to the point of registration. The deed is not a registered deed and I was at one time inclined to doubt whether in view of its not being registered, it could be treated as creating a tenancy. S. 156, however, of the Rent Act exempts from the operation of the Indian Registration Act pattas which are granted for any term not exceeding seven years by a landlord to tenants to whom S. 36 or S. 37 of the Act applies. It seems to me that Bechan Singh was admitted to an ordinary tenancy under the sections just mentioned and consequently the deed did not require registration. I am satisfied, therefore that in the present circumstances the plaintiff is not entitled to obtain from the civil Court an order for the ejectment of the defendant. The appeal fails and is dismissed with costs.

B.V./R.K.

Appeal dismissed.

A. I. R. 1918 Oudh 280

KANHAIYA LAL AND DANIELS, A. J. Cs.

Murli—Appellant.

v.

Gajraj Singh and others—Respondents.

First Appeal No. 64 of 1916, Decided on 22nd April 1918, against the decree of Sub. Judge, Hardoi, D/- 6th March 1916.

(a) Oudh Laws Act (18 of 1876), S. 9—Rent-free grantee has no right of pre-emption.

A mere rent-free grantee is not a member of the village community for the purposes of pre-emption within the meaning of S. 9, Oudh Laws Act. [P 282 C 2 P 283 C 1]

(b) Oudh Rent Act (22 of 1881), S. 107-H—Muafidar holding for long time—Status of under-proprietor is not obtained without declaration under S. 107-H.

A mere muafidar or rent-free holder however long he may have held the muafi as such, does not thereby acquire the status of an under-proprietor, unless proceedings have been taken and the necessary declaration given by the Revenue Court under S. 107-H, Oudh Rent Act. [P 282 C 1; P 283 C 1]

A. P. Sen and Sami Ullah Beg—for Appellant.

Zahur Ahmad for Bisheshwar Nath Srivastava—for Respondents.

Kanhaiya Lal, A. J. C.—Gajraj Singh was the owner of the village Biraichman. On 24th July 1914 he sold the said village to Saïyed Muhammad Jawwad and Ganga Sahai in lieu of Rs. 18,000 leav-

ing Rs. 1,115 out of the consideration for payment to certain prior creditors. The plaintiff seeks to pre-empt that sale. He holds a plot of muafi or rent-free land in the village measuring 1 bigha 16 biswas pukhta. In the plaint he alleged that he was the proprietor of the said land, but at the time of the settlement of issues his Counsel stated that as the plaintiff and his ancestor held the muafi for more than 150 years and more than two generations, the plaintiff had acquired under-proprietary rights therein. He claimed in any event to be a member of the village community with the vendor. According to his allegation the price settled was Rs. 13,169 out of which Rs. 10,000 were left for payment to Ujagar Lal and had not been paid. The defence was that the plaintiff had no under-proprietary rights in the muafi land held by him and was not entitled to sue for pre-emption, that the plaintiff had not brought the suit in good faith for his own benefit and that the real consideration settled was that mentioned in the sale-deed.

The Court below dismissed the claim, holding that the plaintiff was not an under-proprietor and had no right to sue for pre-emption. In regard to the other pleas the findings were that the plaintiff was possessed of sufficient means to enable him to seek pre-emption in his own interest and that with the exception of a sum of Rs. 10,000 left for payment to Ujagar Lal, a prior mortgagee, which had admittedly not been paid, and another sum of Rs. 2,751 left to meet the expenses which the vendee might have to incur in seeking redemption from him, the other items mentioned in the sale-deed aggregating Rs. 5,219 represented the consideration which the vendee had paid to the vendor.

The learned Counsel who appears for the plaintiff appellant says that he does not propose to contest the propriety of the finding at which the Court below has arrived in regard to the consideration money. His contention is twofold. In the first place, he argues that the plaintiff acquired under-proprietary right in the land which was granted to one of his ancestors rent-free by the former proprietor of the village. In the second place, he urges that even if the plaintiff was not an under-proprietor he had a right to sue for pre-emption as a member of the village community. It is difficult

to uphold the former contention. It appears that Radhe, the uncle of the plaintiff, was granted a plot of land in this village shortly after the Mutiny by Saiyed Muhammad Ashraf, the then proprietor of the village. The story related by Hadi Hasan (D. W. 3) is that during the Mutiny Saiyed Muhammad Ashraf had either fled or gone to Farrukhabad, that Radhe looked after his house at Bilgram during his absence and that in consideration of the services rendered by Radhe during that period Saiyed Muhammad Ashraf gave him the muafi land in question on his return. Hadi Hasan does not state that Radhe was required to render any services in future in consideration of his holding the said land rent-free. It is possible that Radhe may have since been helping the landlord or his agent in bringing tenants who had not paid their rents or when the landlord went out on a shooting trip, but there is nothing to show that such assistance as he rendered formed part of the consideration for which the muafi was granted. The help rendered was of a casual character, and it is significant that in the revenue papers Radhe and his successors were described as holding the land as grantees of the Zamindar within the meaning of R. 105, Cl. 6 (i), of the Patwaris Manual and not as holders in lieu of wages who are classed differently.

Radhe died sometime in 1301 Faslī. The allegation of the defendants—respondents is that his landlord Saiyed Muhammad Jawwad, the son and successor of Saiyed Muhammad Ashraf, thereafter resumed the land and gave it for cultivation to a person named Bhudar. But it is admitted that no proceeding in ejectment or for resumption was taken by him in the manner required by law. It is also admitted by Jhabbu Lal (D. W. 2) that Bhudar cultivated the land as a sub-tenant of Radhe from before. Under S. 53, Oudh Land Revenue Act (17 of 1876) then in force, a landlord wishing to resume land rent-free could only do so by applying to the principal Civil Court of Original Jurisdiction of the district in which the land was situated. Madho, to whom Murli had bequeathed the whole of his property (Ex. 14) had never assented to the forcible resumption of the land by the landlord. He protested against the landlord asking Bhudar to attorn directly to him, and it

is admitted by the defendants' own witnesses that within 4 or 5 months of the so-called forcible resumption the landlord allowed Madho and his son, Murli, to continue to hold the muafi and to treat Bhudar as their sub-tenant as before and to take the rent directly from him. The defendants call it a re-grant but as there had been no resumption in law or actual dispossession in fact, the muafi land in question will be deemed to have continued in the possession of Madho and his son Murli in succession to Radhe, the original rent-free grantee.

The position of the plaintiff is however no better than that of a rent-free holder of some land in the village. S. 107-H of Oudh Rent Act empowers the Revenue Court to declare, at the time when a claim for resumption is brought against a person holding land rent-free, that by virtue of his having held the land for 50 years and for more than two generations subsequent to the original grantee he has become an under-proprietor thereof. But a suit for resumption is excluded from the operation of the civil Court by S. 108, Cl. (5-A), of the said Act, and until a suit for resumption is brought and the facts referred to in S. 107-H are established to the satisfaction of the Court which is empowered to deal with the resumption proceeding, the nature of the right which the holder of such land may possess must always remain a matter of uncertainty. When the facts referred to in S. 107-H are established, the law requires that the land so held shall be deemed for the purpose of resumption proceedings to be held in under-proprietary right and the Court charged with resumption proceedings shall declare the holder of such land to be the under-proprietor thereof and to be liable to pay a rent therefor equal to the revenue with an addition of not less than 10 or more than 50 per cent. As pointed out in *Rup Narain v. Badri Prasad* (1) if the Revenue Court rightly or wrongly refuse to make such a declaration, the civil Courts have no jurisdiction to re-open the question and grant a declaration of under-proprietary rights with respect to the land. S. 107-H, Oudh Rent Act, deals with cases in which under-proprietary rights can be acquired under certain circumstances and describes the occasion when and the authority by which the ac-

quisition of such rights can be declared so as to thwart a proceeding in ejectment or resumption, and the civil Court cannot usurp the functions of the Revenue Court to determine, apart from such resumption proceedings, whether such circumstances have been established or not.

The other argument, namely, that the plaintiff should be treated as a member of the village community for the purpose of pre-emption, even if he is a mere muafidar, is equally untenable. S. 7, Oudh Laws Act, (18 of 1876), deals with the classes of communities in which and the property with regard to which the right of pre-emption can be deemed to exist. S. 9 of the Act, deals with the nature of the transfers which give rise to that right and the persons who are entitled to exercise it in the absence of a custom to the contrary. A village community is declared in S. 7-A as proprietary or under-proprietary and distinct from the lessees referred to in S. 40, Oudh Land Revenue Act, 1876, corresponding with S. 79, U. P. Land Revenue Act, (3 of 1901). In *Drighifai Singh v. Court of Wards, Ramnagar Estate* (2) it was accordingly held that an under-proprietor is a member of the village community. A muafidar has no permanent stake in the land comprised in the village. If the muafi is resumed and he is assessed to rent and he fails to pay the same, he may be liable to ejectment. His position is in no sense akin to that of a proprietor or under-proprietor of the village, and if he is allowed a right to pre-empt, there is no reason why every other lessee or occupant or even a temporary sojourner should not have that right. The decision in *Ram Dayal v. Chaudhri Muhammad Abdul Basit* (3), which was referred to in *Gangole v. Kamar Ali Khan* (4), cannot be taken as applicable to a muafidar holding land rent-free which may be liable to resumption or assessment of rent in certain circumstances. For the above reasons, I would dismiss the appeal with costs.

Daniels, A. J. C.—The plaintiff, a rent-free holder in Mauza Birachman, sued for pre-emption in respect of a sale of under-proprietary right in that village, claiming the right under Cl. 3, S. 9, Oudh Laws Act. The question which we have to decide is, whether a rent-free grantee

2. (1902) 50 C 266.

3. (1902) 12 O C 1=11 C 7.

4. (1910) 18 O C 202=7 I C 613.

1. (1909) 12 O C 225=8 I C 667.

is a member of the village community within the meaning of that section. The appellant tried to strengthen his position by alleging facts which would, in the event of a suit for redemption by the proprietor, have entitled him to be declared an under-proprietor and so have rent assessed on the land held by him under S. 107-H, Oudh Rent Act. But this, even if established, does not assist him. It is well settled that under-proprietory right under S. 107-H only arises on a declaration being made by the Revenue Court under that section. Such a declaration changes the status of the usufructer into that of under-proprietor from the date on which it takes effect, and is accompanied by a corresponding liability to pay rent, from which he was previously exempt. This is clear from the section itself and was expressly held in *Shankar Sahas v. Gajulhar Prasad* (5) and in an earlier case, *Parvath Bahadur Singh v. Rajwara Bahadur Singh* (6). We agree with the learned Sahodindas JUDGE that the words "any member of the village community" do not include a rent-free grantee. I know of no case in which pre-emption has ever been claimed under the Oudh Laws Act in favour of any person not having a proprietary or under-proprietory right in the village. In the case of *Dinabhai Shah v. Court of Wards, Romnagar Estate* (2), which was referred to the High Court under S. 2 Oudh Courts Act, STANLEY, C. J., (at p. 278 of 5 O. C.) defined the words "any member of the village community" as meaning "any proprietor or under-proprietor." BLAIR, J., in the same case said that the words were inclusive of all holders in the village.

The appellant argues from the reference to "the cases referred to in S. 40, Land Revenue Act" in S. 7 that a right of pre-emption is recognised in favour of the lessees holding under a judicial decision referred to in that section, which has now been replaced by S. 79, Land Revenue Act, 1901, and that by analogy a muafidar should be put on an equally favourable footing. This argument breaks down in several directions. There are no doubt one or two scattered facts in which it has been suggested that possibly this class of lessees might be able to claim

pre-emption. Such an observation is for instance to be found in Mr. Spankie's judgment in *Syed Rashidullah-Din v. Wali Jan Beg* (7). In *Ham Fayal v. Choudhri Haidamman Ali* (8) the observation of the learned A. J. C., appears to favour the same view, since he expresses an opinion that the village community

"must be considered" (2007, 10). The practical purpose by the author is to "lead the reader to where the end of the narrative will extend which is given in 1.1.10" (2007, 10).

No question of such harmonization arises in the case and the observation quoted was not endorsed by Counsel J. C. In *Danabhar Nakkhar v. Mt. Dolata* (b), which has been referred to, the head-note is misleading. What the Bench actually said was this reference to S. 7 is contained in the following passage:

"The Act confers a right of pre-emption in certain specified cases. The first case, where one of the proprietors or his descendants of a village or town is desirous to acquire a village, or one of them acquires land as officers or part of a village staff, is by virtue of pre-emptible lease, with land or an interest in land in the village."

In other words, they held that a right of pre-emption arises on a sale of any of the interests referred to in Cl. (b) by any of the persons referred to in Cl. (a). Whatever may be the true meaning of S. 7, it is clearly to S. 10 that we have to look to see who are the persons entitled to claim pre-emption on a sale of a share of property or under proprietary right and S. 9 makes no mention of this special class of lessees. Even in S. 7 (a) a clear distinction is drawn between village communities and lessees under S. 10, for it is declared that a right of pre-emption shall be presumed to exist, firstly, in all village communities, and secondly, in these special cases. The position of lease-holders referred to in S. 79, Land Revenue Act, does not arise in this case, but even if a right of pre-emption could be claimed by them, which I doubt, I am certainly not prepared to extend it to musafirs when no such right is recognized in favour of any class of tenants or even of grove-holders. The appeal will be dismissed with costs.

B.V./R.K.

Appeal dismissed.

8. (1898) 1 O C 284.

5. (1917) 20 O C 171=40 I C 260.

6. (1906) 11 Q C 187.

7. (1904) 7 O C 19.

* A. I. R. 1918 Oudh 284

LENDISAY, J. C. AND KANHAIYA

LAL, A. J. C.

Badri Bishal and another—Plaintiffs
—Appellants.

v.

Baij Nath and others—Defendants—
Respondents.First Appeal No. 91 of 1916, Decided
on 12th June 1918, from decree of Sub-
Judge, Unao, D. 11th May 1916.* Evidence Act (1872), S. 115—Benefit of
estoppel by representation can be claimed by
party represented or his privy—Right of
privy can be deprived by arrangement between
parties.The benefit of an estoppel can be claimed either
by the person to whom the representation is made
or by his privy; and the privy cannot be deprived
of such benefit by the fact that since the time
the representation was made and the privy of
estate commenced, the person to whom the re-
presentation was made and the person who made
the representation have come to an arrangement
contrary to the representation. [P 286 C 1]*A. P. Sen and Basudeo Lal*—for Appel-
lants.*Gokaran Nath Misra and Bisheswar
Nath Srivastava*—for Respondents.*Judgment.*—The only question for
decision in this appeal is one of estoppel.
The judgment of the Court below is to the
effect that the plaintiffs, who are the ap-
pellants here, are estopped from suing on
a mortgage executed in their favour which
was the basis of their claim in the lower
Court. In order to elucidate the point
before us it is necessary to refer to what
took place previous to the present litigation.
In the year 1868 one Baldeo Bakhsh
who was the grandfather of the defend-
ant-respondent, Har Dayal, executed a
mortgage in favour of one Daya Shankar
in respect of a four-annas share in a
village called Satan. It is admitted that
eventually the mortgagee obtained posses-
sion over the whole of the mortgaged
property and that his representatives-in-
interest were in possession till a short
time ago. In February 1912 the defend-
ant Har Dayal executed a mortgage with
possession in favour of the plaintiffs-ap-
pellants Badri Bishal and Sheo Sahai.
The mortgage money was a sum of over
Rs. 4,000 and a portion of the considera-
tion was left with the mortgagees to
redeem the mortgage of 1868. About a
fortnight after this mortgage was execut-
ed, a suit was brought against the mort-
gagees on behalf of Har Dayal by his next
friend Baij Nath for the purpose of hav-
ing the mortgage-deed set aside on theground that Har Dayal was a minor and
that he had been tricked into making the
mortgage in the defendants' favour.
Shortly after this it is admitted that
Baij Nath who appeared in the suit as
Har Dayal's next friend was appointed
guardian of the person and property of
Har Dayal.The suit was contended in the Court
of the Additional Judge of Unao. Issues
were framed and we have now to consi-
der what took place on 26th March 1913
in the Court of the Additional Judge.
The order-sheet of the record of that suit
shows that the case was up for hearing
on the date just mentioned in the presence
of the next friend Baij Nath, who was
represented by Babu Lakshmi Narain,
vakil. The defendants on that date were
represented by a wakil named Babu Prag
Narain. It was intimated by the pleaders
to the Court that an arrangement had
been come to between the parties and
that payment of the money which the de-
fendants had agreed to receive was not
possible on that date, inasmuch as the
banker who was to have brought the
money to Court had been unable to pro-
duce it. The pleaders asked the Court
for four days' adjournment promising to
put in a compromise on the next date for
hearing. The learned Judge took down
the statements of the pleaders and the
parties. Baij Nath, the next friend of
the plaintiff Har Dayal, told the learned
Judge that he had agreed to pay a fixed
sum to the defendants, who in their turn
had agreed to relinquish their rights under
the mortgage-deed in suit. The general
agent of defendant 1 made the following
statement:"I have agreed to relinquish my right under
the mortgage in suit if the sum fixed to-day is
paid to my master Badri Bishal by plaintiff's
next friend."A similar statement was made by de-
fendant 2 Sheo Sahai, who was present in
person. He deposed that he had agreed
to relinquish his right under the mort-
gage in suit if the sum agreed upon was
paid to himself and the other mortgagee.
After these statements had been record-
ed, the learned Judge fixed 29th March
1913 for the filing of the compromise.
On 29th March 1913 what took place was
this: The plaintiff's pleader Babu Lakshmi
Narain withdrew the plea of minority
which had been set up in the plaint, and
intimated that it ought to be considered

that his client was of full age at the time he made the mortgage in the defendants' favour. The defendants on this date were represented by two pleaders and both of the pleaders informed the Court that they had no objection to the withdrawal of the plea, the fact being that the defence to the suit was that Har Dayal was of full age at the time the mortgage was made.

This statement having been made, the Additional Judge ordered the plaint to be returned to the plaintiff for amendment. Obviously it was necessary to alter the plaint in view of the withdrawal of the allegation that the plaintiff was a minor. The plaint was duly amended, signed by Har Dayal himself who was present, and lodged in Court. After this had been done, the learned Judge proceeded to inquire regarding the terms of the settlement. The plaintiff's pleader admitted that the agreement was that the plaintiff was to pay a sum of Rs. 1,300 to the defendants, who were for this consideration to relinquish all their rights under the mortgage-deed. The general agent of the defendant, Badri Bishal was present in Court and when he was questioned regarding this matter, the only answer he could give was that he could not say exactly if Rs. 1,300 was the sum fixed. The matter however, was made clear by the evidence of Babu Prag Narain, who was thereupon called as a witness. He deposed that the terms which were settled between the parties on 26th March 1913 were that the plaintiff was to pay a sum of Rs. 1,300 to the defendants and that the defendants were to give up their claim under the mortgage-deed in suit. It was further agreed that the parties would bear their own costs. Having ascertained these facts the Judge proceeded to deliver judgment. He found that the parties had come to terms in the sense above mentioned and he consequently directed that the plaintiff's claim to have the mortgage-deed of 9th February 1912 executed by him in favour of the defendants, Badri Bishal and Sheo Sahai, set aside should be decreed upon payment of Rs. 1,300 to the defendants. The judgment directed that the sum of Rs. 1,300 was to be paid on or before 3rd April 1913, failing which the plaintiff's claim would stand dismissed with costs.

In order to raise the money which he had to pay according to the directions

contained in this judgment, Har Dayal on 31st March 1913 executed a mortgage of the four annas share of Mouza Satan in favour of Jagan Nath, who is defendant 2 in the present suit. Jagan Nath, it may be mentioned, is the full brother of Baij Nath who had been acting as the next friend of Har Dayal in the suit of 1912. The mortgage in favour of Jagan Nath was for a sum of Rs. 5,000. It was arranged that out of this money Rs. 1,300 should be deposited in Court to satisfy the decree of 29th March 1913. We find from the record (Ex. B-16) that this sum of Rs. 1,300 was actually lodged in Court on 31st March by Har Dayal and his mortgagee Jagan Nath. After the close of the proceedings in the Court of the Additional Judge, Badri Bishal and Sheo Sahai brought an appeal in this Court which was disposed of on 10th March 1915. The case was compromised in this Court between Badri Bishal and Sheo Sahai on the one side and Har Dayal on the other, and the result of the judgment of this Court was that the appeal of Badri Bishal and Sheo Sahai was allowed in consequence of which the decree of 29th March 1913 of the Additional Judge was set aside. Jagan Nath the mortgagee and his brother Baij Nath were made parties to the appeal in this Court, but their names were removed from the record and it is common ground that whatever was decided in this Court in no way affects the rights of either Baij Nath or Jagan Nath, whatever they may be. We may mention here that after taking this mortgage of 31st March 1913 Jagan Nath brought a suit for redemption of the mortgage of 1868 and obtained a decree. He paid the money into Court on 23rd March 1914. The result, therefore, is that at the present moment Jagan Nath is in possession of the four annas share of Mauza Satan as a mortgagee.

Badri Bishal and Sheo Sahai having managed to get the decree 29th March 1913 set aside in appeal in this Court, have now brought the present suit in which they claim possession of the four-annas share under the mortgage which was executed in their favour on 9th February 1912. One of the defences which has been set up to this claim and the defence which the Subordinate Judge has accepted is that Badri Bishal and Sheo Sahai are estopped from setting up any rights under their mortgage of 9th

February 1912. The Subordinate Judge has found in favour of the defendants and has dismissed the suit on this ground alone. It is this question of estoppel which has been argued before us by the learned Counsel for the appellants. In our opinion the decision of the lower Court is perfectly correct. The facts have been stated in detail and it is impossible, in our opinion, for the appellants to contend that on these facts they are now in a position to set up their rights as mortgagees under the deed of 9th February 1912. It is perfectly clear that by the proceedings which were taken in the Court of the Additional Judge at Unao on 20th March 1913 the present plaintiffs surrendered whatever claim they had under this mortgage for a payment of Rs. 1,300 to be made to them by Har Dayal. Har Dayal had become the plaintiff in the case, and it is not to be doubted that there was a definite agreement between him and the present appellants. That agreement was communicated to the Court and a decree was passed upon it. On the strength of this agreement Jagan Nath respondent advanced the money on the mortgage of 31st March 1913, and it was out of this money that Har Dayal deposited in Court the Rupees 1,300 which he was bound to pay to Badri Bishal and Sheo Sahai. In these circumstances Jagan Nath has certainly the right to say that the present plaintiffs-appellants cannot, as against him, be heard to set up any rights under their mortgage of 9th February 1912. Jagan Nath claims title under Har Dayal, and the benefit of an estoppel can be claimed either by the person to whom the representation is made or by his privy. It is not to be doubted here that Jagan Nath is in privity of estate with Har Dayal. It may be that since the time the representation was made Har Dayal has come to some other arrangement with Badri Bishal and Sheo Sahai.

That fact, however, cannot deprive Jagan Nath of the benefit of the estoppel, which passed to him as soon as he took a mortgage of the property on 31st March 1913. This finding is sufficient to dispose of the case. It is not necessary for us to inquire into the validity of the mortgage set up by Jagan Nath or whether the plaintiffs are in a position to deny the validity of that mortgage. It is sufficient for us to say that on the principle of

estoppel they are debarred from setting up any rights under their own document, and, as the whole of their case is based upon the terms of that document and as it is upon the strength of this document that they are seeking possession as against Jagan Nath, the result is that their suit was rightly dismissed and their appeal must fail. We affirm the judgment of the Court below and dismiss this appeal with costs to the answering respondents.

B.V. R.K.

Appeal dismissed.

A. I. R. 1918 Oudh 286

LINDSAY, J. C.

Gaya Prasad and others—Plaintiffs—Appellants.

v.

Sada Sukh and others—Defendants—Respondents.

Second Appeal No 196 of 1918, Decided on 2nd September 1918, from decree of Sub. Judge, Unao, D/- 12th February 1918.

Transfer of Property Act (1882), S. 76—Usufructuary mortgagee of under-proprietary plots is bound to pay rent to superior proprietor—Suit for contribution against mortgagor in absence of any stipulation is not maintainable—Contract Act (1872), S. 69.

A usufructuary mortgagee of under-proprietary plots is, in the absence of any stipulation to the contrary entered in the mortgage-deed, bound, under the provisions of S. 76 to pay to the superior proprietor the rent due in respect of those plots, and is, therefore, not entitled to recover it by way of contribution from the mortgagor under the provisions of S. 69 Contract Act.

[F 267 C 1]

Surendro Nath Roy for Tara Shankar Sharma—for Appellants.

Judgment.—This appeal is up for admission under O. 41, R. 11, Civil P. C. It arose out of a suit which was framed as a suit for contribution, and a plea is taken in the memorandum of appeal that the plaintiffs were entitled to recover under the provisions of S. 69, Contract Act. The facts, however, appear to me to render an argument of this kind quite impossible. It is admitted that the plaintiffs-appellants are the mortgagees with possession of certain plots of under-proprietary tenure. The defendants-respondents were the mortgagors. The superior proprietor had to bring a suit for arrears of rent due in respect of these plots. A decree was obtained. The present plaintiffs-appellants objected to the execution of the decree but being unsuccessful, they had in the last resort to pay up the ar-

rears in order to protect the mortgaged property. Obviously, however, they have no claim against the mortgagors in respect of the rents so paid. Under the provisions of S. 76, T. P. Act, the mortgagees in possession were, in my opinion, liable to pay the under-proprietary rent of the holding. It is admitted before me that in the mortgage-deed there is no contract to the contrary. Consequently the primary liability for the rent of the plots in question lay upon the plaintiffs-appellants; and in these circumstances it is not possible for them to set up a case under S. 69, Contract Act. Relief under that section can be granted only where one person is interested in the payment of money which another person is bound by law to pay, but here the defendants-respondents were not bound by law to pay the arrears of rent. That obligation rested upon the plaintiffs themselves. The learned Subordinate Judge is hardly right in saying that the plaintiffs were guilty of contributory negligence. The case is not one of contributory negligence. The whole responsibility for the payment of these rents lies upon the plaintiffs and they are not, therefore, entitled to seek any contribution from the defendants-mortgagors. The appeal is dismissed.

B.V./J.R.

*Appeal dismissed.***A. I. R. 1918 Oudh 287**

LINDSAY, J. C.

Jagannath Singh—Defendant—Appellant.

v.

Drigbijay Singh—Plaintiff—Respondent.

Second Appeal No. 310 of 1917, Decided on 23rd July 1917, against decree of Dist. Judge, Rae Bareilly, D/- 18th May 1917.

Jurisdiction—Civil and Revenue—Jurisdiction to decide finally validity of documents.

The proposition that the Revenue Courts have no exclusive jurisdiction to decide finally upon the validity of document of title, though correct as a general statement of the law, is subject to the obvious qualification that the civil Courts cannot decide any matter in which jurisdiction has been exclusively reserved to Revenue Courts.

[1928 C 1]

Bisheshwar Nath Srivastava—for Appellant.

Gokaran Nath Mirsa—for Respondent.

Judgment.—The dispute between the parties to this appeal has arisen out of certain proceedings which were taken by the plaintiff-respondent, the talukdar, in the

Revenue Court. The talukdar issued a notice of ejectment against the appellant in respect of the lands in suit. The appellant contested the notice in the Revenue Court on the ground that he had under-proprietary rights. The case was fought out as far as the Board of Revenue. The Board held that the notice must be cancelled on the ground that a prima facie case of under-proprietary rights had been made out. The result is that the talukdar has brought the present suit for declaration. The relief claimed in para 12 of the plaint is (1) that a declaration be made that the defendant has got neither proprietary nor under-proprietary rights in the land in suit, (2) that he is a mere tenant of the land in question, (3) that the lease (patta) which is set up by the defendant is a fictitious deed and (4) that the decision of the Board of Revenue is erroneous.

The Courts below have found that the defendant has neither proprietary nor under-proprietary rights in the lands in suit and that finding is not disputed by the appellant. The case with which the appellant comes to this Court is that the Courts below were wrong in giving a decision as to the genuineness of the patta, that is to say, the document upon which the appellant had relied in the Revenue Court. It is said that the civil Court had no jurisdiction to give any declaration regarding the genuineness or otherwise of this document. In my opinion this contention must be allowed and the decree of the Court below must be modified accordingly. It appears that during the trial in the Court of first instance the defendant admitted that he was not in a position to claim proprietary or under-proprietary rights in these lands. He set up the case that he was a tenant with a right of occupancy. Consequently the only matter upon which the parties remained at issue after those admissions had been made was whether the defendant was, as the plaintiff described him, an ordinary tenant of the lands in suit or whether he was an occupancy tenant, as he himself claimed to be. Obviously a civil Court could give no declaration on a question of this kind. It is well settled that the Revenue Courts have exclusive jurisdiction to determine the class to which a tenant belongs. This being so, it seems to me that after the admission made by the defendant the Courts

below were wrong in going further for the purpose of determining whether or not the document set up by the defendant was a genuine document. On behalf of the respondent I have been referred to a ruling of my own reported as *Debi Bakhsh v. Ram Dhani* (1) in which it was laid down that the Revenue Courts have no exclusive jurisdiction to decide finally upon validity of documents of title. As a general statement of the law this appears to me to be correct, but it is necessarily subject to the qualification that the civil Courts cannot decide any matter in which jurisdiction has been exclusively reserved to the Revenue Courts. It appears to me that in the present case the issue regarding the genuineness or otherwise of the patta relied upon by the defendant-appellant could only be decided with the object of determining a question which is exclusively reserved for the jurisdiction of the revenue Courts, namely, whether the defendant is an ordinary tenant or a tenant with a right of occupancy.

The result is that the appeal is allowed. The decree of the Court below is modified by striking out the declaration regarding the genuineness of the patta relied upon by the defendant-appellant. The parties will bear their own costs.

B.V./R.K. *Appeal allowed.*

1. (1916) 19 O C 58=35 I C 416.

A. I. R. 1918 Oudh 288

LINDSAY, J. C.

Ram Piyare Lal—Appellant.

v.

Nageshwar—Respondant.

Second Appeal No. 382 of 1917, Decided on 29th July 1918, against the decree of Dist. Judge, Gonda, D/- 27th August 1917.

Cosharers—Joint Property—Exclusive possession by one cosharer for long time—Other cosharers are not entitled to eject but can claim partition.

The general rule as regards the enjoyment of joint property by cosharers is that one cosharer has no right to appropriate to himself a specific portion of the common land and to exclude his cosharers from all use and enjoyment of the same without a lawful partition. But where a person has been in possession of a piece of joint land for a long time without any let or hindrance by the other cosharers, the latter have no right to eject him or his transferee or to disturb his possession or enjoyment otherwise than by seeking partition, and he is entitled to continue in such possession so long as such user does not interfere with the use by other cosharers of what is in their possession. [P 289 C 1]

Basudeo Lal—for Appellant.

Girja Saran Lal and *S.N.Roy*—for Respondent.

Judgment.—After hearing the learned counsel in this case and considering the evidence, I am of opinion that the decision of the lower appellate Court is erroneous. I think the decree of the Court of first instance ought to be restored. The plaintiff's case was that he is a Zamindar in the village, that he occupies a house there and that in front of that house there is a piece of land which is used as "sahen darwaza." In other words, the land is an open space the occupation of which is enjoyed by the plaintiff for the convenience of his house. His complaint was that the defendant, who is also a Zamindar in the village and has his own house some distance away had come and driven cattle pegs in the land in question and also deposited manure, the result being an interference with his right of enjoyment. It is perfectly plain from a perusal of the oral evidence in the case that the witnesses on neither side are to be believed. They seem to be partizan witnesses who are ready to swear to anything. The fact, however, remains that there is some documentary evidence which goes to show that the plot in suit in the year 1884 stood in front of the house of a man named Ram Ratan. It is described in this document Exhibit A.3 as being "sahen darwaza." The defendant's story is that this house now occupied by the plaintiff was once in the possession of a tenant of his. Whether that is so or not appears to me to make no difference. The admitted fact remains that the plaintiff Ram Piyare Lal has now been occupying this house for some years past: indeed some of the defendant's witnesses admit that he has built or rebuilt the house. If that is so, then it seems to me that the plaintiff is entitled to the undisturbed enjoyment of this land in front of his house, provided that in doing so he does not put the other cosharers to inconvenience and that they are, in a similar way, enjoying the exclusive possession of plots of land in front of their own houses. I do not agree that the case set out in the plaint was a vague case. It is true that there is no claim for an easement; nor again is there any claim to absolutely exclusive possession. The law has, I think, been laid down correctly in a judgment of

Pandit Kanhaiya Lal which is reported as *Sobha Singh v. Ganga Bakhsh* (1).

The general rule is that a cosharer has no right to appropriate to himself a specific portion of the common land and to exclude his cosharers, from all use and enjoyment of the same without a lawful partition. But where a person has been in possession of a piece of joint land for a long time without any let or hindrance by the other cosharers, the latter have no right to eject him or his transferees or to disturb his possession or enjoyment, otherwise than by seeking partition, and he is entitled to continue in such possession so long as such user does not interfere with the user of the other cosharers of what is in their possession. The law as laid down there seems to me to fit this case exactly. It is not to be doubted that the piece of land in front of the house now occupied by the plaintiff has for a very long period been used by the occupants of the house as "sahon darwaza." It is also apparent from the map which was prepared by the Commissioner that the defendant Nageshar has lots of room in front of his own dwelling house for the purposes of making a manure heap and tying up and feeding his cattle. I can only come to the conclusion that he has deposited manure and driven these pegs in front of the plaintiff's house for the purpose of annoying him. If the defendant is not satisfied with the present arrangement, his remedy is to seek partition of this abadi area. Probably what has given rise to this suit is the fact that within the last year or two the plaintiff has erected some sort of chabutra on the land in dispute to be used for the purpose of religious recitations. It may be that the defendant objects to this erection, but as I have already said, if he is not satisfied with the arrangements as they are, he is at liberty to apply for partition. As things are at present, it seems to me that the plaintiff is not interfering in any way with the right of the other cosharers to enjoy for the time being exclusive possession of the pieces of land in front of their houses. I allow the appeal, set aside the order of the Court below and restore the decree of the Court of first instance. The plaintiff will have his costs both here and in the lower appellate Court.

B.V./R.K. *Appeal allowed.*

1. 4 O & L R 349.

1918 O/37 & 38

A. I. R. 1918 Oudh 289

KANHAIYA LAL, A. J. C.

Mahadeo Gir—Plaintiff—Applicant.

v.

Bhagwant Singh and another—Defendants—Opposite Parties.

Civil Ravn. No. 73 of 1917. Decided on 6th June 1917, against order of District Judge Fyzabad, D. 17th March 1917.

Jurisdiction—Civil and Revenue—Suit by heir of under-proprietor—Relationship of landlord and tenant denied and heirship disputed—Subsequent admission of heirship does not oust jurisdiction of civil Court.

A subsequent admission of a fact cannot take away a jurisdiction if it is once vested.

[1918 O C 11]

The plaintiff sued for possession of certain under-proprietary plots on the allegation that he was the heir of the deceased under-proprietor and had been dispossessed from those plots by the defendant landlord. The defendant denied this allegation but at the time of argument in the Court of first instance he admitted that the plaintiff was the heir of the deceased under-proprietor.

Held, that the relationship of landlord and tenant having been denied in the pleadings and the plaintiff's right of succession being in dispute the suit was rightly filed in the civil Court. 10 O C 105 *infra*. [1918 O C 2]

Mahammad Waim—for Applicant.

M. A. Khan—for Opposite Parties.

Judgment.—The plots in dispute were held in birt right by Sheo Pershad Gosain who was succeeded by his disciple Sheogir, who died about five years ago. It was at one time denied that the plaintiff was the disciple and heir of Sheogir but at the time of argument in the Court of first instance, the plaintiff's right to inherit the under-proprietary holding of Sheogir was conceded. The plaintiff alleged that he was in proprietary possession of the plots for a year after the death of Sheogir and was ejected about four years before this suit. It is not clear, however, whether if he held the land in his possession he did so through tenants, or was in cultivatory possession of the same. The defendant denied that the plaintiff ever got possession.

The Courts below returned the plaint for presentation to the proper Court, though no issue was raised on the point. As the right of succession was disputed in this case, the case was not, as pointed out in *Thakur Kishen Kuer v. Mahant Bajrang Das* (1) and *Raghuhar Dayal v. Chandan* (2), excluded from the jurisdiction of the civil Court. A sub.

1. (1898) 1 O C 172.

2. (1907) 10 O C 28.

sequent admission of a fact cannot take away a jurisdiction if it was once vested. The patwari says that the defendant has been in possession for six years, and there is no positive evidence on the record to show that the plaintiff ever got possession or was in physical occupation of the land himself. The decision in *Chandika Bakhsh Singh v. Mt. Raghunath Kunwar* (3) would apply, if the plaintiff was not in physical occupation. In any event the relationship of landlord and tenant was denied in the pleadings, and the suit was rightly filed in the civil Court. The application is, therefore, allowed and the suit remanded to the Court of first instance for disposal on the merits. The costs of this application will abide the event.

B.V./R.K. Case remanded.

3. (1913) 16 O C 105=18 I C 284.

A. I. R. 1918 Oudh 290

STUART AND KANHAIYA LAL, A. J. Cs.

Abbas Bandi Bibi and another—Plaintiffs—Appellants.

v.

Abdul Ghani and another—Defendants—Respondents.

Second Appeal No. 208 of 1917, from decree of Dist. Judge, Fyzabad, D/-23rd February 1917.

Oudh Laws Act (18 of 1876), Ch. 2, S. 9, —Pre-emption—Sale of house by riaya—Suit for pre-emption is not maintainable.

A sale by an occupier of a house in a village who has merely the ordinary rights of a riaya in it, does not give rise to a right of pre-emption exercisable under Ch. 2, Oudh Laws Act, inasmuch as under S. 9 of that Act, unless the transferor is a proprietor of a proprietary or under-proprietary tenure or a share in such a tenure, no right of pre-emption comes into being. 4 O. C. 26, *Foll.*

[P 291 C 1]

Wazir Hasan—for Appellants.

Mohammad Wasim—for Respondents.

Judgment.—The facts of this case are very simple. A widow called Asuda was the occupier of a house in Kasba Jalalpur, Fyzabad district. She had in this house the ordinary rights of a riaya, that is to say, she owned the materials but had no title in the site. She sold this house to one Abdul Ghani. The proprietors of the village have sued to exercise a right of pre-emption under the provisions of Ch. 2, Act 18 of 1876. The lower Courts dismissed the suit, relying on the deci-

sion in *Mangal v. Raja Partab Bahadur Singh* (1). The learned counsel for the appellants at the first hearing of this appeal admitted that, if that decision were followed, this appeal must fail. He stated, however, that he proposed to question the view of the law taken in that decision. The appeal was accordingly referred to a Bench for decision. In *Mangal v. Raja Partab Bahadur Singh* (1), Mr. Spankie laid down that, unless the sale was one by a proprietor or under-proprietor of the land in a village, no right of pre-emption was created. The learned counsel for the appellants has argued on the following lines. Under the provisions of S. 6, Act 18 of 1876, what is referred to as "the right of pre-emption" is stated to be

"a right of the persons hereinafter mentioned or referred to acquire, in the case hereinafter specified, immovable property in preference to all other persons."

He points out that that section does not specify who are the persons who acquired the right but that those persons are specified in S. 9 in the order in which they are entitled thereto, that is to say: (1) cosharers of the sub-division (if any) of the tenure in which the property is comprised, in order of their relationship to the vendor or mortgagor, (2) cosharers of the whole mahal in the same order, (3) any member of the village-community, (4) if the property be an under-proprietary tenure, the proprietor. He thus finds the persons entitled to the right. He then proceeded to consider what was the property to which the right applied. That is found in S. 7. It is the property in all village communities, whether proprietary or under-proprietary, and in the case referred to in S. 40, Oudh Land Revenue Act, and extends to the village site, to the houses built upon it, to all lands and shares of lands within the village boundary, and to all transferable rights affecting such lands. He argued that, as this was a house built upon the village site, it was property to which the right applied, and, as he finds the appellants amongst the persons entitled to the right and the property in suit as property subject to the right, he argues that there must be a right of pre-emption in their favour. This argument, however, ignores the existence of two other necessary conditions. To establish such a right of pre-

1. (1901) 4 O C 26.

emption as created by Ch. 2 of the Act we must discover constituent elements:

Firstly, the person entitled to the right; secondly, the property over which the right can be exercised; thirdly, the nature of the transfer; fourthly, the status of the transferor.

His argument does not cover the two latter points. The nature of the transfer is given in S. 10. It must be a private sale or a foreclosure of a mortgage. Here there was a private sale, so that question is settled. But where his argument fails is with regard to the fourth point. Under S. 9, unless the transferor is the proprietor of a proprietary or under-proprietary tenure or a share of such a tenure, no right of pre-emption comes into being. This point is not made very clear in *Mangal v. Raja Partab Bahadur Singh* (1). But it is undoubtedly the point upon which Mr. Spinkie based his decision. The words of the Chapter must be strictly construed. It could not be suggested for a moment that, where the transfer has been by a gift, any right of pre-emption could exist. It is exactly the case that, where the transferor is not a proprietor of a proprietary or under-proprietary tenure or a share in such a tenure, no right of pre-emption comes into being. We, therefore, accept the principle laid down in *Mangal v. Raja Partab Bahadur Singh* (1) and dismiss this appeal accordingly. The appellants will pay their own costs and those of the respondents.

B.V./R.K.

Appeal dismissed.

A. I. R. 1918 Oudh 291

KANHAIYA LAL AND DANIELS, A. J. Cs.

Raghubar Singh—Defendant—Appellant.

v.

Gajraj Singh and another—Plaintiffs—Respondents.

First Appeal No. 79 of 1916, Decided on 9th May 1918, from decree of Sub-Judge, Unao, D/- 31st March 1916.

Custom—Proof of — Wajibularz — Value depends on circumstances under which entry is made.

The value of a wajibularz as evidence of a custom depends upon the circumstances under

which the entry with regard to the custom came to be recorded in it. [P 292 C 2]

Gokaran Nath Misra and Zahur Ahmad—for Appellant.

A. P. Sen—for Respondents.

Judgment.—This appeal arises out of a suit for the partition of a two-third share out of certain joint properties. The relationship between the parties will appear from the pedigree given by the learned Subordinate Judge in this judgment. It is not disputed that the parties were living jointly till the date of the suit. The main contention of the defendant-appellant is that the properties, the partition of which was decreed by the Court below, were impartible and belonged exclusively to the defendant-appellant.

The learned Subordinate Judge found that the said properties were partible and belonged to the joint family, of which the plaintiffs and the defendant were members. The allegation of impartibility rests on a very slender foundation. The defendant-appellant alleges that by reason of a family custom one member of the family, preferably the eldest, is entitled to possession of the family property and the other members are only entitled to claim a maintenance allowance. He relies in support of that contention on a *wajibularz* made in the *wajibularz* of the village Beoli Islamabad prepared at the first Regular Settlement, on certain statements made by Meharban Singh in previous suits, and some oral evidence showing the mode in which the property is said to have devolved from time to time. As regards the *wajibularz*, its value as evidence of a custom is considerably discounted by the fact that Meharban Singh, who was recorded as the sole owner of Tatal Rautana of this village at the first Regular Settlement and who was probably responsible for the entry contained in it, knew that other claimants might come forward to claim a share in the estate. In the history of the village appended to the *wajibularz* (Ex. 8) it was stated that the first Summary Settlement of Patti Rautana was made by the British Government with Ram Bakhsh Singh in 1264 Fasli. Ram Bakhsh Singh was the grandson of Dalganjan Singh, one of the uncles of Meharban Singh. The defendant-appellant admitted before the Court below on 24th January 1911 that the person who held the estate before Mehar-

ban Singh was Dalganjan Singh. Dalganjan Singh had two sons, Narpat Singh and Bhawani Singh. Ram Bakhsh Singh was the son of the latter, and even if the devolution of the estate was governed by a family custom of impartibility, Meharban Singh could not have succeeded Dalganjan Singh, so long as Narpat Singh and Ram Bakhsh Singh were alive. The first Summary Settlement was followed by the Mutiny, in the course of which numerous persons left their holdings or estate for fear or other cause. In the settlement, which took place after the Mutiny, Meharban Singh got himself recognized as the sole proprietor of the Patti, known as Taraf Rautana, and executed a kabuliyat in regard to the same. He was naturally anxious at the same time to ensure that no member of the family should claim a share from him, and this he safeguarded by getting a custom recorded in respect of Taraf Rautana that if a person died leaving several sons by a married wife, his eldest son was to be the owner of the property and to be responsible for the education and maintenance of the remaining sons. No such custom was recorded as prevailing in the other Tarafs or Pattis. He meant thereby to hold the property exclusively for his life and to exclude the junior members of the family from participation, and this he did effectively, for when Lalta Singh and Narpat Singh filed separate suits for the recovery of their shares in the Patti, he pleaded that there was no custom of division in the family and that the claimants had no right to get possession of any share.

The suits of Lalta Singh and Narpat Singh were dismissed on the ground that they had failed to establish their possession within limitation. Ram Bakhsh Singh filed no suit. On the death of Meharban Singh the names of his sons, Sanwal Singh, Raghubar Singh, Dharendra Singh and Gajraj Singh, were entered in the revenue papers in pursuance of an order of the revenue Court dated 9th November 1881 (Ex. 5), and when Sanwal Singh died mutation of names was similarly effected in respect of his share in favour of his widow Mt. Kalkin (Ex. 16). So far as Lalta Singh and Narpat Singh were concerned, they only succeeded in retaining possession of certain cultivatory plots on payment of rent [Ex. A-1 (2)], while Mt. Narain Kuar,

the widow of Ram Bakhsh Singh, was allowed to remain in possession of certain other land free of rent as a guzaradar (Ex. 2). It is significant however that in the partition which took place in 1887 Taraf Rautana was formed into a Mahal and recorded as belonging to Raghubar Singh and his brothers (Ex. 9), and in the wajibularz which was prepared at the last Settlement in 1300 Fasli the Mahal was shown as an undivided zamindari with Raghubar Singh, the present defendant-appellant, as lambardar. One of the paragraphs of the wajibularz then prepared stated:

"Raghubar Singh lambardar, after making collections from the tenants, deposits the revenue and other demands in the Government Treasury, and incurs village expenses, if any, and being joint in mess, no necessity has arisen for a rendition of accounts among Raghubar Singh, Sanwal Singh, Dharendra Singh & Gajraj Singh: Ex. 7."

Raghubar Singh himself verified this entry. There can be no doubt the refore from the subsequent treatment of the property both on the deaths of Meharban Singh and Sanwal Singh at the time of partition and subsequent settlement that the so-called custom of impartibility recorded in the wajibularz was a bogus entry or a nullity and was never put into force. The statements made by Meharban Singh in the suits filed against him by Lalta Singh and Narpat Singh were similarly valueless and were prompted by considerations of self-interest. The oral evidence adduced by the plaintiffs is of a most unsatisfactory character. The family to which the parties belong is known as the family of Rawats; but the suggestion that one of the members of the family, who ever is considered fit and eligible, is selected as a Rawat by the Janwar Thakurs of the 24 villages roundabout Beoli Islamabad to settle their disputes and to receive their homage annually on the occasion of Holi, seems to be entirely unfounded. The witnesses of the defendant stated that Rawat was the ancestor who founded the Patti; but whether that was so or not, the office of Rawat, if it existed, had no connexion with or bearing on the partibility of the estate held by the family.

In his statement of 24th January 1911 the defendant-appellant admitted: "We belong to Taraf Rautana and are called Rawats," and one of the witnesses Bhabuti Singh (D. W. 8) stated that he was

also a Rawat and all of the Rautana Thoks were called by that name. Rawat is obviously a family title and no inference as to the impartibility of the property held by the family can be drawn from the possession of that title by its members. The learned Subordinate Judge who heard the evidence, adduced by the plaintiff, disbelieved it and we see no reason to come to a different conclusion. The family having been admittedly joint, the property in dispute has been rightly treated as joint family property. The plaintiffs are entered as the owners of the landed property in dispute to the extent of a two-thirds share, and the mere fact that any portion of it may have been purchased in the name of one or other of the members makes no difference. In fact no argument has been addressed by the learned counsel for the appellant on that point. The question raised in the memorandum of appeal regarding the theft of Rs. 85,000 by the plaintiffs-respondents has similarly not been pressed. The partition of the landed property can proceed in the manner provided by S. 51, Civil P. C. The appeal fails and is dismissed with costs.

B.V./R.K.

Appeal dismissed.

A. I. R. 1918 Oudh 293

LINDSAY, J. C.

Beni Madho and another—Defendants—Appellants.

v.

Bir Bal Singh and others—Plaintiff and Defendants—Respondents.

Second Appeal No. 275 of 1917. Decided on 9th April 1918, against decree of Sub-Judge, Unao, D/- 13th April 1917.

(a) Limitation Act (1908), S. 19—Acknowledgment must be of liability in respect of right claimed though every consequence of thing acknowledged need not be specified.

The acknowledgment to which S. 19, Lim. Act, refers must be an acknowledgment of liability in respect of the right claimed, though it need not specify every consequence of the thing acknowledged. (P 294 C 2)

(b) Limitation Act (1908), S. 19—Right acknowledged must be of same description as right in suit—Recital in sale-deed that a sum is left with vendee to pay off mortgage does not amount to acknowledgment of mortgagee's right to possession.

The right acknowledged must be of the same description as the right which is the subject of the suit. (P 295 C 1)

A recital in a sale-deed that a sum of money has been left with the vendee to pay off a mortgage executed by the vendor, does not amount

to an acknowledgment of the right of the mortgagee to obtain possession of the mortgaged property so as to enable the mortgagee to claim that limitation for a suit for possession began to run from the date of the sale-deed.

(P 295 C 1)

Ram Bharose Lal—for Appellants.

Hari Kishen Dhaon—for Respondents.

Judgment.—The principal question for determination in this appeal is one of limitation. The facts are as follows: On 20th July 1897 one Bhairon Singh, the owner of a 1 anna odd pie share in the village of Thur, mortgaged with possession a plot No. 6 measuring 1 high odd to Jograj Singh, the father of the plaintiff-respondent. The mortgage money was Rs. 100. It was agreed that the mortgagee was to remain in possession of the property. He was to be allowed to appropriate Rs. 7.8.0 out of the income of the property in lieu of interest; the balance, namely, Rs. 2.8.0 a year was to be paid to the mortgagor on account of the Government revenue. It was alleged in the plaint that a deed of further charge on this property was executed on 18th August 1899. It has been found, however, by both the Courts below that the document which was executed on this date did not create a charge on the mortgaged property. In the year 1906, Bhairon Singh, the mortgagor, sold the whole of his share to one Chandar Nath, who was the father of defendants 5 to 7 and the father-in-law of defendant 8. The sale was for a sum of Rs. 3,000 and the deed shows that money was left with the purchasers to pay off various encumbrancers including Jograj Singh, the father of the plaintiff. Later on these purchasers executed a deed of mortgage by conditional sale in favour of defendants 9 and 10. The latter brought a suit for foreclosure and obtained a decree and they are now admittedly in possession of the share which belonged once to Bhairon Singh. In the plaint it was stated that Jograj Singh, the mortgagee, and after him the plaintiff had remained continuously in possession of the mortgaged plot No. 6 till 30th June 1915. In para. 7 of the plaint it was stated that the defendants had dispossessed him on 1st July 1915. The cause of action for the suit was alleged to have accrued on this latter date and consequently the prayer was for possession. In the alternative the plaintiff

asked for a money decree, that is to say, for the money due in respect of the mortgage-deed of 1897 and the so-called deed of further charge of 1899.

Various pleas were raised by way of defence. One of them was that neither the plaintiff nor his father had at any time since the mortgage of 1897 been in possession of plot No. 6. But the Courts below have found that this is the case, and consequently it is clear that the statement contained in para. 7 of the plaint to the effect that the plaintiff was dispossessed on 1st July 1915 is untrue. It was further pleaded that the suit for possession was barred by time. Both the Courts below have held that the suit would have been barred were it not for the fact that on 11th April 1906 an acknowledgment was made by the mortgagor Bhairon Singh, which had the effect of starting a fresh period of limitation. This acknowledgment is contained in the sale-deed which Bhairon Singh executed in favour of Chandar Nath, and the plaintiff relies upon the statement contained in this deed in which the existence of a mortgage in favour of Jograj is admitted. I have already mentioned that a portion of the purchase money was left with the purchasers for the purpose of redeeming previous mortgages including a mortgage of Jograj Singh. The Courts, therefore while they held that the story of the plaintiff regarding his dispossession in the beginning of July 1915 was not made out, held nevertheless that by reason of this acknowledgment he was entitled to maintain a suit for possession as mortgagee and that he had 12 years dating from 11th April 1906 to bring the suit. The suit was accordingly held to be within time. The Court of first instance gave a decree for possession and this has been maintained in appeal by the Subordinate Judge.

It has been argued before me in the first place that inasmuch as the plaintiff failed to make out the case which he set up in the plaint his suit ought to have been dismissed. I am not prepared to go to the length of accepting this argument for it seems to me that if the Courts below were satisfied on the evidence that the right to recover possession of the mortgaged property was still subsisting, it was open to them to enforce it in the present suit. I am unable, however, to agree with the opinion of the Courts

below that the statement contained in the sale-deed of 11th April 1906 amounted to an acknowledgment which had the effect of extending the period of limitation for a suit for mortgagee possession. Limitation for such a suit began to run on 20th July 1897, the date upon which the mortgage deed was executed. If we turn to the sale-deed of 11th April 1906, all we find is a recital by Bhairon Singh that a sum of Rs. 835 had been left with the vendee for payment of the mortgage-money due on mortgages executed by the vendor in favour of Raghunandan, Jadunandan, Sbeonandan, Chanharja Singh Desraj Singh and Jograj Singh. It was further recited that the purchasers might pay the money either privately to the mortgagees or might deposit it in Court. It was further provided that any balance out of Rs. 835 left after payment of the mortgage debts was to be returned to the vendor. If this suit were a suit for the mortgage money, it might I think be possible to construe the recital in this deed of sale as amounting to an acknowledgment under S. 19, Lim. Act, that is to say, an acknowledgment of liability on the part of Bhairon Singh to pay the mortgage-money to Jograj Singh. But at the time this sale deed was executed any suit for the mortgage-money was barred.

In the circumstances the right of the mortgagee to bring a suit for the mortgage-money was the right conferred by S. 68, T. P. Act, and for a suit of this kind limitation at the most could be 6 years under the provisions of Art. 116 of the Schedule to the Limitation Act. The sale-deed, however was executed more than 6 years after the date of the mortgage and so this statement in the deed of sale would not save limitation for a suit for mortgage money. The claim for a money decree therefore was barred by time. There remains the question as to whether the recital in this sale-deed can extend the period of limitation for a suit for mortgagee possession. In my opinion it does not. The acknowledgment to which S. 19, Lim. Act, refers must be an acknowledgment of liability in respect of the right claimed, though it need not specify every consequence of the thing acknowledged. There is not a word in the sale-deed which either directly or by implication can be treated as amounting to an acknowledgment on the part of

Bhairon Singh regarding the right of the mortgagee Jograj Singh to acquire possession of the mortgaged property, and indeed so far as I can see, it was never in the mind of Bhairon Singh to make any statement regarding possession. If then the principle is that the right acknowledged must be of the same description as the right which is the subject of the suit, it seems to me that this recital in the mortgage-deed cannot be treated as an acknowledgment which enables the plaintiff to claim that limitation for a suit or possession began to run from the date of the sale-deed. I hold, therefore that the view of the Courts below is erroneous and that there is no acknowledgment in the sale of 1906 which saves limitation. The claim for possession was time-barred and as already mentioned, any suit for the mortgage-money was also beyond time. I allow the appeal, set aside the decrees of the Court below and direct that the plaintiff's claim be dismissed with costs in all three Courts.

B.V./R.K.

Appeal allowed.

A. I. R. 1918 Oudh 295

STUART AND KANHAIYA LAL, A. J. CS.

Ram Suddh—Prisoner—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 262 of 1917, Decided on 18th January 1918, against order of Sess. Judge, Gonda, D/- 7th September 1917.

Criminal P. C. (1898), S. 164 (3)—Memorandum referred to in S. 164 (3) not made—Confession is not admissible.

Where a Magistrate in recording a confession refuses to make the memorandum referred to in S. 164 (3) on the ground that in his opinion the confession has not been voluntarily made such confession cannot form part of any judicial record and is therefore, inadmissible in evidence: 8 Bom. L. R. 950, Foll. [P 296 C 2]

Government Pleader—for the Crown.

Order of Reference

Lindsay, J. C.—"The appellant in this case is Ram Suddh, a Lonia who has been convicted by the learned Sessions Judge of Gonda on a charge of having murdered his wife. The principal piece of evidence against the accused is a confession recorded by a Magistrate on 11th July. The record of his confession is a long one, and it appears that after the statement was made the Magistrate put a number of questions to the accused before he closed the making of the record of

his statement. Under law a certificate is required to be attached to a statement made in these circumstances, and the Magistrate has appended a certificate in which he expresses his opinion that the confession made by the accused was not a voluntary confession. A question of law, therefore, arose before the learned Judge for disposal. His view was that he was not bound by this expression of the Magistrate's opinion and for a variety of reasons which I shall have to consider later on, the Judge came to the conclusion that the statement made by the prisoner was admissible; and he has relied upon it for the purpose of convicting the accused. While I am disposed to agree with the learned Judge's view that the opinion expressed by a Magistrate after taking the statement of confession made by an accused man is not conclusive upon the Court, nevertheless it has to be conceded that the opinion is a matter which has to be carefully weighed when dealing with the question whether the statement should be availed of for the purpose of convicting the accused. In cases where there has been an omission to furnish the certificate required by the section, the practice is to call the Magistrate and examine him as a witness; and similarly I think in a case like this if the learned Judge had reasons to doubt the soundness of the opinion which the Magistrate had expressed, he ought to have sent for the Magistrate and examined him as a witness. I think, before I dispose of this appeal, my proper course is under S. 428, Criminal P. C., to send the case back to the learned Judge with directions to take the statement of the Magistrate touching the grounds of the opinion he has expressed in the certificate attached to the record of confession. The evidence, after it has been taken, will be submitted to this Court along with the record. The evidence, of course, will be taken in the presence of the accused. Let the case be put up again as soon as the evidence has been certified to this Court." (8th November 1917.)

"I think it desirable that this appeal should be referred for disposal to a Bench of two Judges. It is the appeal of a man named Ram Suddh, who was convicted in the Court of the Sessions Judge of Gonda on a charge of murder and sentenced to transportation for life. The case

was up before me on 8th November last and it appeared at that time that the learned Judge had relied upon a confession made by Ram Sudh for the purpose of finding him guilty. This confessional statement had been recorded by a Magistrate who after it had been taken down, put a certificate at the bottom of it declaring his belief that the statement was not a voluntary one. The learned Judge in dealing with this point stated that he did not consider himself bound conclusively by the certificate attached by the Magistrate to the record of confession. I observed at the time that the Magistrate had not been called as a witness at the Sessions trial for the purpose of deposing to the grounds of the belief entertained by him that the statement was not a voluntary one; and so by my order of 8th November I directed the learned Sessions Judge to record the evidence of the Magistrate and to call upon him to explain for what reasons he thought the statement made before him by this accused-appellant was not a voluntary statement. The learned Judge has now recorded the evidence of the Magistrate and it has been called into this Court. In the statement which the Magistrate has now made before the Sessions Judge as a witness he gives certain reasons for considering that the statement made by the accused was not a voluntary one. The question whether the confession to which this evidence of the Magistrate relates ought to be used in evidence against the accused, seems to me to be a somewhat difficult one and in the circumstances I deem it advisable to have the case referred to a Bench for disposal. The appeal is a jail appeal and no one appears on behalf of the appellant. Let the case be laid before a Bench as soon as may be after the Christmas holidays." (21st December 1917.)

Judgment.—This appeal has been referred by the Judicial Commissioner for disposal to a Bench of two Judges. The reason why the reference was made is as follows: The appellant made a confession before Mr. Sinha, a Deputy Magistrate. Mr. Sinha refused to record the memorandum to which reference is made in S. 164 (3), Criminal P. C. He was of opinion that the confession was not voluntarily made. The point for decision is whether in these circumstances

the confession is admissible in evidence. The view taken by the learned Sessions Judge is that it is for the trial Court to decide whether a confession has or has not been voluntarily made and that, if the Court is satisfied that a confession has been voluntarily made, it ought to be admitted in evidence, although the officer who recorded it is of a contrary opinion and has refused to append the necessary certificate. In *Emperor v. Kadar Ghulam Mahmad* (1), a case which was decided by a Bench of the Bombay High Court the view was taken that the word "record" in S. 164 (3), Criminal P. C., must necessarily mean "making a part of a judicial record" and not merely "writing out." We are in agreement upon that point with the learned Judges who decided that case. It follows that Mr. Sinha was precluded from making the confession part of any judicial record. He had written out the confession and the act of writing out could not be undone, but the confession could not be placed upon the record. The committing Magistrate should not have accepted it as part of the record and the Sessions Judge should not have considered it. It is no more admissible than a confession would have been which had been recorded by a police officer. With regard to the merits of the appeal it is clear that, once the confession is excluded, there is not sufficient evidence to justify a conviction on any charge. We, therefore, accept the appeal, set aside the conviction and sentence and direct that the appellant be set at liberty.

B.V./R.K.

Appeal allowed.

L. (1906) 8 Bom L R 950.

A. I. R. 1918 Oudh 296

LINDSAY, J. C.

Ganesh Prasad and another—Plaintiffs
—Appellants.

v.

Khuda Baksh and another—Defendants—Respondents.

Second Appeal No. 280 of 1917, Decided on 16th January 1918, against decree of Dist. Judge, Lucknow, D/- 15th May 1917.

(a) Easements Act (1882), S. 15—Evidence of user prior to statutory period is admissible.

In disputes relating to acquisition of easements evidence of user prior to the statutory period is admissible. [P 299 C 1]

(b) Easements Act (1882), S. 4—Artificial structure as such flat masonry roofs of shops are land.

Artificial structures such as flat masonry roofs of shops are land within the meaning of that expression as used in S. 4 and easements can be acquired over them. [P 299 C 1]

(c) Easements Act (1882), S. 15—As of right—Meaning explained.

The user of an easement without any one's permission and without interference on behalf of the servient owner amounts to user 'as of right.' [P 299 C 1]

(d) Easements Act (1882), S. 15—User by tenants of dominant owner is as good as user by dominant owner himself.

User of the servient tenement by tenants of the dominant owner who are in occupation of the premises is, for the purpose of acquisition of an easement, as good as user by the dominant owner himself. [P 299 C 2]

(e) Easements Act (1882), S. 28—Easements over roof can be acquired.

A general right of easement to use a roof as a place for sitting or as a place for drying clothes or for other purposes of this nature can be acquired under the Easements Act. [P 299 C 2]

(f) Easements Act (1882), S. 28—Delineation of right of way is not necessary.

Where the area over which an easement of way has been acquired is small and the points of egress and ingress are fixed, it is not necessary for the Court to delineate the particular portion of the ground which persons enjoying the easement are entitled to use. [P 300 C 1]

Ishwari Prasad and Ram Bharose Lal
—for Appellant.

Lachman Prasad Varma and P. Koul
—for Respondents.

Judgment—The dispute in this case is with regard to a right of easement, and the facts which it is necessary to consider may be briefly stated as follows:

The plaintiffs are the owners of a number of shops situated at the north end of a row of shops in the Chauri in the Lucknow city. To the west of this row of shops are certain houses one of which belongs to defendant 1 in the case, namely, Khuda Baksh. This house is in the occupation of defendant 2 Pandit Chhamapat, who is a tenant of defendant 1. The upper storey of this house looks out upon the roofs of the shops in front and it is with reference to a right of easement over the roofs of the shops belonging to the plaintiffs that the present dispute has arisen. According to the allegations in the plaint defendant 2 Chhamapat carries on business as a physician (vaid) and interviews his patients and dispenses medicine to them in the upper storey of the house which he rents from defendant 1. It is alleged in para. 3 of the plaint that these patients

pass to and fro over the roofs, although there is another way of access to the premises in the occupation of defendant 2. In para. 5 of the plaint it is alleged that this passing to and fro of persons who go to consult defendant 2 has caused damage to the plaintiffs and the prayer was for a perpetual injunction. The particular nature of the relief sought is set out in para. 7 of the plaint. The Court was asked to issue an injunction (1) restraining the defendants themselves from passing over the roofs, (2) to prevent them from using the roofs in any way, and (3) to restrain them from allowing their relations, visitors, customers and others from passing over the roofs. The plaintiffs also asked the Court to define the right of way, if it were found that the defendants were entitled to any such right.

In the written statement it was set out that the house belonging to defendant 1 consisted of two parts which were entirely separate: one of these, the lower storey, having access to it from one direction, the other, the upper storey, having access to it over the roofs of the row of shops which lie to the west. It was pleaded that the only way of getting to the premises occupied by defendant 2 as tenant was along the roofs in question. It was further stated that these premises had been in possession of the defendants and their predecessors for a period of over a hundred years and that the persons who had occupied the house had always enjoyed various rights by way of easement, namely, rights of way, of air and of light and also a right to use the roof in front of the upper storey in various ways for the convenience of the defendant's premises. Both the Courts below have found in favour of the defendants, and the plaintiffs' suit has been dismissed.

The plaintiffs come here in second appeal, and a great many pleas have been raised on their behalf for the purpose of showing that the decisions of the Courts below are erroneous. The case has been contested at great length and there has been a good deal of what appears to me to be irrelevant argument in the matter with reference to the rights claimed by the defendants. The Munsif who tried the case has written a very long and careful judgment and he has referred in detail to the large volume of oral evidence which was placed before him. Practically

all the witnesses were persons of respectability and both the Courts below have accepted their statements as true. It is only necessary, therefore, for me to mention briefly what the purport of the defendant's evidence is.

It is proved by the statements of some of the witnesses whose memories go back for a very long period that the premises belonging to the defendants have been continuously occupied for very many years past. One of the witnesses, an old man named Hazari Lal whose age is given as 98, deposed that he had known the house occupied by the defendants since before the time of British rule. He states that he remembers it being occupied by one Ghulam Mohammad who originally owned it. According to his story Ghulam Mohammad carried on a dyeing business there and used the roof in front of the premises for the purpose of his trade. He used to spread clothes out to dry and he kept there the receptacle which he used for the purpose of dyeing. After Ghulam Mohammad his son carried on the same business, and there is other evidence on the record to show that it was from Ghulam Mohammad's son that defendant 1 Khuda Baksh purchased the property. Another witness corroborated this evidence. He spoke from a recollection of 50 years and deposed to having seen the customers of Abdullah, the son of Ghulam Mohammad, use a right of way to these premises. He also saw Abdullah using the premises for the purpose of his trade. Then there was evidence to show that next door to the defendant's premises and on the south side of it was another building which for a considerable number of years was used as a Sub-Post Office. Witness 3 for the defendant Hanuman Prasad has been the Post Master and he deposed to people having a right of way over the roofs in order to gain access to the Post Office. This evidence, of course, does not relate strictly to the premises in dispute, but I think the learned Munsif was right in holding it to be admissible for, as he says, it renders probable the story that people had a right of way also to the defendants' premises which were the next on the north side.

There is also evidence on the record to prove that another house to the south of this Post Office has also been used for the purpose of trade and that access to it was

also obtained by a staircase leading from the street over the roof of the row of shops situated to the west. As regards this latter building there was also evidence on the record to show that the occupier of it was successful in an action which he brought for the disturbance of his right of easement. Other witnesses were called who deposed to what had taken place during the occupation of the defendants' premises by successive tenants. Some of these tenants appear to have used the premises for purposes of residence, others including defendant 2 and a predecessor of his a compounder named Parsotam, have been using the house in question for the purposes of this business. Altogether this evidence to my mind establishes clearly that for a very long period, much in excess of a period of 20 years before the suit, there has been a continuous user of the roofs of this row of shops, including the roofs of the plaintiffs' shops, by persons occupying the defendants' premises or by other persons who have come there on the invitation or by the license of the defendants or of the persons who, previous to them, were in occupation. The evidence which the plaintiffs put forward was discarded by the lower Courts as being of practically no value as compared with the evidence led by the defendants.

I turn now to the various points which are raised in the memorandum of appeal which has been filed on behalf of the appellants. In the first ground of appeal it is stated that as the defendants themselves admitted that they did not come into possession with a perfected easement it was necessary for them to prove that the user during the period of 20 years odd prior to the suit was continuous and was always of the same nature. As regards this the only observation to be made is that, so far as the right of way is concerned, a sufficient continuity has been clearly established by the evidence of the defendants' witnesses whose testimony relates to a period of practically 60 years. A right of way is a discontinuous easement and it would not be possible for the purpose of establishing such a right to show that the right has been exercised at every moment of time during the statutory period. It was argued indeed that any evidence relating to a point of time previous to 20 years odd before the filing of the suit was irrelevant. But this argument can-

not be allowed. It was certainly admissible for the purpose of showing that the alleged user of the roofs during the statutory period prior to the suit was probable and that the evidence which was led to prove the user was reliable.

Another point taken in para. 2 of the memorandum of appeal is that the Court below failed to distinguish between a license and an easement and that it should have also held that no easement could be acquired with regard to an artificial structure such as a roof. This argument must fail in view of the definition of the expression "land" as set out in S. 4, Easements Act (5 of 1882). According to the explanation to that section "land" includes things permanently attached to the earth and it is idle to contend that a shop with a flat masonry roof on the top of it is not a thing which is permanently attached to the earth. For the purpose of determining whether or not a right of easement exists the roof of the plaintiff's shops must certainly be treated as "land." Then again it is said that the Court below was wrong in holding that the user of the roofs was not as of right. As to this the evidence is perfectly clear. A number of witnesses have deposed that no one's permission was ever asked for leave to use the roofs in question. That is the meaning of the expression "as of right." The witnesses all say that the persons who used the roofs for the purpose of getting to the defendants' premises did so without any reference to the owner of the shops, and there is also reliable evidence on the part of one or two witnesses who were once employed by Ali Naki Khan, the owner of the shops, to show that no interference with the exercise of this right of passage was ever attempted on behalf of the owner.

Then again it has been argued that because the premises have for practically the whole of the time been let out to tenants, the exercise of a right of way by tenants was not on behalf of the owners of the property and consequently the defendants had failed to show that any right of easement had been acquired. This argument is altogether beside the mark, for it is obvious from a perusal of S. 4, Easements Act, that a right of easement may be acquired either by an owner or by an occupier. A further point has been raised to the effect that the period of enjoyment of the right by one tenant could not be

tacked to the period of enjoyment of another tenant. This argument is erroneous. The fact that the premises have not been in the occupation of the same persons all along is immaterial and it does not matter what the number of tenants may have been, because the act says (see S. 15) that where a right of way or any other easement has been peaceably and openly enjoyed by any person claiming title thereto as an easement and as of right, without interruption and for 20 years, the right to such easement shall be absolute. For the purposes of the section therefore it clearly makes no difference whether the right has been asserted by successive tenants of the dominant heritage. Next it has been argued that the user claimed by the defendants does not constitute an easement at all. This argument seems to relate to that portion of the evidence in which the witnesses said that in addition to the right of passage the occupants of the defendants' premises had used the roof in grant of those premises for other purposes, namely, as a place for sitting or as a place for drying clothes or for other purposes of this description. It cannot, in my opinion, be argued that such user cannot amount to an easement, having regard to the expression "beneficial enjoyment" as defined in S. 4 of the Act. According to the language of the section the expression "beneficial enjoyment" includes possible convenience, remote advantage and even a mere amenity; so it appears to me that any user deposed to by the defendants which can rightly be deemed to have been for the convenience of the persons occupying the defendants' premises and for the fuller enjoyment of those premises, must be deemed to be an easement within the meaning of the Act.

Then it is said that if the Courts below found that there was a right of way it was their duty to define it and that it should not have been held that the defendants had a right of way over the entire surface of the roofs. This argument has, in my opinion, been well met by the observations of the learned Munsif in his judgment. He points out that the evidence establishes that the right of way exists between two fixed points, namely, the head of the staircase or steps which gives access to the roof and the doors of the premises occupied by the defendants. The roof of these shops after all is a very small

area and in the circumstances I do not think the plaintiffs were entitled to call for a delimitation of the particular portion which the customers and others who frequent the premises of the defendants were entitled to use, all the more so as the defendants have, in my opinion, established not only a mere right of way but the right to use the whole extent of the plaintiffs' roofs in front of their premises for other purposes of convenience. These are the principal points which have been argued before me on behalf of the appellants. It seems clear to me for the reasons I have given that the appeal must fail and that the plaintiffs' suit was properly dismissed. All the evidence in the case shows that the rights of easement claimed by the defendants are used for purposes connected with the enjoyment of the dominant heritage; and referring to Illus (b), S. 21, Easements Act, it is apparent that these rights may be claimed not only by the owner or occupier of the premises but by the members of their families, their guests, lodgers, servants, workmen, visitors and customers. User to this extent has, in my opinion, been amply established by the evidence led for the defendants. In cases where it is necessary to determine the extent of an easement which has been acquired by prescription, there is no way of ascertaining the extent of the easement except from what has been done. I have already summarized the evidence led by the defendants and it appears to me that it has established fully the various rights which the defendants claimed in respect of the roof of the plaintiffs' shops. For these reasons the appeal fails and is dismissed with costs.

B.V./R.K. *Appeal dismissed.*

A. I. R. 1918 Oudh 300

KANHAIYA LAL, A. J. C.

Deputy Commr. of Sitapur—Plaintiff—Appellant.

v.

Muhammad Amir—Defendant—Respondent.

Second Appeal No. 161 of 1916, Decided on 28th May 1917, from decree of Dist. Judge, Sitapur, D/- 16th March 1916.

(a) Transfer of Property Act (4 of 1882), S. 10—Restraint on alienation is void in case of absolute and not limited transfer—

Hereditary rent-free tenancies can be created without right to alienate.

A restraint as regards alienation might be void where property is transferred in other respects in absolute right. But where land is merely granted for use or cultivation, either free of rent or at a favourable rate of rent, any condition restraining alienation would not be inconsistent with the rights conferred or necessarily void.

Hereditary rent-free tenancies of a perpetual character might exist without any right of alienation attaching to them. [P 301 C 2]

(b) **Deed—Construction—Entry in under-Proprietary register and wajibularz—Land held for maintenance in perpetuity at low rent without right to alienate—Grant held of hereditary tenancy.**

Where in the under-proprietary register and the wajibularz prepared at the time of the old settlement a person was entered as the sole owner of some land holding it for his maintenance in perpetuity and in hereditary right on a low annual rental, without any power of alienation:

Held: that the above entry showed that a grant of only hereditary and perpetual tenancy was intended. [P 301 C 2]

(c) **Landlord and Tenant—Forfeiture—Right of re-entry not reserved—No forfeiture would result from breach of condition.**

Where a permanent and heritable lease is granted without any reservation as to the right of re-entry in case of a breach of the conditions of the grant, the lessor cannot claim a forfeiture of the lease by reason of such breach. [P 301 C 2]

Nagendra Nath Ghosal—for Appellant.

Mohammad Wasim—for Respondent.

Judgment.—Rama Das was a Bairagi faqir holding about 51 bighas 9 biswas of land in the village Mashji Jallapur. The exact period from which he held the land is not ascertainable. The statement of the defendant-appellant is that he held the land as a muasfidar or under-proprietor, but an entry made in Register No. 5 of the old Settlement, and in the wajibularz prepared in 1864, shows that Ram Das was entered as a "malik bazat wahid" or sole owner holding the property for his maintenance, in perpetuity, on a rental of Rs. 10 per year, without any power of alienation. The wajibularz further said that the land was held in hereditary right and that the talukdar had assented to the same. In 1870, Ram Das instituted a suit, claiming mauafi rights in the said land in the Settlement Court; but his claim was dismissed for default. An application to have the suit restored to the file was also rejected. Ram Das was succeeded on his death by his disciple, Badri Das, who mortgaged this land with possession to Raja Ram. Raja Ram remained in possession till 1904, when

Badri Das obtained a decree for redemption and got back possession of the mortgaged property. On 1st February 1908, Badri Das sold his rights to Wahidul Hasan for Rs. 1,000. The defendant-appellant sued to pre-empt that sale and obtained a decree on 22nd June 1908. He paid the pre-emption money to the vendee and obtained possession and mutation in his favour in January 1909.

The present suit was filed by the Court of Wards, representing the Katesar Estate to which the village Mashri Jallapur appertains, for the possession of the land in dispute, with mesne profits, on the allegation that the sale by Badri Das, in favour of Wahidul Hasan and the decree for pre-emption obtained by the defendant-appellant were null and void and not binding on it. The allegation of the plaintiff was that the Court of Wards was in possession of the land and was ejected therefrom on 29th July 1909. The defendant denied that the plaintiff had at any time been in possession of the land and pleaded that Ram Das had an under-proprietary right in the land in the suit and that the claim was barred by limitation.

The Court of first instance found in his favour, holding that the restraint on alienation referred to in the *wajibularz* and Register No. 5 was not legal or enforceable. The lower appellate Court, however, held that Ram Das and his successor, Badri Das were rent-free grantees and had no right of transfer. It accordingly decreed the claim for a declaration that the sale by Badri Das, and the subsequent decree for pre-emption were not binding on the plaintiff, and dismissed the claim for possession and mesne profits, on the ground that the plaintiff should seek his remedy by a suit for resumption in the revenue Court. Each party has filed an appeal from that portion of the decree which is against him. The first question for consideration is whether Ram Das, or his successor Badri Das, had an under-proprietary right in the land in dispute. No grant or other document evidencing the conferment of under-proprietary rights has been filed in this suit. The *wajibularz*, and the copy of an extract from Register No. 5, clearly show that what was granted was a right to hold the land in hereditary right at a fixed rate of rent, without any power of alienation. The withdrawal of the power of alienation indicated that no grant of under-pro-

prietary rights was intended, and though Ram Das, and after him Badri Das, were entered in the under-proprietary register, the presumption that might be raised by such an entry is sufficiently rebutted by the entry itself, which declares that no right of alienation was granted. A restraint of that nature might be void where property is transferred in other respects in absolute right.

But where the land is merely granted for use or cultivation, either free of rent or at a favourable rate of rent, any condition restraining alienation would not be inconsistent with the rights conferred or necessarily void. Hereditary rent-free tenancies of a perpetual character might exist without any right of alienation attaching to them and the fact that the right of alienation was withheld in this case shows that a grant of only hereditary and perpetual tenancy was intended. The next question is whether the plaintiff is entitled to claim a forfeiture of the lease of the holding by reason of the alienation made by Badri Das. There is nothing to show that the right of re-entry was reserved in case of a breach of the conditions of the grant. As pointed out in *Madar Sahib v. Sannabama Gujranah* (1) and *Nil Madhab Sikdar v. Norottam Sikdar* (2), where a landlord grants a permanent and heritable tenure in land, so long as the tenancy subsists no estate is left in him unless he reserves to himself a right of re-entry or reversion. The decisions in *Parameshwari v. Vittappa Shanbhoga* (3) and *Netrapal Singh v. Kalyan Das* (4) adopt the same view. The learned counsel for the plaintiff-respondent relies on a decision in *Ali Mahammad Khan v. Chhedan* (5) and *Rae Shambhu Nath v. Rudra Pratab Narain Singh* (6). The former was a case in which a grove-holder had mortgaged his right with a third person and it was held by this Court that according to the general principles of law applicable to leases, which could also be extended to licenses, the breach of any condition for which forfeiture was not prescribed as a proper penalty under the terms of the lease or agreement under which the lessee held, did not involve a

1. (1897) 21 Bom 195.

2. (1890) 17 Cal 826.

3. (1903) 26 Mad 157.

4. (1906) 28 All 400.

5. (1912) 15 O C 91=15 I C 385.

6. (1911) 12 I C 324.

forfeiture of the lease. In the latter case an award granting a village rent-free and in perpetuity was held not to confer an under-proprietary right; and a purchaser of a certain area of land, appertaining to that village, in execution of a mortgage decree obtained against the grantee, was held liable to ejectment at the instance of the superior proprietor.

It was there found that the right which was conferred by the award was only personal and not hereditary; and the person in whose favour the award was made had died. The superior proprietor was therefore, naturally entitled to claim a reversion of the land. These decisions do not, therefore, help the plaintiff. It is not alleged that Badri Das is dead or has no heirs or disciples alive. The grant in the present case was perpetual and hereditary and so long as Ram Das or any of his heirs or disciples exist, the plaintiff has no right to resume the land except in the manner provided by Ch. 7-A, Oudh Rent Act. The suit for possession and mesne profits has, therefore, been rightly dismissed. Both the appeals, accordingly, fail and are dismissed with costs.

B.V./R.K.

Appeal dismissed.

A. I. R. 1918 Oudh 302

LINDSAY, J. C. AND STUART, A. J. C.

Gur Dayal—Judgment-debtor—Appellant.

v.

Begg Sutherland and Co—Decree-holders—Respondents.

Ex. Decree Appeal No. 36 of 1918, Decided on 6th September 1918, against order of Sub-Judge, Lucknow, D/- 23rd August 1918.

(a) Oudh Civil Digest, Para. 172—Attempt to execute decree becoming unsuccessful—Court to which decree is transferred is competent to persevere with execution until satisfaction of decree or until execution is no longer possible.

A decree does not become incapable of execution within the meaning of para 172, Oudh Civil Digest merely because one attempt to execute it has proved unsuccessful. The Court to which a decree is sent for execution is competent to persevere with the execution until it is made to appear either that satisfaction has been obtained or that execution is no longer possible.

[P 303 C 1]

(b) Execution—Warrant of arrest returning with endorsement that judgment debtor not traceable—Court has jurisdiction to issue fresh warrant of arrest.

A decree having been transferred to a Court for execution, the decree-holder made an application for arrest of the judgment-debtor. The

Court directed the issue of a warrant of arrest, which was returned with an endorsement that the judgment-debtor could not be found. Immediately afterwards the decree-holder again made an application for the arrest of the judgment-debtor and the Court directed the issue of a second warrant.

Held: that the Court had jurisdiction to direct the issue of a second warrant. [P 303 C 1]

Hari Kishen Dhaon—for Appellant.

Judgment.—This appeal is up before us under O. 41, R. 11, and after hearing the arguments of counsel we have come to the conclusion that it must be dismissed. The facts are as follows: The appellant *Gur Dayal* is a person against whom a decree for close on Rs. 14,000 was obtained in the Court of the Subordinate Judge at Cawnpore. This decree was transferred for execution to the Court of the Subordinate Judge of Lucknow and after the transfer an application was made on behalf of the decree-holders for the arrest of the appellant-judgment-debtor. It is said that a warrant was issued and that it was returned with an endorsement to the effect that the judgment-debtor could not be found. The learned counsel informs us that after this return had been made, the Court ordered the proceedings to be filed (*dakhil daftar*). Immediately after this another application was made for the judgment-debtor's arrest. This time the warrant was executed and *Gur Dayal* was taken into custody.

The argument before us is that after the first warrant for arrest had been returned unexecuted, the executing Court had no further jurisdiction to deal with the matter and that it was the duty of the Court there and then to return the execution on proceedings to the Court at Cawnpore. In support of this argument a reference is made to para. 172, Oudh Civil Digest, which deals with the procedure to be observed by Courts in Oudh which receive applications from other Courts for execution. It is provided by the rule contained in this paragraph that the execution record is to be returned to the Court which made the decree in three cases, namely: (1) when the decree has been executed wholly or in part; (2) when the decree is found for any reason to be incapable of execution, and (3) if no application is made for execution after the expiry of one year from the date on which the decree is received. The rule further provides that in no case is the execution file to be con-

signed to the record room of the executing Court. The appellant's counsel takes his stand upon that portion of the rule which provides for the return of the execution record when the decree is found for any reason to be incapable of execution. In other words, the contention seems to be that because the first warrant which was issued for the arrest of the judgment-debtor was returned unexecuted, the decree could no longer be executed by the issue of a second warrant.

We are unable to entertain this argument. In no way is it possible to say that a decree becomes incapable of execution because one attempt to execute it has turned out to be infructuous. In short, it cannot be said that the jurisdiction of the executing Court is to be confined to one attempt to execute the decree and no more. In our opinion it is competent to the Court which is executing decree to persevere with the execution, until it is made to appear either that satisfaction has been obtained or that execution is no longer possible. We have no doubt that the Subordinate Judge of Lucknow had jurisdiction to issue this second warrant for the arrest of the judgment-debtor. The appeal is dismissed accordingly.

B.V./R.K.

Appeal dismissed.

A. I. R. 1918 Oudh 303 (1)

LINDSAY, J. C.

Iqbal Narain and others—Plaintiffs
Appellants.

v.

Suraj Narain and another—Defendants
—Respondents.

Second Appeal No. 156 of 1917, Decided on 18th July 1917, from the order of Dist. Judge, Lucknow, D/- 24th January 1917.

Limitation Act (1908), Art. 61—Parties agreeing to share costs of printing and preparation of record in appeal—Deposit by plaintiffs on one day—Appropriation by Court on another date—Suit for contribution—Limitation commences from date of appropriation.

It was agreed between the parties to an appeal that the cost of printing and preparing the record should be shared equally between them. In consequence of this arrangement the plaintiffs made a deposit in Court of a certain sum, out of which the Court subsequently appropriated the actual cost of printing and preparing the record. Thereafter the plaintiffs sued the defendants for contribution.

Held: that for the purpose of Art 61, the

limitation for the suit began to run not from the date of the deposit but from the date of the appropriation. [P 303 C 2]

A. P. Sen—for Appellants.

Lachman Prasad Varma—for Respondents.

Judgment.—The parties to this appeal were concerned in a certain litigation which went ultimately to the Privy Council. It was agreed between them that the costs of printing and preparing the record for the Privy Council should be shared between them in equal shares. In consequence of this arrangement the plaintiffs, Iqbal Narain and others, made a deposit in Court on the 25th January 1912 of a sum of over Rs. 23,000. On the 29th January 1913 the Court intimated that the actual costs of printing and preparing the record was Rupees 6,472-2-9. The present suit has been brought by the plaintiffs to recover the defendants' share of this sum. Both the Courts have dismissed the claim on the ground that it was barred by limitation. Art. 61, Sch., Lim. Act, was applied and it was held by both the Courts that limitation began to run from the 25th January 1912. In my opinion this decision was wrong. The date of payment for the purpose of Art. 61 could not have been earlier than the 29th January 1913. What was done on the 25th January 1912 was that the money was merely deposited in Court. It cannot be said that on that date there was any payment to any person on behalf of the defendants and until the money was appropriated in accordance with the actual estimate of which the parties were given notice on the 29th January 1913, it cannot be said that there was any definite payment on the defendants' behalf. The suit was brought within three years from the 29th January 1913 and is, in my opinion, within limitation. This is the only question which is raised in the case. The result is that the decision of the Court below is reversed and the plaintiff's claim is decreed with costs in all three Courts.

B.V./R.K.

Appeal allowed.

A. I. R. 1918 Oudh 303 (2)

LINDSAY, J. C.

Anant Singh—Appellants.

v.

Kalka Singh—Opposite Party.

Civil Misc. Appeal No. 39 of 1917,
Decided on 3rd September 1917.

Provincial Insolvency Act (1907), Ss. 2 and 13—Undivided share in joint family property is not "property" under S. 2—Receiver cannot be appointed in respect of such share.

A receiver cannot be appointed under S. 13, Provincial Insolvency Act in respect of an insolvent's undivided share in the property of the joint family of which he is a member. Such undivided share is not "property" as defined in S. 2 of the Act. [P 304 C 1]

d. P. Sen—for Appellants.

Bazudeo Lal—for Respondents.

Judgment.—This appeal is directed against an order made by the District Judge of Sitapur in his insolvency jurisdiction. It appears that the opposite party Kalka Singh filed an application to be adjudged insolvent. His application was accepted and an adjudication order was passed. It was made to appear to the Court below that the chief property of the insolvent consists of an area of 400 Kham bighas of land, which he held as a guzaradar. The learned Judge in his judgment refers to a decision of this Court, in which it was held that this property which was granted to the grandfather of the insolvent was granted for the maintenance of the family and was not alienable and in that judgment, a copy of which has been produced before me, I find that we refused to recognise alienations made in favour of mortgagees.

What the learned Judge in his order says is this. His argument is that the usufruct of the property was transferred to the insolvent and that this usufruct may be alienated for the purpose of paying off his debt, subject to any rights which his sons may have to be maintained out of the property; and taking this view of the law he had directed the appointment of a receiver and ordered him to take over this property and arrange for a lease of the same. The contention in appeal here is that it was not competent to the Court to order the appointment of a receiver for the purpose of dealing with property which is joint family property and, further, property which has been declared to be incapable of alienation. It seems to me that this objection must prevail, looking at the definition of the term "property" in the Provincial Insolvency Act (3 of 1907), S. 2, we find that it includes property over which or the profits of which any person has a disposing power which he may exercise for his own benefit. If it is the fact, and it does not seem to be

disputed, that Kalka has got 8 sons who with him constitute a joint family, then it is impossible to describe any portion of this 400 bighas area or the usufruct of 400 bighas as property within the meaning of the definition just quoted. The case from the legal point of view is very much the same as the case in which it has been held that a guardian of the property of an infant member of a joint Hindu family cannot properly be appointed in respect of the infant's interest in the joint family property, because the interest is not individual property and, therefore, not property with which the guardian, if appointed, would have anything to do; on similar principles it seems that a receiver cannot be appointed in respect of the undivided share of the property of a member of a joint Hindu family. Further it may be pointed out that to vest the property in a receiver and to direct the receiver to grant a lease of the same is to treat this property as being capable of alienation. It has already been decided that it is not. On this ground, too, I think the order of the Court below is not correct. I allow the appeal and set aside the order of the Court below. I make no order as to costs.

B.V./R.K.

Appeal allowed.

A. I. R. 1918 Oudh 304

LINDSAY, J. C.

Mohamad Askari—Defendant—Applicant.

v.

Lalu—Plaintiff—Opposite Party.

Misc. Appln. No. 56 of 1918, Decided on 14th March 1918, against order of Judicial Committee, D/- 30th January 1918.

Civil P. C. (1908), O. 22, Rr. 4 and 9—Appeal—Death of respondent—Legal representatives not brought on record—Abatement of appeal—Application to set aside abatement—Ignorance is not sufficient cause.

It is the duty of a person who is prosecuting an appeal to keep himself informed of the existence of his adversary, and unless special reasons are shown why this duty has not been performed, an application to set aside an abatement of the appeal by reason of the legal representative of a deceased respondent not having been brought upon the record within the period of limitation allowed for that purpose should not be entertained. [P 305 C 1]

A mere plea of the ignorance of the appellant that a respondent had died is not a sufficient cause for setting aside an order of abatement under O. 22, R. 9. : [P 305 C 2]

In cases of this kind the question of sufficient cause should be determined with reference to the facts of each case. [P 305 C 2]

P. C. Gupta—for Applicant.

Ram Chandra—for Opposite Party.

Judgment.—This is an application under O. 23, R. 9, for the purpose of having set aside an order passed by me on 30th January 1918, by which it was directed that the applicant's appeal should abate. The facts are that the appeal was drafted in the month of May 1917. The memorandum was submitted to the Assistant Registrar of this Court for examination on 25th May 1917, but it was not actually filed in Court until 23rd July 1917, upon which date an order was passed that the case was to be put up under O. 41, R. 11. Subsequently having been put up under that rule it was directed that notice should go. A date having been fixed and notice having been sent to the respondent, the process-server reported that the respondent had died about the month of June 1917. It was on these facts that the order for abatement was made; and now the case for the applicant is that he can show sufficient cause for not having made his application for substitution of parties within the period of six months fixed by the law of limitation. His case is that he lives in the city of Lucknow, that respondent lived in the town of Kursi in Bara Banki which is not more than 18 or 20 miles away. It is admitted, moreover, by the applicant's learned counsel that his client is the zamindar of a village which is situated not very far from the town of Kursi. On the other hand an affidavit has been filed on behalf of the opposite party and with it has been exhibited a certain letter, said to have been written by the Mukhtar of the applicant in which he addressed the son of the deceased respondent in the month of October last and from the language of which it appears that the Mukhtar was very well aware of the fact that the respondent Lalu had died.

The applicant who is here in person denies that this letter was written by any agent of his. The law on the subject has been considered in a ruling to which the learned counsel for the opposite party has referred me, to be found in 24 I. C. at p. 275 [*Govind Prasad v. Ganga Prasad* (1)]. That is a ruling

1. A I R 1914 Oudh 411=24 I C 275.

of a Judge of this Court and it follows a judgment to be found in the Punjab Record for 1911 Case No. 60 [*Mir Nawab v. Hardeo* (2)]. Mr. Gupta has drawn my attention to another Bench case of the same Court in which the law has been laid down in a different sense. It seems to me that in cases like this the question of sufficient cause is to be determined with reference to the facts of each case. I agree with Mr. Piggott in thinking that a mere plea of ignorance of the fact that the opposite party had died is not a sufficient cause for setting aside an order of abatement. It surely is the duty of the person who is prosecuting the appeal to keep himself informed regarding the existence of his adversary; and unless special reasons are shown why this duty has not been performed, I think applications of this kind should not be entertained. Following the principle laid down by Mr. Piggott in the case cited by the opposite party, I hold that no sufficient cause is shown. I dismiss the application with costs.

G.V./H.R. *Application dismissed.*

2. 11911 60 PR 1911=121 C 871.

A. I. R. 1918 Oudh 305

STUART AND KANHAIYA LAL, A. J. CS.
Prag Datt—Plaintiff—Appellant.

v.

Kanhaiya Lal and others—Defendants
—Respondents.

First Appeal No. 115 of 1917, Decided on 8th July 1918, from decree of Sub-Judge, Bara Banki, D/-19th July 1917.

Practice—Burden of proof—Party failing to discharge through bad advice of counsel—Re-hearing cannot be allowed.

The mere fact that a party to a case did not adduce evidence owing to the bad advice of his pleader, which resulted in a decision against him, is no ground for allowing him a re-hearing of the case. [P 305 C 2]

A. P. Sen for *George Jackson*—for Appellant.

Gokaran Nath Misra, Haidar Husain and Sarju Prasad—for Respondents.

Judgment.—*Prag Datt* mortgaged on 2nd September 1915 certain shares in Bichlinga and Kamai to the mother of *Kanhaiya Lal*. On 23rd November 1915 he sold the rights that he retained in the share in Bichlinga to *Kanhaiya Lal* and *Rameshri Prasad*. When the vendees applied for mutation in February 1916, *Prag Datt* opposed the entry of their names on the ground that the whole con-

sideration of the sale had not passed. The vendees failed to obtain mutation. They sued for possession in the Civil Court on 20th June 1916. On 15th September 1916, Prag Datt was party to a compromise in Court by which he agreed to the vendees' obtaining possession over the share in question. Prag Datt subsequently filed a suit to have that compromise set aside on the following grounds: He said that he had executed the compromise because he was in abject terror of Kanhaiya Lal and incapable of protecting his own interests owing to the following facts: 1. That Kanhaiya Lal who is a pleader by profession had continually acted for him in legal proceedings. 2. That Prag Datt's brother had been prosecuted on 13th of April 1916 and that he believed that Kanhaiya Lal had been responsible for the prosecution. It is to be noted that the brother was acquitted on that occasion. 3. Because Prag Datt's brother was being prosecuted in a criminal case at the time when the compromise was effected and Prag Datt believed that Kanhaiya Lal was at the bottom of the prosecution.

Issues were framed on these points. Kanhaiya Lal has admitted in the proceedings that he had acted as a pleader for Prag Datt. But there was on the face of it no close connexion between the two. Kanhaiya Lal was in no way Prag Datt's family lawyer, or regular lawyer, or confidential adviser. He had taken up certain cases on his behalf. That was all. It should have been clear to any counsel, we consider, that in view of the nature of the plaintiff's case the burden of proof was on him and on him very strongly to prove, firstly, that Kanhaiya Lal had instigated the prosecution of his brother in April and was instigating the prosecution of his brother in September, and secondly, that he was really reduced to such hopeless and pitiable terror, by the fact that such prosecution had taken place and his impression that Kanhaiya Lal was responsible for it, as to be unable to defend himself in the previous civil proceedings, and to be ready to accede to whatever Kanhaiya Lal wished. How any Counsel could believe that if he produced no evidence on these points he would succeed in his case, we fail to understand. However, that was the attitude adopted by Prag Datt's Counsel. He refused to produce any evidence. He said that, as Kanhaiya

Lal admitted having appeared for Prag Datt in certain legal proceedings, it would necessarily follow that unless Kanhaiya Lal could show that he had not been privy to the criminal prosecutions, Prag Datt's case was bound to succeed. He refused to produce any evidence and the suit was dismissed. The learned Counsel who has represented Prag Datt in this Court has very wisely thrown up practically every point taken in the grounds of appeal and has pleaded simply for compassion for his client. His case is that his client was badly advised, that his client's Counsel took an extraordinarily mistaken attitude, that his client should not be made to suffer because of the mistaken attitude adopted by his Counsel, and that he should be given a re-hearing and allowed to re-open his case from the very commencement.

We do not think that if we acceded to this request we should be acting in fairness to the other side, and also we should be, we consider, embarking upon a very dangerous course, for in the period of nearly two years which has elapsed between the hearing of the case and the decision of this appeal, it has been possible to prepare evidence on behalf of the appellant which might not have been forthcoming at the time of the hearing of the suit. In these circumstances we consider the appeal must and should fail and dismiss it with costs.

B.V./R.K.

Appeal dismissed.

A. I. R. 1918 Oudh 306

LINDSAY, J. C.

Deoki Nandan and others—Plaintiffs—Appellants.

v.

Kali Shankar and others—Defendants—Respondents.

Second Appeal No. 363 of 1916, Decided on 5th December 1917, from decree of Sub-Judge, Unao D/. 10th July 1916.

U. P. Land Revenue Act (1901), S. 111—Partition case before Revenue Court—Question of title raised by applicants themselves—Civil suit to decide question of title is maintainable.

Where in a partition case filed in a Revenue Court, before any notices were issued to the recorded encroachers or at any rate before any objections could be filed by them to the application for partition, the applicants themselves asked the Court to postpone the case until they could have the question of their title cleared up in a civil Court and the Revenue Court granted the required postponement and the applicants then instituted the proposed suit in the civil Court:

Held: that the civil Court had jurisdiction to entertain the suit: *A. I. R. 1914 Oudh 115, Dist. from.* [P 308 C 2]

Gokaran Nath Misra—for Appellants.

Tara Sharnkar Sharma—for Respondents.

Judgment.—The only question which arises for determination of this second appeal is whether or not the civil Court had jurisdiction to entertain a declaratory suit which was brought by the plaintiffs appellants against the defendants-respondents. The case has already been before this Court on a question of limitation. It was decided here in second appeal that the suit was not barred by time and this Court refused to interfere with a remand order which had been made by the lower appellate Court directing the case to be returned for investigation on the merits. After the case went back to the Court of first instance this question of jurisdiction arose. The defence was taken that the suit was not cognizable by a civil Court. This plea was given effect to by the Munsif, who dismissed the suit. His order dismissing the suit has been upheld in appeal by the lower appellate Court. In my opinion the decision of the Courts below was wrong. In order to elucidate the matter in question it is necessary to set out the following facts.

The parties are co-sharers in a village called Dabepur in the Unao district. This village is held in imperfect partition and is divided into two pattis, one of which is called Patti Ausari representing a share of 13 annas 4 pies. The owner of this patti is the defendant respondent, Gaya Prasad, No. 8. The other Patti Sri Kishan which consists of 2 annas 8 pies is held by three sets of owners. The plaintiffs between them own a 1 anna and 16 krants share in this patti. Defendants 1 and 2 who are the sons of one Ambika Prasad own a 1 anna 4 pies share, and the other defendants 3 to 7 own the rest, namely, 3 and 4 krants. Ambika Prasad, whose name has just been mentioned, made an application to the Revenue Court for an imperfect partition of this Patti Sri Kishan. The present plaintiffs Deoki Nandan and others objected to an imperfect partition taking place, the main ground being that it was not proper that imperfect partition should be allowed because the whole Mauza was joint (*bil ijmal*) and that until all the co-

sharers of both the pattis were joined in the proceedings it would not be possible to arrive at a correct division of the shares. This objection filed by Deoki Nandan and others was, however, rejected in June 1913 as being beyond time. The imperfect partition case proceeded and these plaintiffs again objected; but their objection was overruled. Finally in order to attain their purpose the plaintiffs on 1st September 1913 put in an application to the Revenue Court asking for a perfect partition of their share and demanding that all the co-sharers in the village including Gaya Prasad, the owner of Patti Ausari, should be made parties. The object clearly was that the plaintiffs might obtain a total separation of their share in the entire Mauza. On 9th September the plaintiffs came before the Revenue Court and presented a petition in which they referred to the application made on 1st September. They went on to say that they desired this application for perfect partition to be postponed until they went to the civil Court in order to obtain a decision regarding the proper extent of their share. This application having been put in the Assistant Collector passed the following order:

"The petition of the applicants for adjournment is granted. Let the case be put up again on 15th December."

After this the plaintiffs came to the civil Court and brought the suit out of which this appeal has arisen. It must be admitted that the plaint has been very badly drafted and that the plaintiffs could not be given relief in the form in which it is sought in para. 9 of the plaint. At the same time it appears to me that if the Court has jurisdiction to entertain the suit, there is a case for a declaratory relief if the facts can be established as they are represented by the plaintiffs. I will deal first, however, with the question of jurisdiction. The Courts below have relied upon a Bench decision of this Court which is reported as *Mukhtar Ahmad v. Barati Lal* (1). But in my opinion the present case is one of a different kind and the law as laid down in this Bench decision cannot be applied to the facts before me. S. 111, U. P. Land Revenue Act, shows the manner in which questions of title arising in partition proceedings can be brought before a civil

Court, and it was held in the Bench case to which I have referred that the question whether the civil Court has jurisdiction in such cases must be determined with reference to the provisions of this section. It will be seen on a reference to S. 110 that the circumstances which are contemplated in S. 111 arise only after a notice has been issued to the recorded cosharers of the village calling upon them to file objections. S. 111 provides that if on or before the date fixed for the proclamation any of the recorded cosharers to whom notice has issued files an objection relating to a question of proprietary title, then the Revenue Court can deal with the matter in one of the three ways set out in S. 111. What is clear, however, in the present case is that this suit with which we are now dealing did not come into the civil Court in consequence of any of the events described in Ss. 110 and 111. It appears that before any notices were issued or at any rate before any objections could be filed to the application for perfect partition which the plaintiffs-appellants put before the revenue Court, they themselves went to the Assistant Collector and asked him to stay his hand while they went to the civil Court in order to have the question to their title cleared up. It is manifest therefore that the Assistant Collector had not before him any objection of a recorded cosharer such as is described in S. 111 of the Act, and it is further clear that the Assistant Collector did not decline to grant the application for partition until the question in dispute had been determined by a competent Court. All he did was to stay proceedings and to direct that no action should be taken upon the application until the plaintiffs who had made that application had done something which was necessary for them to do by means of a suit in the civil Court. In these circumstances I am unable to see how it can be said that the jurisdiction of the civil Court to entertain this suit was in any way ousted. In my opinion it was not, and the decision that the suit was not entertainable must be set aside as erroneous. The case must now go back for investigation on the merits.

The frame of the plaint has occasioned a certain amount of difficulty and it has been conceded that the plaintiffs cannot ask for relief in the form in which it is

sought in para. 9 (a) of the plaint. To me it seems that the question which will have to be investigated is the following. The plaintiffs say that in the present state of affairs in which the whole village is divided by imperfect partition into two Pattis Auseri and Sri Kishna, they, the plaintiffs, are not in possession of the full area of the village to which they are entitled as being owners of a 1 anna and 16 krants share. In other words, the suggestion is that as the village is divided at present, Patti Sri Kishan does not contain the full area which it ought to, having regard to the ratio which 2 annas 8 pies bears to 13 annas 4 pies. The plaintiffs say that taking the area of the whole village their 1 anna and 16 krants share represents an area of 51 bighas 12 1/15 biswansis, while if partition were effected only in respect of the Patti Sri Kishan they would get possession of an area of 43 bighas 13 biswas 16 4/5 biswansis only, which is a good deal less than the area to which they are entitled. It was this circumstance which led the plaintiffs to object to the application for an imperfect partition of Patti Sri Kishan only, for they objected that if that partition be carried out the result would be to give them great deal less than they are entitled to. What they now want to be made clear is that as owner of a 1 anna and 16 krants share they are entitled at the time of the division of the whole of the village lands to a share of the area of the village which bears the proportion of 1 anna and 16 krants to 16 annas, and it seems to me that this is a declaration which if the necessary facts are established, the civil Courts are competent to grant them. Once this matter has been settled, the plaintiffs will be in a position to ask the revenue Court to go on with the application for partition and to have partition made in accordance with the declaration made by the civil Court. I allow this appeal, set aside the order of both the Courts below and send the case back to the Court of first instance for decision on the merits. Costs here and hitherto will abide the result.

B.V./R.K.

Case remanded.

A. I. R. 1918 Oudh 309 (1)

LINDSAY, J. C.

Tulshi Ram and another—Plaintiffs—Appellants.

v.

Gur Dayal and another—Defendants—Respondents.

Second Appeal No. 126 of 1914, Decided on 29th March 1916, from decree of Dist. Judge, Hardoi, D/- 14th March 1914.

Negotiable Instruments Act (1881), S. 83—S. 83 does not apply to hundi presented for purpose of payment and not for acceptance.

Section 83 does not apply where a hundi is presented not for the purpose of acceptance, but for the purpose of payment. (1909 C 2)

Gokaran Nath Mishra—for Appellants.

Judgment.—This second appeal has arisen out of a suit brought upon a hundi which was drawn on 29th December 1912. The facts of the case may be shortly stated as follows: One Sheo Prasad, who is the agent of a Cawnpore firm named Ganeshi Lal Ramai Lal, drew a hundi for Rs. 1000, on the date above mentioned in favour of a firm named Rup Chand Bal Kishan which carries on business at place called Kachechauna in the Hardoi district. On this same date Rup Chand Bal Kishan endorsed the hundi to the plaintiff firm in this case, that is to say, the firm of Tulshi Ram Badri Prasad. It appears that at the time the hundi was endorsed to the plaintiffs, the endorsers owed the plaintiff firm a sum of Rs. 852. The balance making up the total of Rs. 1,000 was paid to the defendants by the plaintiffs on the 31st December. The hundi was taken to Cawnpore on the 29th December and made over to the agents of the plaintiff firm in Cawnpore, these agents being the proprietors of a firm named Ganga Prasad. Auseri Lal. The document was endorsed to this firm as agents for the purpose of presentation. A presentation was made accordingly and on the findings of the Court below it must be taken that successive presentations for payment were made until finally payment was refused on or about the 10th January 1913. On the first date on which presentation was made for payment, a note was made by the drawee to the effect that the hundi had been presented, "dekhi." Immediately after the dishonour of the bill the agents of the plaintiffs communicated with the plain-

tiffs at Kachechauna. They at once made a demand for the money from the defendant firm. They were put off for several days and finally on 13th January 1913 the payment was refused, and this suit was eventually brought on 18th January 1913. The first Court decreed the claim, holding that the defendants were in the circumstances just set out liable to the plaintiffs. The lower appellate Court has dismissed the plaintiffs' claim, apparently on the ground that the plaintiffs did not give the defendants reasonable notice of dishonour. The learned Judge applied the provisions of S. 83, Negotiable Instruments Act, to the case. The section lays down that if the holder of a bill of exchange allows the drawee more than 24 hours, exclusive of public holidays, to consider whether he will accept the same, all previous parties not consenting to such an allowance are thereby discharged from liability to such holder. The learned Judge did not perceive apparently that S. 83 could have no application to the facts of this case, for the presentation of the hundi was not for the purpose of acceptance but for the purpose of payment and consequently the decision, so far as it purports to be based on the provisions of this section, must be taken to be erroneous. On the other hand, the facts are that there was a final refusal on or about the 10th January and there cannot be the slightest doubt that the notice of this dishonour was conveyed to the defendants with all reasonable promptitude. This being so the defendants are clearly liable and the claim must succeed. I therefore, allow this appeal, set aside the decree of the lower appellate Court and restore the decree of the Court of first instance. The appellants will get their costs both here and in the lower appellate Court:

B.V./R.K.

*Appeal allowed.***A. I. R. 1918 Oudh 309 (2)**STUART AND KANHAIYA LAL, A. J. CS.
Kehri Singh and another—Appellants.

v.

Deo Kunwar—Respondent.

Second Appeal No. 458 of 1917, Decided on 26th March 1918, from decree of Dist. Judge, Sitapur, D/- 4th August 1917.

(a) Pre-emption—Right must exist also at time of institution of suit—If right lost before decree, no relief can be granted—Loss of right subsequent to decree does not affect title under decree unless loss has effect of

Invalidating antecedent title giving him right to pre-empt.

The right of a plaintiff to enforce pre-emption must exist not only at the time of the sale or foreclosure but also at the time of the institution of a suit to enforce that right. If he loses that right after the sale or foreclosure or at any time after the institution of the suit and before a decree for pre-emption can be passed in his favour, he is put out of Court and no relief can be granted to him. But where he obtains a decree, anything which may subsequently happen cannot affect the title which he may acquire under the decree by complying with its terms, unless what happens has the effect of invalidating the antecedent title which he held on the date of the sale or foreclosure or on the date of the suit and by virtue of which he claimed the pre-emptive right. [P 310 C 2]

(b) U. P. Land Revenue Act (1901), S. 131—Relationship of sharers continues until partition.

The relationship of the sharers of a village inter se continues for all legal purposes till a Revenue Court partition actually takes effect.

[P 311 C 1]

(c) Pre-emption—Vendee's defeasible right becoming absolute by time of appeal—Right can be referred back to date anterior to suit so as to defeat claim for pre-emption—But if right of defence did not exist at date of sale or foreclosure or of suit it cannot be available for first time after passing of decree.

Where in a pre-emption suit the vendee is found to have had a defeasible right, which becomes absolute by the time the claim for pre-emption comes up for hearing on appeal the right so perfected can be referred back to a date anterior to the suit so as to defeat the claim for pre-emption. But a right of defence which did not exist at all on the date of the sale or foreclosure or on the date when the suit for pre-emption was filed, cannot be of any consequence, if it becomes available for the first time after a decree for pre-emption is passed in favour of the plaintiff in that suit: *A. I. R. 1914 Oudh 288, Expl.*

[P 311 C 1, 2]

(d) Pre-emption—Appellate Court need only consider whether right existed at date of sale or foreclosure and at time of decree for pre-emption.

A Court of appeal need not go beyond considering whether the right of pre-emption claimed by the plaintiff existed at the date of the sale or foreclosure and retained its enforceable character when the suit for pre-emption was filed and till a decree for pre-emption was obtained therein which was the subject of appeal. [P 311 C 2]

Gokaran Nath Misra—for Appellants.

Sami Ullah Beg—for Respondent.

Judgment.—This appeal arises out of a suit for pre-emption brought by the plaintiffs-appellants in respect of share situated in mahal Kehri Singh, village Barabarhi, and a share in some shamilat land situated in patti Lahori Singh in the village Bagrehti. The defendant got the said property by virtue of a decree for foreclosure obtained by her against Kundan Singh, the owner thereof, on

24th February 1912. The plaintiffs claimed to be cosharers both in mahal Kehri Singh, village Barabarhi, and in patti Lahori Singh in village Bagrehti. The defendant was not a cosharer in either of them at the time of foreclosure but she held shares in another mahal of the village Barabarhi and in another patti of the village Bagrehti. The Court of first instance decreed the claim subject to the payment of Rs. 1,110 to the defendant or into Court within a certain time. The plaintiffs paid the money within the said time. On appeal the lower appellate Court reversed the decree so far as the village Bagrehti was concerned, on the ground that by virtue of a partition of that village, which was carried into effect on 1st July 1917 after the decree of the Court of first instance was passed, the defendant had become a cosharer in the patti in which the share foreclosed was situated. It is a well-settled rule of law that the right of a plaintiff to enforce pre-emption must exist not only at the time of the sale or foreclosure but also at the time of the institution of a suit to enforce that right. If he loses that right after the sale or foreclosure or at any time after the institution of the suit and before a decree for pre-emption can be passed in his favour, he is put out of Court and no relief can be granted to him. But where he obtains a decree, anything which may subsequently happen cannot affect the title which he may acquire under the decree by complying with its terms, unless what happens has the effect of invalidating the antecedent title which he held on the date of the sale or foreclosure or on the date of the suit and by virtue of which he claimed the pre-emptive right. In *Sakina Bibi v. Amiran* (1) it was accordingly held that a subsequent sale of the share of a plaintiff, by virtue of which a right of pre-emption was claimed in execution of a decree in another suit, did not affect the propriety of a decree for pre-emption, which he had obtained on the strength of that right, if decree was otherwise a good and valid decree on the date on which it was passed. In *Amir Hasan v. Sardar Begam* (2) and *Nuri Mian v. Ambica Singh* (3) it was similarly held that a plaintiff pre-

1. (1888) 10 All 472.

2. (1907) 12 O C 229=3 I C 546.

3. (1917) 44 Cal 47=34 I C 869.

emptor was bound to show a valid title on the date the decree of the Court of first instance was passed.

An imperfect partition of the village Bagrehti was started in 1914 and was completed on 3rd August 1916, when it was sanctioned by the Collector. It was, however, to take effect from 1st July 1917. The present suit was filed on 17th March 1917, after the imperfect partition was sanctioned by the Collector but before it had been carried into effect. The plaintiffs obtained a decree for pre-emption in their favour while the pattis of the village Bagrehti were still intact, that is, before the re-distribution of the land into fresh pattis had come into legal operation, and as held in *Amir Hasan v. Sardar Begam* (2), the relationship of the sharers of the village inter se did not cease till the imperfect partition took effect. S. 131, U. P. Land Revenue Act (3 of 1901) lays down that a partition shall not be complete until the Collector has passed an order confirming it, and then goes on to declare that when the partition has been so confirmed the Collector shall issue a proclamation thereof and the partition shall take effect from the 1st of July next following the date of such proclamation. The confirmation of a proposed partition cannot, therefore, be in itself sufficient to destroy an existing coparcenership, which must for all legal purposes continue till a proclamation is issued and the date from which the partition is to take effect arrives.

The learned Counsel for the respondent relied on the decision in *Onkar Singh v. Bhagwan Dat Singh* (4), but as explained in *Ram Sahay v. Jagdamba Singh* (5) that was a case in which the vendee was found to have held certain property to which he had defeasible right on the date on which the suit for pre-emption was filed, but to which his right had become absolute owing to the failure of the party interested to impugn it with success by the time the claim for pre-emption came up for hearing on appeal. A right so perfected can be referred back to a date anterior to the suit so as to defeat a claim for pre-emption. But a right of defence which did not exist at all on the date of the sale or foreclosure

or on the date when the suit for pre-emption was filed cannot be of any consequence, if it became available for the first time after a decree for pre-emption was passed in favour of the plaintiff in that suit. A Court of appeal need not go beyond considering whether the right of pre-emption claimed by the plaintiff existed on the date of the sale or foreclosure and retained its enforceable character when the suit for pre-emption was filed and till a decree for pre-emption was obtained therein which was the subject of that appeal. The propriety of the decree granted in this case by the Court of first instance cannot, therefore, be assailed by reason of the redistribution of land into fresh pattis which has been effected since that decree was passed. The appeal is consequently allowed, the decree of the lower appellate Court set aside and that of the Court of first instance restored with costs throughout.

W. V. J. R. R.

Appeal allowed.

A. I. R. 1918 Oudh 311

LINDSAY, J. C.

Rameshwar Dayal and another—Defendants—Applicants.

v.

Gur Sahai—Plaintiff—Opposite Party.

Civil Reven. No. 192 of 1917, Decided on 16th April 1918, against order of Sub. Judge, Hardoi, D/- 17th September 1917.

Civil P. C. (5 of 1908), S. 151—Suit for pre-emption pending—Title qualifying him for pre-emption lost by virtue of decree in another suit—Suit dismissed as not maintainable on condition of revival on decree being set aside in appeal—Title regained in appeal—S. 151—Court has inherent power to revive suit under S. 151—Proper order would have been to stay proceedings—Application was governed by Limitation Act (9 of 1908), Art. 181.

During the pendency of a pre-emption suit the plaintiff lost his title to the property which qualified him for the exercise of the right of pre-emption, by virtue of a decree passed against him in another suit, and he filed an appeal from that decree. The Court trying the pre-emption suit thereupon dismissed it as not maintainable, but remarked in its judgment that if the plaintiff's appeal in the other suit was accepted, he might apply for revival of the pre-emption suit. The plaintiff won his appeal and within three years he applied under S. 151, Civil P. C., to the Court, which had decided the pre-emption suit, for its revival. The Court allowed the application:

Held: (1) that the Court had inherent power under S. 151, to revive the suit. (2) that the original order passed by the Court in the pre-emption suit was not the proper order to be passed in the circumstances, and that the pro-

4. A. I. R. 1914 Oudh 238 = 17 O. C. 242 = 25 I. C. 691.

5. (1916) 19 O. C. 153 = 37 I. C. 163.

per course for the Court would have been to stay the proceedings until the pre-emptor had an opportunity of getting the decision of the Appellate Court on the question of title under which he was claiming pre-emption: (?) that the application was governed by Art. 151, and was, therefore, within time. [P 312 C 2; P 313 C 1]

Rudra Dat Singh—for Applicants.

Harkaran Nath Misra—for Opposite Party.

Judgment.—This is an application for revision of an order passed by the Subordinate Judge of Hardoi on 17th September last. The facts of the case are somewhat peculiar. It appears that in the year 1911 the opposite party Gur Sahai filed a suit for pre-emption in the Court of the Subordinate Judge of Hardoi. The two applicants in the present case were defendants in that suit, being the purchasers of the property sought to be pre-empted. The case came up for trial in the Court at Hardoi, and one of the issues which was raised on the pleadings was whether or not the suit was maintainable. The plea of the defendants was that Gur Sahai could not maintain the suit on the ground that he was not a co-sharer in the village in which the property was situated. It seems that Gur Sahai's claim to be a co-sharer in this village was based upon his relationship to one Data Ram, who died leaving two widows. The last of these two widows died in the year 1906 and Gur Sahai who was the nephew of Data Ram took possession after the death of the last widow. Then one Nand Kishore came upon the scene. He brought a suit against Gur Sahai for possession of this property. This suit was brought in the year 1910 and was decreed in the Court of first instance on 31st October 1911, so that at the time when this suit for pre-emption was pending before the Subordinate Judge, the state of things was that the plaintiff Gur Sahai had lost his title to the property which qualified him for the exercise of the right of pre-emption. Gur Sahai had filed an appeal before this Court and that appeal was pending when the pre-emption suit was decided on 5th December 1911. The Subordinate Judge held that the suit was not maintainable and the concluding words of his judgment are as follows:—

"At this moment the plaintiff owns no share and he cannot, therefore, sue for pre-emption. If his appeal is accepted he may apply for the revival of this suit, if he is so advised."

Later on, that is to say, on 24th Octo-

ber 1913, Gur Sahai won his appeal in this Court and the result of the decree was that his title to the property was established from the beginning, in other words, it was held that he was the rightful heir of Data Ram who was entitled to succeed to possession of this property after the death of Data Ram's widows. Gur Sahai, having obtained this decree in his favour, might, I think, very well have gone at once to the Court of the Subordinate Judge and applied for revival of the suit as had been suggested to him. However, he held back for nearly three years and it was not till 15th September 1916, that he went to the Court at Hardoi and asked for the old suit to be revived. This application purported to be one under S. 151, Civil P.C. The right of Gur Sahai to make this application was contested on a variety of grounds. Eventually the Subordinate Judge decided that it was a case for the exercise of the inherent powers of the Court specified in S. 151.

The defendants now come in revision and the ground is taken that the Subordinate Judge had no jurisdiction to make this order. I think that argument cannot be maintained. It seems clear to me that a wide power is conferred upon Courts by S. 151, and it has been held by a Bench of the Allahabad High Court in the case referred to in the judgment of the Court below *Bhagwan Dayal v. Param Sukh Dass* (1), that under S. 151 the Courts have inherent power to revive suits. It is clear enough to me that the order which was passed by the Subordinate Judge on 5th December 1911, by which he dismissed the plaintiff's suit, was not the proper order to be passed in the circumstances. I do not go the length of saying that it was an absolutely illegal order, but clearly in the interests of justice the proper course was to stay the proceedings until Gur Sahai had an opportunity of getting the decision of this Court on the question of the title under which he was claiming pre-emption. However, the Subordinate Judge did not take that course. He dismissed the suit, at the same time giving the plaintiff the assurance that if he won his case in the Judicial Commissioner's Court he would be entitled to apply for revival. In the circumstances I think it is not to be denied that a great in-

justice would be caused to Gur Sahai if he were not allowed to go on with this suit. The only ground upon which it can be urged that this relief should be denied to him is that he has been guilty of great delay in making the application.

There is some force in this argument, for there is, so far as I can see, no reasonable explanation of the fact why Gur Sahai waited from 24th October 1913 till 15th September 1916 for the purpose of filing the application to have the suit revived. On the other hand it would be difficult to say that the application was liable to be dismissed on the ground that it was barred by time, for as pointed out by the counsel for the opposite party an application of his kind would seem to be governed by Art. 181 of the Schedule of the Limitation Act, and so it would appear that Gur Sahai had three years from 24th October 1913 to file the application. The application was admittedly filed within three years from that date. On the whole I have come to the conclusion that this application should be dismissed. I think the argument that the lower Court had no jurisdiction to make the order cannot be maintained; on the contrary, I think, there was jurisdiction under S. 151 of the Code. As regards the other plea, namely, the delay in the presentation of the application, I am not prepared to say that it was barred by any Article of the Schedule to the Limitation Act and I should not feel justified in interfering with the order of the Court below merely upon the consideration that Gur Sahai was guilty of delay in moving the Court. The application fails and is dismissed with costs.

B.V./R.K. *Application dismissed.*

A. I R. 1918 Oudh 313

LINDSAY, J. C. AND DANIELS, A. J. C.

Dalpat Singh and others—Plaintiffs—Appellants.

v.

Ahmad Shah and others—Defendants—Respondents.

First Appeal Nos. 102 and 131 of 1916, Decided on 30th May 1918, from decree of Sub-Judge, Sitapur, D/- 1st July 1916.

(a) Contract Act (9 of 1872), S. 16—Bargain unconscionable—Rate of interest excessive is not sufficient ground to reduce it—Interest.

Apart from the Usurious Loans Act the mere fact that a bargain is unconscionable, in the

sense that the rate of interest charged is excessive is not in itself a sufficient ground for interference by the Court. [P 313 C 2]

(b) Contract Act (9 of 1872), S. 16—Undue influence—Karinda cannot be presumed to dominate the will of his employer.

A karinda is as a rule a servant of very minor status, who cannot be presumed without very distinct evidence on the point to be in a position to dominate the will of his employer [P 314 C 1]

John Jackson and Chhote Lal—for Appellants.

H. C. Dutt—for Respondents.

Judgment.—These two cross-appeals arise out of a suit brought by the plaintiffs Dalpat Singh, Mathura Singh, and Mangli on the basis of three deeds of simple mortgage executed by Haider Ali Beg, the father of the first four defendants. The rate of interest in each case was two per cent. per mensem compound interest with six monthly rests. The learned Subordinate Judge has reduced this to 24 per cent. per annum simple interest on two grounds: (1) that the debtor was in the hands of the plaintiffs who could dominate his will and that the plaintiffs, therefore, imposed their own terms, and: (2) that compound interest at two per cent. per mensem is a monstrous rate and is by itself sufficient evidence of the fact that the contract is hard and unconscionable and cannot be enforced. The plaintiffs appeal against reduction of interest. The defendants have filed a cross-appeal asking that the interest should be still further reduced. It is now well established that apart from the recent Usurious Loans Act the mere fact that a bargain is unconscionable, in the sense that the rate of interest charged is excessive, is not in itself a sufficient ground for interference. Here the rate of interest though high is by no means unprecedented, and it is admitted that the same rate of interest has been charged in previous transactions between the parties. The bonds in suit were executed partly in lieu of previous bonds bearing the same rate of interest. The learned Subordinate Judge's finding as to undue influence is difficult to follow, in view of the fact that in the course of the proceedings it was distinctly admitted by the first defendant through his pleader that he did not plead that execution of the deeds in suit was procured by undue influence and in fact no issue of undue influence was framed. (The other representatives of the mortgagor were absent and put in no defence.) Defendant 1 had put for-

ward certain pleas in his written statement, paras. 12 and 13, which look like a plea of undue influence under S. 16, Contract Act. He was asked by the predecessor-in-office of the Subordinate Judge who decided the suit to clear up this pleading and did so as stated above. Immediately afterwards on the same date the issues were framed and no issue under S. 16 Contract Act, was drawn up. The issues were: 1. Whether the mortgage-deeds were genuine and for consideration? 2. Whether the terms relating to interest were hard and unconscionable; and 3. Whether the plaintiffs were entitled to all the interest claimed.

There was a fourth issue relating to certain prior mortgagees with which we are not now concerned. It is clear that the Court treated the question whether the terms as regards interest were hard and unconscionable as distinct from the question whether the execution of the documents had been procured by undue influence. The learned Subordinate Judge who decided the case has done the same, where he holds that the rate of interest charged is by itself sufficient to render the contract unenforceable. In view of the fact that the plea of undue influence had been withdrawn and that no issue had been framed upon it, it was not open to the learned Subordinate Judge to set aside the terms of the contract on this ground. Even if it had been open to him, the evidence falls very far short of establishing undue influence within the meaning of S. 16, Contract Act. The defendants adduced no evidence whatever on this point. The only evidence on which the Subordinate Judge relies is a statement of the principal defendant Ahmad Shah, who was called as a witness for the plaintiffs on another matter, and statements of two attesting witnesses, Maiku Lal and Girja Dayal, whom the plaintiffs were obliged to call but who, being for obvious reasons on the side of the defendants, were desirous of doing the plaintiffs' case as much harm as they could. The two latter declared that the deceased debtor used to take opium and that Dalpat Singh was a karinda of the deceased who used to repose great confidence in him. A karinda is as a rule a servant of very minor status, who could not be presumed without very distinct evidence on the point to be in a position to dominate the will of his employer.

As for the statements of the defendant, the stamp of falsehood is written large upon them. He would have us believe that the plaintiffs had full control over his father's estate, could make him do what they liked and were practically talukdars. They are said to have the sole charge of the books of account and it is stated that the deceased never saw them. When challenged, the defendant could not produce a lease or account or a single scrap of paper relating to the estate in the handwriting of the plaintiffs. Two of the plaintiffs were examined as witnesses and they emphatically denied the defendant's story and there was hardly any cross-examination directed to show that they were in a position to, far less that they ever did, dominate the will of Haidar Ali Beg. The lower Court's finding cannot be supported. We allow the plaintiffs' appeal and restore the contractual rate of interest up to the date fixed for payment, though in view of the very large sum claimed as interest we think it equitable to direct that the parties should bear their own costs in this Court. In the lower Court the plaintiffs will have their costs. For the reasons already given the defendants' cross-appeal fails and it is accordingly dismissed with costs.

B.V./R.K.

Order accordingly.

A. I. R. 1918 Oudh 314

LINDSAY, J. C.

Ram Dayal and others—Plaintiffs—Appellants.

v.

Lalta Prasad and others—Defendants—Respondents

Second Appeal No. 200 of 1914, Decided on 24th February 1916, from decree of Dist. Judge, Hardoi, D/- 17th February 1914.

(a) Negotiable Instruments Act (1881), S. 83—S. 83 does not apply to case of hundis payable at sight.

Section 83 has no application to cases of hundis payable at sight, inasmuch as such hundis are presented not for acceptance but for payment. [P 315 C 2]

(b) Negotiable Instruments Act (1881), S. 83—Holders of hundis are entitled to return of consideration money.

Holders of hundis for valuable consideration are entitled to return of the consideration money paid by them to their endorers, if the hundis subsequently turn out to be worthless and no payment can be obtained upon them.

[P 316 C 1]

Gokaran Nath Misra—for Appellants.
John Jackson and Salig Ram—for Respondents.

Judgment.— These two appeals (Nos. 200 and 201 of 1914) may be disposed of by one judgment. They have arisen out of two suits brought by two sets of plaintiffs against the same set of defendants. The principal defendants in the case were defendants 3, 4, and 5 whose names are Lalta Prasad, Mul Chand and Phul Chand. The facts of the case may be briefly set out. On 24th December 1912 two hundis were drawn by defendant 1 Sheo Prasad upon a firm in Cawnpore, which was owned by defendant 6 in the suit, Salik Ram. These hundis were handed to defendant 2 Gur Dayal in payment of certain moneys due to him by Sheo Prasad. This defendant endorsed the hundis to defendants 3 and 4 Lalta Prasad and Mul Chand. It is necessary to explain here that Lalta Prasad is the father of defendant 4, Mul Chand and also of defendant 5, Phul Chand, the latter being a minor whose age is given as nine years. Lalta Prasad and his two sons have two places of business, one at Kachhauna in the Hardoi district and another in Sandila also in the Hardoi district. The former business is run in the names of Lalta Prasad and Mul Chand while the business at Sandila is carried on in the names of Mul Chand and Phul Chand. After the hundis had been endorsed to the Kachhauna firm owned by Lalta Prasad and Mul Chand, the hundis were passed on by the Sandila firm to the present plaintiffs. The hundis were sent by these plaintiffs to defendant 7, Gauri Shankar, who carries on business at Cawnpore. The hundis were endorsed to him not by way of negotiation but merely in order to enable him to present the hundis for payment as the agent of the plaintiffs.

Defendant 7, Gauri Shankar took the hundis to the firm owned by Salik Ram upon which the hundis were drawn. They were first taken to Salik Ram's place of business on 28th December, on which date it is said Salik Ram was not there. On that date his munim wrote on the hundis the word 'dekha', meaning that the hundis had been presented. Presentation for payment was made on successive dates from 28th of December up till 9th January 1913 and on this latter date Salik Ram dishonoured the hundis. He took objection first of all to the endorse-

ments in favour of the plaintiffs and he also made a further objection regarding the cancellation of the hundi stamps. As soon as this was done, the hundis were returned by defendant 7, Gauri Shankar to the plaintiff, who thereon communicated with their endorsers, defendants 3 to 5, from whom they claimed the money. These defendants refused to pay and these suits were instituted. The Court of first instance decreed the claims. The Subordinate Judge held that there were irregularities in the endorsements in favour of the plaintiffs in this way, namely, that whereas the hundis had been endorsed to Lalta Prasad and Mul Chand by defendant 2, Gur Dayal, the endorsers who passed the notes on to the plaintiffs were Mul Chand and Phul Chand, the members of the other firm trading at Sandila. He also was of opinion that the stamp had not been properly cancelled, and for these reasons it was held that the hundis could not be used in evidence, but he was of opinion that it having been proved that the plaintiffs had given value for these hundis which were subsequently dishonoured, defendants 3, 4 and 5 were liable.

It may be noted here that in the defence put up by these three defendants it was contended that the endorsements in favour of the plaintiffs were in order and also that there was no irregularity about the stamps. For this reason they contended that there was no cause of action against them. A further plea was put forward to the effect that no reasonable notice of the fact of dishonour had been communicated to these defendants. This plea was based upon the terms of S. 83, Negotiable Instruments Act, a section which can have no application to the facts of the present case. S. 83 provides a rule relating to the presentation of bills of exchange for the purpose of acceptance. Here the hundis were not being presented for acceptance, but for payment for they were payable at sight. Defendants 3, 4 and 5 went in appeal to the District Judge, who dismissed the suits. He has taken a view of the law which in my opinion is altogether untenable. After adverting to the finding of the Court below regarding the informality in the endorsements and the irregularity about the cancellation of the stamps, he went on to say that there was no question of loan in the case. He pointed out that in the plaints

and throughout the cases it had been alleged that the two hundis had been sold and that it was not the case for the plaintiffs that any money had been lent upon them. Then he went on to point out that defendants 3 to 5 were holders for valuable consideration and he argued in this way, namely, that as the plaintiffs wanted these hundis and paid for them, they took the hundis over with their eyes open and subject to all risks. One of the risks he mentioned was that the drawee might go bankrupt, as he apparently did in the present case; but I am informed and the matter has not been disputed that Salik Ram did not become bankrupt until after the date upon which he refused to cash the hundis. The learned Judge sums up his discussion by saying:

"In any case the plaintiffs knew what they were getting or could have known and now that the hundis are worthless the loss must fall on them."

This is an altogether mistaken view of the rights of the parties. The facts remain that the plaintiffs in these two suits gave money to defendants 3, 4 and 5 for hundis which have turned out to be worthless and upon which no payment could be obtained. This being so, they are in every way entitled to the return of their money. Defendants 3, 4 and 5 were clearly liable to the plaintiffs. I therefore, allow both these appeals, set aside the decree of the Court below and restore the orders of the Court of first instance with costs to the appellants both here and in the Court below. Babu Salig Ram, who has appeared in this Court on behalf of the respondent Gauri Shankar who was impleaded as defendant 7, has pointed out that his client was impleaded without any cause of action being shown against him and without any relief sought being against him. There can be no doubt as to the correctness of the plea. Gauri Shankar had only been acting as the agent of the plaintiffs and there was no relief which they could seek against him. I, therefore, direct that Gauri Shankar's costs be paid by the present plaintiffs-appellants in all three Courts.

B.V./R.K.

Appeal allowed.

A. I. R. 1918 Oudh 316

KANHAIYA LAL, A. J. C.

Jagdamba Bakhsh Singh—Plaintiff
—Appellant.

v.

Mahadeo Singh and another—Defendants—Respondents.

Second Appeal No. 238 of 1918, Decided on 19th August 1918, against decree of Sub.Judge, Sultanpur, D/- 7th March 1918.

Landlord and Tenant—Ejectment—Cancellation of notice to quit by Revenue Court—Tenant claiming under proprietary rights—Suit for declaration by landlord—Limitation commences from date of order—Fresh notice does not give fresh cause of limitation—Limitation Act (9 of 1908), Art. 120.

Where a notice issued by a landlord to eject his tenant is cancelled by the Revenue Court on the ground that the tenant is more than an ordinary tenant, the right to file a suit to challenge that order accrues to the landlord on the date of the order and he must bring a suit for that purpose within six years of that date.

It is not open to him to defeat the law of limitation by issuing an abortive notice of the same character shortly before the institution of the suit. Such a proceeding cannot bring the suit within time if the right has already lapsed.

[P 316 C 2]

Fakhruddin Hasan—for Appellant.

Judgment.—The plaintiff appellant sued for a declaration that the defendants had no proprietary or under-proprietary rights in the plots in dispute. The Court of first instance dismissed the claim. The lower appellate Court upheld that decree in regard to three of the plots, on the ground that the claim with regard thereto was barred by limitation and discharged it in regard to plot 4, holding that the defendants had proprietary or under-proprietary rights therein. The learned counsel for the plaintiff-appellant contends that the right to sue accrued to the plaintiff when the notice issued by him to eject the defendants was cancelled in March 1916. But as a previous notice to the same effect had been issued by the plaintiff in 1905 and cancelled by the Revenue Court on the ground that the defendants were more than ordinary tenants, the rights to file a suit to challenge that order accrued in 1905 and the present claim was therefore, barred by time. It was not open to the plaintiff to defeat the law of limitation by issuing an abortive notice of the same character shortly before the institution of his suit. Such a proceeding cannot bring the case within time if his right has already lapsed.

The plaintiff was not in possession constructively or otherwise, and as the Court below has pointed out, his title, so far as it is inconsistent with the order cancelling his notice, ceased to exist after the expiry of six years from that date. The appeal is therefore rejected.

B.V./R.K. *Appeal dismissed.*

A. I. R. 1918 Oudh 317

LINDSAY, J. C.

Nadir Singh and others—Plaintiffs—Appellants.

v.

Inder Sen Singh and others—Defendants—Respondents.

Second Appeal No. 141 of 1917, Decided on 27th May 1918, from decree of Dist. Judge, Fyzabad, Dn- 19th January 1917.

Hindu Law—Alienation — Coparcener—Consent of other members cannot be implied on ground of existence of legal necessity—Silence on part of other members is not adequate evidence of consent.

Where a member of a joint Hindu family other than the manager, sells property belonging to the joint family, the consent of the other members cannot be implied merely on the ground that there was legal necessity for the transfer, nor does the fact that the other members kept silent for a long interval after the date of the sale by itself amount to adequate evidence of implied consent. (1918 C.L. 2)

*A. P. Sen—*for Appellants.

*H. N. Misra—*for Respondents.

Judgment.—The suit out of which this appeal has arisen was brought by the plaintiffs-appellants for the purpose of setting aside a sale of the property mentioned in the plaint, which was carried out on 20th January 1904 in favour of defendant-respondent 1, Babu Inder Sen Singh. The plaintiffs and the other members of their family were under-proprietors in a village belonging to the defendant Talukdar, and it is proved that prior to the date upon which the sale-deed in suit was executed two decrees for arrears of rent had been obtained by the Talukdar against certain members of the plaintiffs' family. In execution of these decrees the property was put up for sale by public auction and was purchased on 22nd December 1903 by a stranger for a sum of Rs. 471. On 20th January 1904 the judgment-debtors made a private sale of the property, which had been sold by auction in favour of the defendant Talukdar. They then deposited in Court the amount which was due under the decrees

which were being executed, the result being that the sale in favour of the stranger was set aside. The plaintiffs now come to Court alleging that the conveyance in favour of defendant 1 is not binding on them inasmuch as it was a conveyance of joint family property in which the plaintiffs were co-sharers. It was alleged that the sale had taken place without their consent and that they were entitled to avoid it.

The defence put forward was that the sale was made for legal necessity and for the benefit of the family. It was pleaded that defendant 1 had given more for the property than it had fetched at the public auction. It was also pleaded that the sale-deed had been executed by persons who stood to the other members of the family in the relation of managers and that the sale was accordingly binding. The Subordinate Judge found that the family to which the plaintiffs belonged was a joint family and that the property in suit was joint family property. He further found that it was not proved that the persons who had sold the property to defendant 1 were managing members. There was no evidence of consent on behalf of the plaintiffs; and accordingly the Subordinate Judge was of opinion that they were entitled to avoid the sale. He made a condition however that the plaintiffs should pay a sum of Rs. 234-5-0, this being the amount of the judgment debt which was owing to defendant 1 at the time of the auction sale, the money being due on account of arrears of rent. I may observe here that the Subordinate Judge is in error in stating that the amount of the debt was only Rs. 234-5-0. It is clear from Ex. A-7, which is a copy of the sale statement prepared before the sale in execution, that there were in fact two decrees for arrears of rent against these persons. The document also proves that at the date the property was brought to sale the amount owing under the decrees was Rs. 453-8-6.

When the case went up in appeal, the learned Judge was of opinion that the sale, having been made for the purpose of raising money which was due and which had to be deposited in order to have the auction-sale set aside, was binding upon the plaintiffs. He further pointed out that defendant 1 had given more for the property than it fetched at the auction. He held therefore that on

the basis of legal necessity the plaintiffs were bound and he dismissed the suit. The decision of the Court below is attacked here on several grounds. It is argued in the first place that the question between the parties was not to be decided with reference to the doctrine of legal necessity. The findings are that the property was joint family property, that the plaintiffs were co-sharers in the property and the only question for determination is therefore whether or not the sale was carried out in circumstances which would indicate that the plaintiffs' consent to the transfer had been given. There is admittedly no evidence of express consent; and the only point therefore is whether there are any circumstances in the case from which the plaintiffs' consent is to be implied. It has already been pointed out that the first Court's finding is that there is nothing to show that the vendors represented the other members of the family as managers of the joint family property; and so far as I can see, there is no evidence from which it might fairly be deduced that the plaintiffs were consenting parties to the sale. There can be no doubt that all six plaintiffs were alive at the time of the sale. The first four plaintiffs are now elderly men and were all of adult age when the sale took place.

Nadir Singh (Plaintiff 1) and Bhawani Bakhsh (plaintiff 2) are the nephews of one of the vendors, Bira. Dalpat (plaintiff 3) is the son of Ram Sarup, another of the vendors; he was well over 30 years of age at the date of the sale. Plaintiff 4 whose age at the time of sale was 23 or 24 years is the brother of another vendor, Bindesri (impleaded as defendant 3). Plaintiffs 5 and 6 were minors when the sale took place. They are the sons of the fourth vendor Bishnath (defendant 2). As it has been found that the vendors were not managing members on behalf of these plaintiffs, the consent of the latter to the sale cannot be implied merely on the ground that there was a legal necessity for the transfer, even if it could be assumed that any legal necessity existed for the sale which is now attacked. The property had been sold in execution of a decree for arrears of rent; that stage having been reached it is difficult to see how there was any "necessity" for a private sale of the same property to defendant 1, and equally difficult to understand

in what way this private sale was for the benefit of the family. The learned Judge thinks the family benefited because by the second transfer they were freed from liability for a debt of Rs. 30 which they owed to defendant 1, but the Subordinate Judge has pointed out that there was no reliable proof that this debt of Rs. 30 was actually due. The utmost that can be said in proof of the implied consent of the plaintiffs is that they kept silent for a long interval after the date of the sale, but that by itself would not amount to adequate evidence of implied consent, particularly when it is remembered that at the date of the suit plaintiffs 5 and 6's ages were 22 and 19 respectively.

If there is no evidence to prove consent either express or implied on behalf of the plaintiffs, the necessary result is that the sale must be deemed to be void. On this point I need only refer to a recent decision of their Lordships of the Privy Council reported as *Sahu Ram Chandra v. Bhup Singh* (1). I am satisfied therefore that the decision of the lower appellate Court is not correct. The suit should not have been dismissed. I think in the circumstances the plaintiffs are entitled to a decree for possession of the property in suit on payment of Rs. 453.8.6, that being the amount which was owing on account of arrears of rent at the time when the property was brought to sale. I allow the appeal, set aside the decree of the Court below and direct that the plaintiffs be given a decree for possession of the property in suit on payment of Rs. 453.8.6 with costs. I direct the plaintiffs to deposit this money in Court within three months from the date of this Court's decree. If the money is not deposited within the time fixed, the plaintiffs' suit will stand dismissed with costs to defendant 1 in all three Courts.

R.V./R.K.

Appeal allowed.

1. A I R 1917 P C 61 = 39 All 437 = 39 I C 280
= 44 I A 126 (P C).

*A. I R. 1918 Oudh 318

LINDSAY, J. C.

Ramadhin and another—Appellants.
v.

Jokhan—Respondent.

Second Appeal No. 257 of 1917, Decided on 14th May 1918 from decrees of First Sub-Judge, Bahraich, D/- 23.4.1917.

*** (a) Transfer of Property Act (4 of 1882), S. 60—Mortgagee acquiring portion of mortgaged property—Right to allow redemption of whole depends upon will of mortgagee.**

Where a mortgagee acquires a portion of the mortgaged property, the right of the owner of the other portion of the property to redeem the whole is not absolute. In such a case the right of redemption depends upon the will of the mortgagee. He can insist upon the mortgagor's seeking redemption of the entire mortgage; but if he acquires any portion of the mortgaged estate, he can in that case insist that the plaintiff shall not be allowed to redeem more than his own share of the mortgaged estate. [P 319 C 2]

*** (b) Transfer of Property Act (4 of 1882), Ss. 52 and 60—Suit for redemption by some co-mortgagors—Mortgagee acquiring portion of equity of redemption pending suit—Doctrine of lis pendens does not apply—Mortgagee can insist upon redemption of shares of mortgagors.**

Where a mortgagee acquires portion of the mortgaged property, pending a suit for redemption by some of several mortgagors, it cannot be said that by taking such a transfer he affects the rights of the plaintiffs under the decree or order which may be made in the suit. S. 52, T. P. Act has, therefore, no application to such a case, and the mortgagee can insist upon his right to confine the plaintiffs to a suit for redemption of their share of the mortgaged property only. [P 319 C 2]

Gokaran Nath Misra—for Appellants.
Aditya Prasad—for Respondent.

Judgment.—This is a defendant's appeal arising out of a suit for redemption brought by the plaintiff respondent Jokhan. In my opinion the decision of the lower appellate Court is wrong and must be reversed. The facts are very simple. On 4th November 1894 one Debi Din mortgaged a 4-annas share in certain immovable property to one Har Bhasan. The mortgage was a mortgage by conditional sale. The mortgage money was Rs. 50 and the period of the mortgage was ten years. The mortgagee was put in possession, with a stipulation that he was to be allowed to enjoy the fruits of the trees in the groves which were mortgaged and was also to be allowed to appropriate dry timber. It was further agreed that interest on the mortgage money should accrue at the rate of 9 per cent. per annum. Debi Din died about the year 1900 and was succeeded by his two sons, Jokhan and Janki. Jokhan is the plaintiff in the present suit while Janki was impleaded as defendant 3. The mortgagee has also died and is now represented by his son and grandson, defendants 1 and 2, who are the appellants before me. Jokhan sued for redemption of the entire mortgage. While the suit was

pending the mortgagee-defendants took from Janki a conveyance of his 2-annas share in the mortgaged property and consequently it was urged in the lower appellate Court that the plaintiff was only entitled to redeem his own share. The Subordinate Judge who heard the appeal applied the provisions of S. 52, T. P. Act, to the case and held that the transfer made by Janki in favour of defendants 1 and 2 was, as he put it, null and void under this section and could not operate to prevent Jokhan claiming redemption of the entire property. Accordingly the Subordinate Judge allowed redemption of the entire 4-annas share upon payment of the principal sum of Rs. 50 plus Rs. 45 by way of interest. He refused to allow any post diem interest. In appeal here two points are taken on behalf of the mortgagee appellants. It is said in the first place that the Subordinate Judge ought only to have allowed redemption of a 2-annas share and further that post diem interest ought to have been allowed. So far as S. 52, T. P. Act, is concerned, I think the Court was wrong in applying it in the present case. By the last clause of S. 60, T. P. Act it is provided that

"nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only on payment of a proportionate part of the amount remaining due on the mortgage, except where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of the mortgagor."

It is clear that in a case like the present the right of the owner of a portion of the mortgaged property to redeem the whole is not absolute. The right of redemption depends upon the will of the mortgagee. He can insist upon the mortgagor's seeking redemption of the entire mortgage, but if he acquires any portion of the mortgaged estate, he can in that case insist that the plaintiff shall not be allowed to redeem more than his own share of the mortgaged estate. Consequently, although, as in the present case, the mortgagee may acquire a portion of the equity of redemption pending the suit, it cannot be said that by taking a transfer he affects the right of the plaintiff under the decree or order which may be made in the suit. In other words, the right of the plaintiff not being absolute no case of prejudice can arise and I can see no reason why the mortgagee should not be allowed to take a transfer

of a portion of the mortgaged property during the suit, and then insist upon his right to confine the plaintiff to a suit for redemption of his share of the mortgaged property only. If the decree of the lower appellate Court be allowed to stand, the only result will be that the mortgagee will now be driven to bring a suit for redemption against the plaintiff-respondent for the purpose of obtaining possession of a 2-annas share of the mortgaged property. If the rights of the parties can be finally settled in one suit, there is no point in driving either of them to a second suit.

As for the question of interest the decision of the Subordinate Judge is certainly wrong. There is nothing in the language of the deed to show that it was the intention of the parties that interest should cease to run as soon as the period of the mortgage had expired. On the contrary, the reasonable and proper construction is that both parties intended that interest should continue to accrue up to the time of redemption. The Subordinate Judge seems to think that the mortgagee was not entitled to claim post diem interest, because, if he were, he would gain an advantage by making delay in bringing his suit for foreclosure. The answer to this is that no matter how long the bringing of the foreclosure suit is delayed, all that the mortgagee can get in the event of foreclosure taking place is the property itself, whatever may be the amount of the mortgage debt. On the other hand the plaintiff could easily have stopped the running of interest by bringing his suit immediately after the expiration of the period of the mortgage. The case-law on the subject is very clear and is laid down in a decision of their Lordships of the Privy Council in *Mathura Das v. Raja Narindar Bahadur* (1). The result is that I allow the appeal. A fresh decree will be prepared declaring the right of the plaintiff Jokhan to redeem 2-annas share of the property upon payment of one-half of the mortgage debt. Interest at the contract rate will be allowed up till the date fixed for payment. The office will prepare a redemption decree in accordance with the terms of O. 34, R. 7, and a period of six months will be allowed to the plaintiff for redemption. In case redemption is not made, the decree will order that the

plaintiff's right to redeem will be barred. As regards costs, the plaintiff will be allowed proportionate costs in the first Court, and defendants 1 and 2 will have their costs from the plaintiff both here and in the Court below.

B.V./R.K.

Appeal allowed.

A. I. R. 1918 Oudh 320

LINDSAY, J. C.

Dargahi—Plaintiff—Appellant.

v.

Rajeshwari Pershad—Defendant—Respondent.

First Appeal No. 111 of 1917, Decided on 2nd September 1918, against decree of Sub. Judge, Gonda, D/- 6th July 1917.

Hindu Law — Alienation — Father — Rate, excessive or exorbitant — Court has discretion to reduce rate — Appellate Court will not interfere with discretion exercised in a reasonable manner.

In cases of debts contracted by Hindu fathers on the credit of the family property, Courts have a discretion to reduce the rate of interest if it is excessive or exorbitant.

(P 321 C 1)

An appellate Court will be slow to interfere where it can be shown that such discretion has been exercised in a reasonable manner.

(P 321 C 2)

*Bisheshwar Nath Srivastava—for Appellant.**Aditya Prasad—for Respondent.*

Judgment.—The only question for consideration in this case is, whether the Court below was justified in reducing the contract rate of interest in the mortgage bond upon which the suit of the plaintiff-appellant was based. The facts may be briefly stated: The mortgage was executed by Chaudhri Jagdamka Prasad, the father of the defendant Rajeshri Prasad, on 3rd July 1911. The principal sum was Rs. 3,000 and there was an agreement that interest should be payable at the rate of 2 annas 3 pies per rupee per annum, which works out to just over Rs. 14 per cent. per annum. It was also agreed between the parties that interest should be payable yearly and that in case of default compound interest should be calculated at the stipulated rate with yearly rests. Nothing having been paid on account of the mortgage, the present suit for sale was brought, the amount of the claim being Rs. 6,167-10-8. The plaintiff asked for the sale of the mortgaged property consisting of a 2 annas share in a village called Rahmatpur,

Various pleas were put forward by the defendant, of which it is only necessary to consider one. He pleaded that the rate of interest was exorbitant and was not justified. The Court below has found that there was legal necessity for the borrowing of this money. It seems that at the time the mortgage was made, certain ancestral family property of Jagdamka Prasad, had been sold in execution of a decree. The judgment-debtor was anxious to have the sale set aside under the provisions of O. 21, R. 89, and it is proved that on the day after this mortgage was executed Jagdamka Prasad deposited in Court a sum of Rs. 2,301 and had the sale of the property set aside.

Turning to the mortgage-deed in suit, it is to be noted that out of the principal sum of Rs. 3,000, a sum of Rs. 2,210 was advanced in cash to Jagdamka Prasad for the purpose of enabling him to deposit the money in Court. The balance was appropriated in discharge of a previous debt owing to the plaintiff. I think there can be no doubt on these facts that the finding of the Court below is correct, namely, that there was legal necessity for the taking of the loan was established. The question then is, whether the Subordinate Judge was justified in holding that the contract rate of interest was liable to be reduced. It is no longer possible to argue that the Courts have no powers to interfere in cases of this kind with the rate of interest agreed upon. The principle has been sanctioned by their Lordships of the Privy Council in cases where a mortgagee has dealt with a Hindu widow, and such a principle can reasonably be applied also to the case of a father who is the manager of a joint Hindu family and who has qualified powers of disposal over the family property for the purpose of meeting what is called legal necessities. I need only refer to two cases in this Court, in which it has been held that the Courts have a discretion to interfere with the rate of interest in cases of this kind [*Gf. Sarabjit Singh v. Gur Bakhsh Singh* (1) and *Sanku Charan Prasad v. Ram Ratan* (2)]. I may also refer to a judgment of a Bench of the Allahabad High Court which is reported

as *Padam Singh v. Ram Rup* (3). It has been argued that the present case may be distinguished from these other cases on the facts and that here the rate of interest is not so exorbitant as it was in the cases to which I have referred.

In the case reported as *Sarabjit Singh v. Gur Bakhsh Singh* (1), it appears from a perusal of the record that the rate of interest there was 24 per cent. per annum compoundable with 6-monthly rests.

In the case reported as *Sanku Charan Prasad v. Ram Ratan* (2), the interest was 24 per cent. compound with quarterly rests. In the Allahabad case the rate of interest was 18 per cent. compoundable with 6 monthly rests. It may, therefore, be taken that in the present case the contract rate of interest was substantially lower than it was in any of these reported cases. The Subordinate Judge allowed 12½ per cent. simple interest, thinking that that was a reasonable amount of compensation to the creditor. The reason why this rate was fixed by him was that there had been a previous loan transaction between Jagdamka Prasad and the plaintiff in which the money had been borrowed on a simple bond at the rate of 12½ per cent. per annum. It is pointed out, however, and I think correctly, that the Subordinate Judge omitted to notice that the simple bond provided for compound interest; and so it has been argued here on behalf of the plaintiff-appellant that the Subordinate Judge, if he had noticed this fact, would have allowed at least 12½ per cent. compound interest in the present case. Whether this was so or not it is difficult to say.

The law being that the Court has a discretion to interfere with the rate of interest in cases of this nature, an appellate Court will be slow to interfere if it is shown that the discretion of the Court below has been exercised in a reasonable manner. One fact is worth consideration in the present case, and that is that when this mortgage was executed the only cash which was advanced was a sum of Rs. 2,210. The balance which went to make up the total of Rs. 3,000 was, as I have said, applied to the discharge of a previous debt. Interest, however, has been charged on the whole sum of Rs. 3,000 and from

1. (1916) 19 O C 159=36 I C 916.

2. (1917) 40 I C 369.

3. (1916) 36 I C 217.

this point of view it may be said that the total amount of interest claimed in the present suit is excessive, having regard to the fact that the only money which the debtor got on the date of the mortgage was a sum of Rs. 2,210. The lower Court has given the plaintiff a decree for Rs. 5,047-15-0 together with proportionate costs and future interest at 12½ per cent. up till the date fixed for payment. On the whole, therefore, I do not feel disposed to interfere with the decree. It seems to me that having regard to all the circumstances just referred to, the mortgagee has had substantial justice and that there is no occasion for me to interfere with the decision of the Court below for the purpose of increasing the amount of the decree by awarding compound interest. I dismiss the appeal with costs.

B.V./R.K. *Appeal dismissed.*

A. I. R. 1918 Oudh 322

LINDSAY, J. C.

Gopal—Plaintiff—Appellant.

v.

Sarju—Defendant—Respondent.

Second Appeal No. 305 of 1917, Decided on 13th March 1918, against decree of Dist. Judge Lucknow, D/- 25th April 1917.

(a) Guardians and Wards Act (1890), S 34—Guardian spending without leave of Court more than income of estate on ward is not entitled to recover excess.

A guardian who, without taking the leave of the Court, chooses to spend upon the ward more than the income of the ward's property is not entitled, after his guardianship has determined to come forward and sue the ward personally for the excess amount so expended. [P 323 C 1]

(b) Guardians and Wards Act (1890) S. 34—Accounts filed by guardian and accepted by Court—Presumption of correctness attaches to them.

It is the duty of a Court which appoints a guardian to examine into the accounts submitted to it by the guardian periodically to the best of its ability and to satisfy itself that they are properly prepared. A presumption of correctness attaches to such accounts after they have been scrutinized and accepted by the Court.

[P 323 C 1; P 322 C 1]

S. N. Sinha and R. N. Banerjee—for Appellant.

Hari Kishen Dhaon—for Respondent.
Judgment.—This is a somewhat peculiar case. The appellant Gopal was for a number of years the duly appointed guardian of the defendant-respondent Sarju. His guardianship came to an end on 29th March 1916, when the District

Judge, after declaring that Sarju had come of full age, discharged the plaintiff from his office. This present suit was brought by the plaintiff for the purpose of recovering from the minor a sum of Rs. 984-13-6 which he alleged to be due to him on account of his dealings on behalf of the minor during the period of guardianship. In support of his claim the plaintiff put in certain accounts which he had filed from time to time in the Court of the District Judge during the period he was acting as the defendant's guardian. He relied principally upon these accounts for the purpose of establishing his claim to the money in suit; and one of the issues raised in the Court of first instance was whether those accounts were to be presumed to be correct and whether the defendant had a right to impeach their correctness. The Munsif who tried this suit seems to have been of opinion that there was no presumption in favour of the correctness of these accounts and that the defendant was at liberty to impeach them.

He also pointed out that the original accounts had not been produced and he dismissed the suit in accordance with his finding on this issue. He did not deal with any of the other issues which were raised. The case came up in appeal before the District Judge, and here again the question as to the presumption to be made in favour of the correctness of the accounts filed in the District Judge's Court was brought up for discussion. On this point the learned Judge observes that he does not consider that there could be any presumption against the defendant that the accounts which had been so filed were correct. He pointed out that they were not produced until the plaintiff had been urged to produce them and that on the face of them they appear to be fictitious. Pausing here I wish to observe that in my opinion the Judge is in error when he states that there is no presumption in favour of the accounts filed by a guardian in the Court which has appointed him. These accounts have been scrutinized by the Court and accepted, and it is indeed strange to find the District Judge now saying that on the face of them they appear to be fictitious, bearing in mind that they are the very accounts which he himself and his predecessor accepted at the time they were filed. I can hardly think that the

learned District Judge means to say that the Court to which the accounts of a guardian are submitted for examination is under no obligation to scrutinize them and satisfy itself regarding their correctness. If the learned Judge entertains any such notion I take the present opportunity of correcting it.

It certainly is the duty of the Court which has appointed a guardian to examine into the accounts submitted to it periodically to the best of its ability and to satisfy itself that they are properly prepared. After this I observe the learned Judge has gone on to examine the various items in the account put forward by the plaintiff and has given various reasons (not always good reasons, I fear) for coming to the conclusion that the plaintiff had failed to prove his case. However, it will not be necessary for me to discuss the various items in the plaintiff's account in view of the argument which has been put forward on behalf of the defendant-respondent. It is clear from the order of a Judge of this Court who appointed the present plaintiff the guardian of the minor that he was to be entitled to a reasonable allowance for the maintenance of the minor. There is certainly nothing in the order appointing him which justifies any claim by the plaintiff for anything more than a reasonable allowance for the maintenance of his ward. So far as I can ascertain, the principal piece of property which belonged to the ward in this case was a house which brought in a rent of about Rs. 10 or Rs. 11 a month. According to the account submitted by the plaintiff he has been spending sums which were considerably in excess of the income of the property which was under his care; and the question arises whether a guardian who chooses to spend upon the ward more than the income of the ward's property is entitled, after his guardianship has determined, to come forward and sue the ward personally for the excess amount so expended.

In my opinion he is not; and if this view of the legal situation of the parties be accepted, there is an end to this case. According to the finding of the learned Judge, which is not seriously disputed here, a reasonable sum for the maintenance of the ward during the period of seven years for which the plaintiff acted comes to about Rs. 420 and in any case

to less than a sum of Re. 500. On the other hand, as the learned Judge points out, the income of the property during this period ought, on the plaintiff's own showing, to have been over Rs. 900. It is said that a number of the items which the plaintiff spent on the minor's behalf were necessary, for example, moneys spent upon his marriage ceremonies and moneys spent upon the repairs of the minor's house. The answer to this is that the guardian was under no obligation to incur any expenditure in excess of the income of the property. It is not pretended that the guardian ever consulted the Court before he spent these various amounts, otherwise he might perhaps have been protected, had the Court passed an order authorizing him to raise money for these purposes. But if, without taking the leave of the Court, he has spent money out of his own pocket upon what he believed to be the necessities of the minor he ought not, in my opinion, to be allowed to recover. I think therefore that on this ground the decree of the Court below ought to be maintained. The appeal fails and is dismissed with costs.

B.V. R.K.

Appeal dismissed.

A. I. R. 1918 Oudh 323

LINDSAY, J. C.

Lachhmi Narain and others—Plaintiffs—Appellants.

v.

Daya Shankar and another—Defendants—Respondents.

Second Appeal No. 217 of 1917, Decided on 26th November 1917, from decree of Sub-Judge, Unao, D/- 10th March 1917.

(a) Limitation Act (1908), Art. 132—Money payable by instalments—Right to sue on default of instalment—Suit instituted more than 12 years after default is barred under Art. 132—Question of waiver could not arise.

Where a mortgage-deed provided for payment of the mortgage money by certain definite instalments and further stipulated that if the instalments were not paid at the appointed time and if any default were to take place, then the contract relating to the payment of future instalments was to be deemed rescinded and the mortgagees were to be entitled to bring their suit at once and claim interest at a certain rate:

Held: (1) that a suit brought by the mortgagees on the basis of the above mortgage-deed more than 12 years after the date when the first default in payment was made was time-barred under Art. 132. [P 324 C 2]

(2) that no question of waiver on the part of the mortgagees could arise for consideration in connexion with a mortgage bond, the enforce-

ment of which was being sought by a sale of the property. [P 324 C 2]

(b) Limitation Act (1908), S. 20 — "Debtor" explained—Joint Hindu family—Son is neither debtor or agent of father during father's life-time.

The word "debtor" as used in S. 20 means the person who is liable under the contract of debt. Hence, where a father and his son form together a joint Hindu family and a debt is contracted by the father, the son is in the lifetime of the father neither a debtor nor, in the absence of any evidence, an agent of the father for the purposes of the said section. [P 325 C 1]

Hargobind Das—for Appellants.

Harkaran Nath Misra and Bisheshwar Nath Sriwastava—for Respondents.

Judgment. — The only question for discussion in this second appeal is a question of limitation. The suit was a suit for sale on a mortgage and the Courts below have decided that it was time-barred. In my opinion the decision is correct. The document upon which the suit was brought was executed on 27th October 1894 and the suit was instituted on 3rd April 1916. Turning to the mortgage deed, we find that the mortgagor was one Sheo Mangal who, it is said, is now deceased and is represented by his sons Daya Shankar and Har Shankar, defendants. The mortgage was made in favour of two persons Sukh Nandan Lal and Lal Behari, who are the predecessors-in-title of the present plaintiffs. The question of limitation must be determined with particular reference to the terms of the mortgage-bond. The deed provides that the principal sum in respect of which the mortgage is being executed is a sum of Rs. 800 and the agreement was that this money was to be paid up in certain definite instalments of Rs. 40 and 50 each. It was agreed between the parties that if the instalments were not paid at the appointed time and if any default were to take place, then the contract relating to the payment of future instalments was to be deemed rescinded and the mortgagees were to be entitled to bring their suit at once and claim interest at the rate of 12 per cent.

The evidence shows that the first default in payment was made on 11th April 1895, and consequently on the terms of the bond a suit for sale ought to have been brought within 12 years of that date. The learned counsel for the appellants has referred to the fact that payments were made on account of principal after the date of this default, and he relies on

these payments as proof of waiver on the part of the creditors. The answer to this is that no question of waiver can arise for consideration in connexion with a mortgage-bond, the enforcement of which is being sought by a suit for sale of property. In such a case the Article of limitation to be applied is Art. 132 of the Schedule to the Lim. Act. The provision about waiver in connexion with the question of limitation is to be found in Art. 75, of the schedule, but that article refers in terms to suits based upon promissory notes or bonds. Nothing to be found in Art. 75 can be applied to a suit to which Art. 132 applies in order to make out some other rule of limitation than that which is laid down in the latter Article itself. This plea, therefore, must fail.

The learned counsel then has relied upon the general exception which is declared by S. 20, Lim. Act. I have been referred to the document of mortgage on the back of which, it is true, there are recorded certain payments. These are set down in a somewhat peculiar way. First we have one or two notes of payments followed by a signature, then five and six memoranda of payments followed by another signature, and similarly a third set of payments followed by another signature. It has been stated here that the signature in each case is that of Daya Shankar, the son of the mortgagor Sheo Mangal, who is impleaded here as defendant 1. Now before any reliance can be placed on these endorsements for the purpose of extending the period of limitation under S. 20 it must be shown, in the case where the payment was payment of a part of the principal, that it was made by the debtor or by his agent duly authorised in this behalf. We have also to take notice of the proviso to the section which says that, in the case of part payment of the principal of a debt, the fact of the payment must appear in the handwriting of the person making the same. It may be stated at once that no question of payment of interest can arise in this case for, as I have already stated, the principal sum was Rs. 800 and that was to be payable in certain instalments. No interest was to be charged and consequently any payments made must have been on account of principal. Then the question arises, if these payments were made, were they made by the debtor or by his agent duly authorised on his behalf. That they

were not made by the debtor seems to be admitted.

The debtor in the case was the executant of the mortgage-deed, Sheo Mangal. It has been argued, however, that Sheo Mangal with his sons constituted a joint family and that Daya Shankar was a debtor within the meaning of Sub.S. (1) of S. 20. I very much doubt whether that argument can be maintained, because it appears to me that this part of the section must be strictly construed and the natural meaning to be attributed to the word "debtor" is the person who is liable under the contract of debt, and that person in this case was Sheo Mangal. I have to observe that it is admitted that all the payments endorsed on the back of the document were made while Sheo Mangal was still alive. I do not think, therefore, that with reference to the terms of this section Daya Shankar can be treated as a debtor. Not again it is, I think, possible to contend that he was the duly authorised agent of the debtor. No agency can be inferred from the fact that Daya Shankar and his father Sheo Mangal were members of a joint Hindu family. Sheo Mangal, while alive, was presumably the managing member of the family and certainly there is no authority that I know of for the proposition that the son, in the absence of any evidence, could be deemed to be a duly authorised agent of his father for the purpose of paying a debt. It seems to me, therefore, that the whole argument with regard to S. 20, Lim. Act, fails and that the plaintiffs are not entitled to the benefit of that section. No other question remains for decision. The suit was, in my opinion, time-barred and was rightly dismissed. The consequence is that the appeal fails and is dismissed with costs.

ILV R.K.

Appeal dismissed.

A. I. R 1918 Oudh 325

LINDSAY, J. C.

Nakshad and others — Defendants—Appellants.

v.

Angad and others—Plaintiffs—Respondents.

Second Appeal No. 76 of 1917, Decided on 11th July 1917, from order of Dist. Judge, Gonda, D/- 15th December 1916.
Pre-emption—Suit for—Plea as to price entered in sale-deed being fictitious—Prima

facie case made out by pre-emptor—Burden of proof shifts on vendee.

Where a pre-emptor pleads that the price entered in the sale deed is fictitious and is able to put forward a prima facie case to that effect, the burden of proving that that price represents the real price of the property is thrown on the vendee. [P. 325 C 2]

Baodeo Lal—for Appellants.

Gokaran Nath Misra and Harkaran Nath Misra—for Respondents.

Judgment.—This appeal has arisen out of a suit for pre-emption. The appellants here are the purchasers. The document of sale was executed on 30th January 1915 and purports to convey to the vendees a 6 pies share in a village called Johrauli. According to the terms of the deed the consideration for this sale was a sum of Rs. 1,400 which was made up of four items. The plaintiffs came into Court alleging their right to pre-empt and further pleading that the price entered in the document was fictitious. It was the plaintiffs' case that the property transferred by this deed was not worth anything like the sum of Rs. 1,400. The Courts below have come to the conclusion that the price stated in the deed is fictitious, and with that finding of fact I agree. It is quite clear that the plaintiffs-*pre-emptors* were able to put forward a prima facie case which threw upon the other side the burden of proving that the money entered in the deed represented the real price of the property. It is argued that the decision of the Courts below ought to be revised here on account of their misunderstanding of the effect of certain documents to which I will now refer. In this sale-deed it was stated that out of the Rs. 1,400 at item of Rs. 675-0-5 was due to the purchasers on a mortgage held by them, dated 5th July 1911. It is recited that this mortgage deed was with possession and the sum just mentioned was stated to be due in respect of the balance of principal and interest.

The Courts below have found that this item is entirely fictitious. It is a most extraordinary circumstance that when the burden of proof was thus shifted to the purchasers they failed to put into Court either the original document of mortgage, dated 5th July 1911, or a certified copy of it. The learned Advocate who appears here for the appellants was under the impression that a certified copy of this mortgage was on the record, but I find

that this is not so. The result, therefore, is that we really know nothing about this mortgage of 5th July 1911. Probably there was such a document, inasmuch as we find a reference in the sale-deed to the pages of the register in the Sub-Registrar's Office on which the document was copied at the time of registration, but the fact remains that neither the document itself nor any copy of it was before the Court so as to enable it to form any opinion as to whether any money was or could be due on account of principal or interest or both. The defendants could have summoned the original document from the vendors, for the story is that this document was returned to them, and in default of its being produced they could have given secondary evidence. So far, therefore, as we are concerned with this item, the judgment of the Court below appears to me to be quite correct. I can see no reason for disturbing it.

The next items to be referred to are one item of Rs. 400 and one item of Rupees 125-5-4. It is stated in the sale-deed that these two sums are owing to two persons Badri and Ram Sunder under mortgages with possession executed in their favour and the arrangement came to between the vendors and the purchasers was that these two mortgages were to be discharged. One of these mortgagees Badri appeared in Court and produced a receipt for the full amount of these sums, that is, Rs. 528-5-4. He further deposes that the mortgage deeds had been returned to the purchasers after the money was received. He also produced a receipt which the Courts below have rejected on the ground that it was not registered. It has been argued here that the statement of Badri ought to be accepted as sufficient proof that the money was paid to him, but it seems to me to be clear that if the pre-emptor is to be entitled to stand in the shoes of the purchasers, he is entitled to have the mortgages discharged, and the fact that they had been discharged could only be proved by proper evidence. The production of an unregistered receipt does not, I think, amount to legal proof that the mortgages in favour of Badri and Ram Sunder had been lawfully discharged, and again there is only the statement of one of the mortgagees, namely, Badri, to the effect that the money had been received. Here again the appellants seem to have been singularly negligent in

the matter of prosecuting their case. Badri deposed that these mortgages had been returned to the purchasers. Why they were not produced before the Court is not explained.

If the purchasers had produced the original mortgage deeds, then no doubt it might have been held in their favour that these two sums had been paid and the mortgages had been redeemed. But if parties do not choose to produce the best evidence, in their favour, they cannot complain if the decision of the Court is given against them. In the absence of this evidence, which it was incumbent upon these defendants-appellants to produce, it seems to me that the judgment of the Court below is correct. I am satisfied, therefore, that there is no ground upon which I can interfere with the decision of the Court below. The price was fictitiously entered. The Courts have arrived at what they held to be the genuine price of the property and they have directed the redemption of the two mortgages in favour of Badri and Ram Sunder, the balance of the pre-emption money being handed over to the purchasers. These are the only grounds which I have been called upon to consider. I decide them all against the appellants and dismiss the appeal with costs.

R.V./R.K.

Appeal dismissed.

A. I. R. 1918 Oudh 326

STUART AND KANHAIYA LAL, A. J. Cs.

Ram Sewak and others—Plaintiffs—Appellants.

v.

Baldeo Bakhsh Singh — Defendant — Respondent.

First Appeal No. 101 of 1915, Decided on 21st December 1917, from decree of Sub. Judge, Sitapur, D/- 18th September 1915.

(a) Mortgage—Mortgage in favour of joint Hindu family—Suit by sons of mortgagee—Other members of family disclaiming their interest—Registered deed of assignment is not necessary—Succession certificate is not required.

A mortgage-deed stood in the name of a person who together with his sons and nephew formed a joint Hindu family. After his death the sons claimed the entire money due on the mortgage, and the nephew stated that he had received from the sons his share of the mortgage money and had no objection to the sons realizing the entire mortgage money:

Held: (1) that a registered deed of assignment by the nephew was in the circumstances not necessary to give the sons a right to sue; (2) that

the plaintiffs being the survivors of a joint Hindu family, a succession certificate was not required to enable them to bring a suit on the mortgage.

[P 327 C 2; P 328 C 1]

(b) Interest—High rate of—Compound interest is not necessarily penal, illustrated.

A covenant to pay compound interest in case of default at the rate originally fixed is not necessarily penal.

[P 328 C 1]

Where a mortgage-deed provided for payment of interest at Rs. 1-8-0 per cent. per mensem and for payment of compound interest with six-monthly rests if the mortgage money was not paid within the fixed period:

Held: that the rate of interest secured by the mortgage-deed was neither penal nor hard and unconscionable.

[P 328 C 1]

Gokaran Nath Misra and K. P. Tili—*for Appellants.*

Ishwara Prasad and Bhandoo Lal—*for Respondent.*

Judgment.—This appeal arises out of a suit brought by the plaintiff-appellants for the recovery of money due on a mortgage affected by the defendant-respondent in favour of Gayadin, the father of plaintiff 1 and the grandfather of plaintiffs 2 and 3. The defence was that the covenant as to the payment of interest at Rs. 1-8-0 per cent. per mensem was hard and unconscionable and was obtained by undue influence exercised by Gayadin at a time when the defendant was in embarrassed circumstances and that the further covenant to pay compound interest with six-monthly rests, if the mortgage money was not paid within a year, was penal and unenforceable. The learned Subordinate Judge found on all these points against the defendant. There was a further plea that the plaintiffs were not the only heirs of Gayadin or the sole owners of the mortgage-deed in suit, or, in other words, that the suit was bad for non-joinder of Ram Dayal, his nephew. The learned Subordinate Judge accepted this plea and dismissed the suit.

In so dismissing it, the learned Subordinate Judge overlooked the provision of O. 1, R. 9, Civil P. C., which lays down that no suit shall be defeated by reason of the misjoinder or non-joinder of the parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court below was asked by the plaintiffs to implead Ram Dayal as a co-defendant, if his impleading was necessary but the defendant objected that Ram Dayal should be a co-plaintiff, because he had an interest in the mortgage-deed in suit. Ram Dayal,

however, stated in his evidence that he had no share in the mortgage-deed in suit, inasmuch as the plaintiffs has paid him Rs. 1,100 on account of his share of the principal and Rs. 1,000 on account of interest thereon 10 or 15 days after the grant of a certificate of guardianship to Mt. Rupni on account of her minor sons, who are now plaintiffs 2 and 3. It appears that Gayadin, Loka and Gokaran were three brothers; the last named died childless. Loka left a son named Ram Dayal. Ram Dayal claimed a share in the family property, including the mortgage-deed in suit and gave deeds of mortgage. On 26th April 1909 Ram Dayal agreed to assign Rs. 2,400 from the present obtaining in satisfaction of all his claims to the family property and secured the payment of that amount by taking Rs. 100 in cash from the Sub-Registrar and stipulating for the payment to him of Rs. 1,100 out of the mortgage-deed in suit and Rs. 1,200 out of another mortgage-deed with interest thereon after the date this agreement was registered. Whether it was open to him to receive his share of the money directly from the mortgagor or not, his admission in this case that he had received the money payable to him on account of the mortgage-deed in suit from the plaintiffs is sufficient to protect the interest of the defendant.

The learned Counsel for the defendant-respondent contends that a registered deed of assignment was needed to enable the plaintiffs to claim the share belonging to Ram Dayal; but the statement of Ram Dayal being that he had no interest left in the mortgage deed, the plaintiffs as the sole heirs of Gayadin are entitled to sue. S. 45, Contract Act, has no application, because no promise was made by the debtor to Ram Dayal, who is not one of the heirs of Gayadin. As a matter of further precaution, Ram Dayal has now been added as a respondent to this appeal and as a defendant to the suit on his own application. The statement made by him in this Court, similar to what he said in the Court below, is that he had received his share of the money in the mortgage-deed in suit from the plaintiffs and that he had no objection to the plaintiffs' realizing the entire money due on the mortgage. On the face of it, the deed stands in favour of Gayadin, whose heirs have brought the suit, and an assignment by Ram Dayal in

favour of Gayadin was in the circumstances not necessary to give the plaintiffs a right to sue.

The rate of interest, secured by the deed of mortgage, is not penal nor hard and unconscionable. In the case of default of payment of the principal money within a year, the interest was to be compoundable at the original rate every half year. As pointed out by their Lordships of the Privy Council in *Sundar Kora v. Rai Sham Krishen* (1), a covenant to pay compound interest at the rate originally fixed in case of default is not necessarily penal. The plaintiffs are the surviving members of a joint family, of which Gayadin was the manager, and no succession certificate under Act 7 of 1889 was needed. The appeal is, therefore, allowed, and the claim of the plaintiffs decreed with costs here and below and future interest at 6 per cent. per annum from the date of the suit till realization. Six months' time will be allowed for payment. A decree will be framed in terms of O. 34, R. 4, Civil P. C. The defendant-respondent will bear his own costs throughout.

B.V. R.K.

Appeal allowed.

L. (1907) 34 Cal 120=81 F.A.D.P.C.

A. I. R. 1918 Oudh 328

LINDSAY, J. C.

Achhaibar Singh and others—Defendants—Appellants.

Jang Bahadur Singh and others—Plaintiffs—Respondents.

Misc. Appeal No. 28 of 1918, Decided on 14th August 1918, against order of Dist. Judge, Rae Bareilly. D/- 20th April 1918.

(a) Hindu Law—Joint family—Ancestral property—Separate property of father passing to sons becomes ancestral.

Under the Hindu Law when the separate property of a father descends on his death to his sons, it becomes their joint ancestral property.

(P 329 C 1)

(b) Oudh Estate Act (1 of 1869), S. 2—Oudh Estates (Amendment) Act (3 of 1910), Ss. 2 and 21—Original grantee dying before passing of Oudh Estates Act—Succession of heirs of grantee and their descendants before passing of Oudh Estates (Amendment) Act is governed by personal law.

Where an original grantee died before the passing of Oudh Estates Act and his estate passed to his brother as his heir and after the latter's death, to the latter's sons before the passing of the Oudh Estates (Amendment) Act:

Held: that the estate in the hands of the original grantee's nephew and their descendants

was governed by the rules of their ordinary personal law. [P 329 C 1]

Bisheshwar Nath Srivastava—for Appellants.

Gokaran Nath Misra—for Respondents.

Judgment.—This is a defendants' appeal against an order of remand made by the lower appellate Court.

The suit was brought by three plaintiffs, the sons of Sheo Balak Singh, for the purpose of setting aside an alienation of a share in certain property made by their father Sheo Balak Singh on 30th May 1906. This alienation was made in favour of defendants 1 to 4 or their predecessors-in-title. The case for the plaintiffs was that at the time the alienation was made they and their father constituted a joint Hindu family, that their father had no authority to sell the property and that there was no legal necessity for the sale. The principal defence was that the property in question was not joint ancestral property and that the plaintiffs had no right to maintain the suit. Various other pleas relating to legal necessity and the like were raised. The Court of first instance on its construction of the Oudh Estates Act (Act 1 of 1869) held that Sheo Balak Singh was the sole owner of this property and the plaintiffs (his sons) had no interest in it at the time the sale was made. The suit was accordingly dismissed. In appeal the learned District Judge has held that the law as laid down in Act 1 of 1869 did not apply as regards succession to the property. The judgment of the first Court was reversed and the suit was remanded for disposal on the merits.

It is admitted that the property in dispute formed a portion of a grant which was made to one Sheo Lal after the annexation of Oudh. Sheo Lal's name was entered in list 6 prepared under S. 8 of Act 1 of 1869, although it is admitted that he died long before the Act was passed. There seems to be no doubt that Sheo Lal died without issue in the year 1860 and that the property then came into possession of his brother Jai Dayal. Jai Dayal also seems to have died very soon after he succeeded, for we have it that in the khewat which was prepared at the first Regular Settlement of 1862, this property was recorded in the names of Jai Dayal's three sons, one of whom was Parmeshar. There is no evidence on

the record to show when Parmeshar died, but at any rate it is clear that he must have died before the year 1906 when the alienation now in question was made. Sheo Balak Singh, the man who sold the property, is the son of Parmeshar and the three plaintiffs are Sheo Balak's sons and, therefore, Parmeshar's grandsons.

The learned Judge was of opinion that the provisions of Act I of 1869 relating to succession did not apply in this case because Sheo Lal, the original grantee, died before the passing of the Act. It is quite clear that Jai Dayal who succeeded his brother Sheo Lal was not an heir within the meaning of that expression as defined in Act I of 1869, for according to that definition "heir" means

"a person who inherits property, otherwise than as a widow, under the special provisions of this Act."

Jai Dayal, therefore, could not have inherited the property under the provisions of the Act; and if this be so it must, I think, be taken that it came to his hands as property governed by the ordinary Hindu Law. So far as Jai Dayal is concerned he took the property as his separate property, but on his death it descended to his three sons of whom one was Parmeshar, and as it appears to me that in the hands of Parmeshar this property became joint ancestral property under the Hindu Law. The argument for the appellants is that the learned Judge did not take into consideration the fact that the definition of the term "heir" as used in Act I of 1869 has been altered by the Amending Act which was passed in the year 1910. Under S. 2 of this latter Act "heir" now means

"a person who has inherited or inherits, other than as a widow or mother, an estate or a portion of an estate whether before or after the commencement of this Act."

Further by the provisions of S. 21, Amending Act, this definition operates retrospectively and so the contention is that although before the passing of the Amending Act neither Jai Dayal, Parmeshar or Sheo Balak could have been heirs according to the original definition, they nevertheless must now be deemed to have taken as heirs by virtue of the provisions of the new Act. Consequently the argument is that Sheo Balak took this property as an "heir" within the meaning of the Act and, therefore, under S. 11 of the Act he had full power to dispose of it as he pleased. On the other hand

the learned counsel for the respondents points out that although by the terms of S. 21, Amending Act, retrospective effect is given to the definition of "heir", it is nevertheless provided in the saving clause that no rights already vested are to be affected by the alteration made in the definition, and so it is argued that inasmuch as the property had become joint ancestral property before the new Act was passed, Sheo Balak's three sons (the plaintiffs in the present case) had acquired a vested interest in the property by reason of their birth and that this interest cannot be divested or affected in any way by reason of the alteration made in the definition of the term "heir."

I think this argument on behalf of the respondents is correct and must be accepted, and on this ground I hold that the judgment of the Court below must be affirmed. In the circumstances the sons were entitled to set up the case that the property was joint ancestral family property and that their father was not competent to alienate it without some justifying necessity. The appeal fails and is dismissed with costs.

O.V. N.K.

Appeal dismissed.

A. I. R. 1918 Oudh 329

LINDSAY, J. C.

Madho Singh—Defendant—Applicant.

v.

Badil Singh and others—Plaintiffs—Opposite Parties.

Civil Revision, Appeal No. 46 of 1918, Decided on 3rd May 1918 from decree of Munsif, Hardoi, D/19th February 1918.

Provincial Small Causes Courts Act (1887), S. 25—Erroneous decision on question of limitation—High Court can interfere.

A High Court, in the exercise of its revisional powers under S. 25 can interfere with an erroneous decision of a Small Cause Court on a question of limitation. [1330 C 2]

Anwar Ali—for Applicant.

Iskhwari Prasad—for Opposite Parties.

Judgment.—This is an application under S. 25, Provincial Small Causes Courts Act, for revision of an order passed by the Munsif of Hardoi. The claim was decreed by the Munsif in spite of a plea of limitation raised by the defendant and it is principally on this question of limitation that the present application for revision has been filed. A preliminary objection has been taken on behalf of the opposite party that this Court cannot, in the exercise of its powers under S. 25,

Prov. Small Causes Courts Act, interfere with the decision of the first Court on a question of limitation, and in this connexion I am referred to a judgment reported as *Raghuraj Singh v. Sahib Din* (1).

The head-note, it is true, does suggest that a High Court cannot interfere with the decision of a Small Cause Court merely because there has been an erroneous decision on a point of limitation. It is doubtful, however, whether the learned Judge who is responsible for that ruling meant to lay down any universal proposition of this kind. I observe from the concluding words of his judgment that it was apparent to him that no substantial injustice had been done; and this, of course, by itself was a sufficient reason for refusing to interfere. I note that the learned Judge has relied upon a judgment of the Calcutta High Court to be found reported as *Ramgopal Jhonnhoonwala v. Jaharmall Khemka* (2). There the learned Judge was of opinion that the question before him was whether or not he could interfere under the provisions of S. 115, Civil P. C., with the decision of a Court of Small Causes. I take it from the judgment that the Small Cause Court there was a Presidency Small Cause Court, although this matter is not quite clear. If this was the case it may be that the High Court can exercise its powers of revision under S. 115. On the other hand it is manifest that no High Court can interfere under S. 115 with the decision of a Court of Small Causes exercising jurisdiction under the Provincial Small Causes Courts Act. This is evident from a reference to S. 7, Civil P. C. which lays down in express terms that S. 115 cannot be applied to any proceedings in a Provincial Court of Small Causes. It seems to me, therefore, that this Calcutta decision is no authority for the proposition that a High Court cannot under the terms of S. 25, Provincial Small Cause Courts Act, interfere on a question of limitation.

Another case which is referred to in Mr. Stuart's ruling is a decision of a single Judge of the Allahabad High Court reported as *Raghu Nath Sahai v. Official Liquidator of the Himalaya Bank* (3). There the learned Judge laid down the law that a High Court acting

under the provisions of S. 25, Provincial Small Cause Courts Act, could only interfere upon the grounds which are specified in S. 622, old Civil P. C. which corresponds to the present S. 115. I may remark here that these observations of the learned Judge are obiter, for he had already come to the conclusion that on the merits no injustice had been done to the defendant. I am not prepared to accept the statement of the law that the powers of a High Court under S. 25, Provincial Small Cause Courts Act, are to be measured by the language of S. 115. One reason for my opinion has already been given, namely, that the present Code of Civil Procedure at any rate expressly declares that this section is not to be applied for the purpose of revising the proceedings of a Small Cause Court. The learned Judge referred to a Full Bench decision of the Allahabad Court reported as *Muhammad Bakar v. Bahal Singh* (4), which laid down the principle that no right of appeal is conferred by the Provincial Small Causes Courts Act, and the powers conferred by S. 25 are purely discretionary and not to be exercised unless it appears that some substantial injustice has resulted from the decree of the Small Cause Court.

I have no quarrel with this statement of the principle which should guide Courts which are called upon to act under S. 25, but what is there laid down is quite different from saying that the Courts must be guided by the provisions of a section of the Code of Civil Procedure which is declared not to be applicable to proceedings of Small Cause Courts. Turning now to the language of S. 25, Act 9 of 1887, it is clear that the High Court has power to pass orders in any case in which the decision of the Court of Small Causes is not "according to law," and it is not possible, therefore, to say that this Court cannot interfere with an erroneous decision on a question of limitation. Of course the High Court has a discretion in the matter and it may very well be that the discretion may be properly refused even in cases where the point of limitation has not been rightly decided. I must hold, however, that no universal proposition in this connexion can be laid down. In the present case it seems to me that the decision of the

1. (1912) 15 O C 319=17 I C 470.

2. (1912) 39 Cal 473=15 I C 547.

3. (1899) 15 All 139.

4. (1891) 13 All 277 (F B).

Munsif on the point of limitation is erroneous and I think this is a case in which my discretion should be exercised in favour of the applicant.

What happened in this case was that a mortgage deed for a sum of Rs. 350 was executed on 10th August 1877. In October 1888 the mortgagor, who is now represented by the defendant executed a simple bond in favour of the mortgagees. One condition of the bond was that the sum due was to be paid before redemption of the mortgage of 1877 could be allowed. The mortgagees brought a suit on the mortgage and also on this bond asking that it should be treated as constituting a charge upon the property. The claim on the bond was dismissed in 1916, the Court being of opinion that there was no charge. The Munsif in the present case relying upon a judgment reported as *Lal Behari v. Satgur Prasad* (5), held that limitation began to run from the date of the decision of 1916. That however is not the case. In the report upon which he relies the fact was that the condition of the bond was that the debt should be paid at the time of the redemption of the mortgage and so it was held that the date fixed for payment was the date upon which redemption took place. In the present case, however, no date can be said to have been fixed for the condition was that the bond was to be discharged before redemption but no particular date was specified. Obviously therefore, the principle laid down in *Lal Behari v. Satgur Prasad* (5) does not apply. Being of opinion that this is a case in which I ought to move I allow the application and set aside the lower Court's decree. I dismiss the plaintiffs' claim with costs in both Courts.

B V./R.K. Application allowed.
5. (1917) 35 I C 480.

A. I. R. 1918 Oudh 331

LINDSAY, J. C.

Partab Singh—Defendant—Appellant.
v.

Balwant Singh—Plaintiff—Respondent.

Second Appeal No. 374 of 1917. Decided on 30th August 1918, from decree of Dist. Judge, Hardoi, D/- 13th July 1917.

(a) Contract Act (9 of 1872), Ss. 46 and 55—Money left with mortgagee to redeem prior mortgage—Time for redemption not speci-

fied—Failure of mortgagee to redeem within reasonable time—Mortgagor is entitled to recover damages sustained from mortgagee—Mortgage.

Where a portion of the mortgage consideration is left with the mortgagee to redeem certain prior mortgages existing on the property and no particular time is specified in the deed for such redemption, it is the duty of the mortgagee, in accordance with the principles laid down in Ss. 46 and 55, Contract Act, to redeem the prior mortgages within a reasonable time, i. e., by the first date upon which redemption is obtainable. If the mortgagee fails to do so to redeem the prior mortgages, the mortgagor is entitled to recover from the mortgagee damages sustained as a result of the failure of the mortgagee to redeem. [P 332 C 2]

(b) Mortgage—Mortgage with possession—Consideration overstated by mistake—Mortgagor is entitled to show mistake and is entitled to claim interest on amount overstated.

Where a deed of mortgage, under which possession of the mortgaged property was handed over to the mortgagee, provided that there was to be no accounting between the parties at the time of redemption, and it appeared that a portion of the mortgage consideration was set down in the deed as being due to the mortgagee from the mortgagor, (wrongly, by way of gift) without any account having been really taken at the time:

Held: (1) that it was open to the mortgagor to show that there was a mistake in the statement of the mortgage consideration; [P 333 C 2]

(2) that the mortgagor was entitled to claim from the mortgagee in possession interest on the amount by which the said portion of the mortgage consideration exceeded the real amount due to the mortgagee from the mortgagor. [P 333 C 2]

A. P. Sen and Ishwari Prasad—for Appellant.

Gokaran Nath Misra and Harkaran Nath Misra—for Respondent.

Judgment.—The defendant-appellant in this case is a mortgagee of the plaintiff-respondent. A suit was brought by the latter for the purpose of recovering a sum of Rs. 800, which he claimed to be due to him by way of damages for breach of the mortgage contract. The Court of first instance awarded the plaintiff a sum of Rs. 615-3-0. This decree has been affirmed in substance by the Judge of the lower appellate Court, who modified it only to a small extent. The defendant now appeals, and his case practically is that the suit as framed was not maintainable and that the plaintiff had no right to recover. In order to understand the matter in issue between the parties, it is necessary to state that on 21st June 1902 Balwant Singh and his brother Gur Bakhsh mortgaged a 2½ hiswas share in Mauza Kakuman to Partab Singh for a sum Rs. 4,100. The mortgage is professed to be a mortgage with possession and the

mortgaged property included the *sir* rights of the mortgagors. It seems that actual physical possession was not delivered to the mortgagee under this mortgage but that for a number of years he received his share of profits from the mortgagors. On 12th July 1910, Balwant Singh alone executed another mortgage of the same 2½ *bighas* in consideration of a loan of Rs. 9,000. The intention of the parties by this second transaction was to discharge the earlier mortgage of 21st June 1902. When the mortgage of 1902 was made, it is admitted that a sum of Rupees 1,400 was left with the mortgagee Partab Singh to pay off certain prior mortgages with possession which had been executed in favour of Hazari Lal and Sheo Lal. These mortgagees were in possession of a number of specified plots the aggregate area of which came to 132 *bighas* odd and when the sum of Rs. 1,400 was left with Partab Singh to redeem these earlier charges, the intention was that he after redemption was to get possession of one-half of this area of 132 *bighas*, the other half being made over to the mortgagors.

The mortgagee failed to pay off the prior mortgages and at the time the mortgage with which we are now concerned (namely, the mortgage of 12th July 1910) was executed, Rs. 1,400 was still with the mortgagee. Again an agreement was made between the parties that Partab Singh should apply this sum of Rs. 1,400 in discharge of the earlier mortgages. It is an admitted fact that up to the date of this suit he had failed to do so. The plaintiff Balwant Singh now comes to Court and claims that by reason of Partab Singh's failure to redeem these mortgages he has suffered loss, inasmuch as if redemption had been made in accordance with the contract he would have been in possession of a one-half share of this area of 132 *bighas* odd and would have received the profits thereof. Consequently the plaintiff claimed a sum of Rs. 492, being the profits of this half share of the area described for a period of 6 years before the suit. The Court of first instance held that the plaintiff could not succeed in getting profits for the full period claimed but awarded profits for a period of five years. It is to be observed that the plaintiff was not claiming this sum of Rs. 1,400 from his mortgagee. Both the Courts below have stated quite correctly that a claim of this sort could not

succeed for that would mean enforcing a contract to lend money. They were both of opinion, however, that the plaintiff had been damaged by the refusal of the mortgagee to discharge the prior mortgages for which purpose he had the money in hand and that he was entitled accordingly to the damages he claimed.

On this part of the case the argument here is that there was no breach of contract on the part of the mortgagee and that consequently the plaintiff was not entitled to recover. The main contention on this point is that neither the deed of 1902 nor the deed of 1910 contains any stipulation regarding the time at which redemption is to be made by the mortgagee Partab Singh. I am unable to accede to this argument. It is quite true that no express covenant was recorded in the deed of mortgage requiring Partab Singh to redeem the prior charges at any particular time, but in accordance with the principles laid down in Ss. 46 and 55, Contract Act, it must be taken that, in the absence of any specification of the time for performance, it was the duty of Partab Singh to redeem the prior charges within a reasonable time. It is to be noted here that the mortgages in favour of Hazari Lal and Sheo Lal were only redeemable in the fallow season of Jeth.

The mortgage with which we are now concerned was executed on 12th July 1910 and it may reasonably, therefore, be said that Partab Singh should have redeemed the earlier charges by 1st July 1911, that being the first date upon which the redemption was obtainable. I may mention here that in the Courts below the defendant-appellant did not seek to excuse his non-performance of the contract on the ground that no particular time for performance had been specified. On the contrary he tried to justify his action by saying that the mortgagor Balwant Singh had not performed his portion of the contract. This argument relates to that stipulation in the mortgage deed by which the mortgagor contracted to relinquish his *sir* rights in some of the lands mortgaged. Both the Courts below have very properly held that the defendant could not be excused or justified on this ground, inasmuch as the contract for the relinquishment of *sir* right is an illegal contract which cannot be enforced. I have no doubt therefore, that the plaintiff was

entitled to recover damages under this head.

With regard to the plea of limitation contained in para. 3 of the memorandum of appeal, that must be rejected. The claim of the plaintiff was not limited, in my opinion, to a claim for three years for it is based upon the breach of a contract in writing and registered. The other point to be dealt with relates to an item of Rs. 1,018-8-0, which is referred to in the mortgage-deed of 12th July 1910. It seems that at the time when this mortgage was executed the mortgagor Balwant Singh had failed for two years to render to the mortgagee his profits in respect of the $2\frac{1}{2}$ biswas share which had been mortgaged to him. The years in question were the years 1312 and 1313 Fasil. When the mortgage of the 12th July 1910 came to be written, a sum of Rs. 1,018 was allowed to the mortgagee in respect of the profits of a $2\frac{1}{2}$ biswas share for these two years.

According to the case of the plaintiff now this statement of the account in the mortgage-deed is a mistake and that, as a matter, of fact a much smaller sum than Rs. 1,018 represented the aggregate amount of profits which was due to Pratah Singh for the two years in question. Both the Courts below have examined the account in this respect and they have both held on the evidence of the papers, which they accepted as correct, that the statement in the mortgage-deed that a sum of Rs. 1,018-8-0 was due in respect of these two years to Pratah Singh is a clear mistake. There was evidence before the Court to show that at the time this mortgage of 1910 was drawn up no accurate calculation of the profits was made and it is said that this sum of Rs. 1,018 was set down merely at random. On the findings come to by both the Courts it is not possible to doubt that there was a serious mistake in the statement of the profits. It has been argued before me that the plaintiff is bound by the statement in the mortgage-deed and that he is not now at liberty to plead that the amount of the profits was erroneously stated to be Rs. 1,018-8-0. The argument is that as an account was made up at the time which was accepted by the plaintiff mortgagor, he cannot be allowed to resile from his agreement. But I have just stated that the evidence shows that no account was really taken and that this amount was

set down merely by way of guess. There is no merit, therefore, in the argument and, I think, it was open to the plaintiff to show that there was a mistake in the statement of the profits.

Here again it is to be observed that the plaintiff is not asking the defendant to hand over to him the amount by which the sum of Rs. 1,018 odd exceeded the real amount which was due. He is only claiming interest on the excess amount and, in my opinion, he is entitled to that relief, the fact being that the mortgagee is in possession and receiving the profits of the property in lieu of interest on a sum which is found not to have been owing to him. It is to be noticed here that according to the terms of the deed of mortgage there is to be no accounting between the parties at the time of redemption. I can see no reason why in the present suit the plaintiff should not claim interest on the excess amount just referred to. Another point which is argued is that the Court below was wrong in allowing interest at the rate of 12 per cent. I see no force in this contention. The rate seems to me to be a reasonable rate. Lastly exception is taken to the finding of the lower appellate Court as to the amount by which the sum of Rs. 1,018 odd exceeds the sum which was really due. After examining the calculation of the Court below I think the learned Judge was right and that the calculation which was made in the Court of first instance was erroneous. The appeal fails on all points and is dismissed with costs.

N.V./N.K. Appeal dismissed.

A. I. R. 1918 Oudh 333

LINDSAY, J. C.

Faqir Bakhsh Singh and others—Plaintiffs—Appellants.

v.

Dan Bahadur Singh and others—Defendants—Respondents.

Second Appeal No. 126 of 1917, Decided on 14th May 1918, against decree of Addl. Dist. Judge, Lucknow, D/- 28th February 1917.

Evidence Act (1872). S. 108—Court cannot raise presumption as to time of his death—Presumption can arise only in respect of fact of death.

Under S. 108 it is not permissible for a Court to raise a presumption that a certain person died at a particular time anterior to the proceedings in which the question of his death is in issue. The presumption can arise only in respect of the

fact of his being dead or alive at the time of those proceedings. [P 335 C 2]

Bisheshwar Nath Srivastava—for Appellants.

Gokaran Nath Misra and Hari Kishen Dhaon—for Respondents.

Judgment.—The facts of this case as found to be by the Courts below are as follows: Two brothers, Jagannath and Deo Bakhsh, were members of a joint Hindu family. Deo Bakhsh is said to have disappeared from his home some 25 years before the date on which the present suit was brought, that is 6th April 1916. On 21st August 1908 in the absence of his brother, Jagannath sold the entire family property belonging to himself and his brother to one Abhay Dat, who is now represented by the appellants. It is proved that at the time this transfer was made the names of both Jagannath and Deo Bakhsh were recorded in the Khewat. The purchaser applied for mutation. His application was granted in part only. The Revenue Court gave him mutation to the extent of the share of Jagannath, but refused to record him as the proprietor of the share belonging to Deo Bakhsh. It is also established that in spite of the sale-deed in favour of Abhay Dat, Jagannath retained possession of the half share of this property belonging to his brother up till the date of his death, namely, January 1913.

After Jagannath's death the defendant entered into possession of this property alleging it to be the share of Deo Bakhsh and they claimed to be in possession of it as Deo Bakhsh's heirs, assuming it to be proved that Deo Bakhsh has died. The present suit has been brought by the representatives of the vendee on the ground that they are entitled under the sale-deed of 21st August 1908 to possession of the property in suit. The plaintiff-vendees founded their case upon the provisions of Ss. 107 and 108, Evidence Act. Both the Courts below have found that since the time Deo Bakhsh left his village in or about the year 1891 no news has been received of him by persons who in the ordinary course of events would have received it. The Court of first instance, on its interpretation of the provisions of these two sections of the Evidence Act, was of opinion that the presumption that Deo Bakhsh was dead could be raised after the expiration of a period of seven years running from the date of his dis-

appearance in 1891. Consequently the Subordinate Judge held that it being presumed that Deo Bakhsh was dead after the close of the year 1898, it must be taken that his share in his joint family property passed to Jagannath by survivorship and that on 21st August 1908 when Jagannath executed the sale-deed he was legally competent to transfer the entire property referred to in the document. The result was that the plaintiffs' claim was decreed.

In appeal the learned Additional Judge has reversed the decree of the Court of first instance. He held that provisions of Ss. 107 and 108, Evidence Act, had been misapplied and that the Court was not competent to raise any presumption for the purpose of showing that Deo Bakhsh had died at any particular point of time within the period which has elapsed since the date of his disappearance. The plaintiffs were unable to produce any evidence for the purpose of showing the date upon which Deo Bakhsh died and having therefore, failed to show that Deo Bakhsh died before Jagannath, the Judge was of opinion that the plaintiffs were not entitled to succeed. The principal matter argued in appeal here is the interpretation of Ss. 107 and 108, Evidence Act. The learned counsel for the appellants has contended for the view which was taken by the Court of first instance and has argued that this view has the support of the English authorities. The learned *vakil* referred to para. 200 of Taylor on Evidence (Edn. 10, at p. 200) and to Halsbury's Laws of England (Vol. 13, at p. 500 et seq.). He also relied upon a well known case on this branch of the law, namely, *Phene's Trusts*, In re (1). In short the argument for the learned counsel has been that it having been proved that Deo Bakhsh disappeared about the year 1891, a presumption could have been raised that after the lapse of seven years from that date he was dead. The learned counsel was obliged to concede that the view of the law presented by him has not been adopted by the Courts in India. The learned Additional Judge referred to the statement of the law as laid down in *Fani Bhushan Banerji v. Surjya Kanti Roy Chowdhury* (2). There dealing with the

1. (1870) 5 Ch. 189=23 L J Ch 316.

2. (1908) 35 Cal 25.

interpretation of S. 108, Evidence Act, it was held that this section raises no presumption as to the time of a person's death. It is incumbent on him who alleges that a person died at some antecedent date to prove that fact by evidence. One of the learned Judges further pointed out that the question for which provision is made in S. 108 is the question whether a man is alive or dead when the question of death is raised and not whether he was alive or dead at some antecedent date.

This is the sense in which the Courts in India have interpreted this section. It is true that there are some authorities which show that the Courts were inclined to take a contrary view. One of the cases referred to in this connection by the learned counsel for the appellants was *Dharup Nath v. Gobind Saran* (3). That case, however, has been overruled by a Full Bench ruling of the Allahabad Court reported as *Muhammad Sharif v. Bande Ali* (4). This latter case may be usefully referred to for the purpose of disposing of the matter now under discussion. The facts were in many ways similar to those of the present case. There it was alleged that a person, named Madad Ali, had disappeared some 18 years ago, and the Court was asked to draw the presumption that in these circumstances Madad Ali had been dead for the last 11 years. The Court refused to allow this presumption and pointed out that on the language of S. 108 the only question which could be decided was whether Madad Ali was dead or alive at the time the question was raised in the suit. The learned Chief Justice pointed out that there was no presumption that Madad Ali died in the first seven years of the period of 18 years or in the last 7 years. The learned Chief Justice also discussed the English case which I mentioned above [*Phene's Trusts*, *In re* (1)] and held that that case was no authority for the proposition which was advanced before the Court by the counsel for the appellants. The learned Chief Justice referred to the decisions of other High Courts including the case mentioned above, namely, *Fani Bhusan Banerji v. Surjya Kanta Roy Chowdhry* (2).

In view of these authorities it appears to me impossible to yield to the argument of the learned counsel for the appellants;

and whatever the English view of the law may be, it seems to me quite clear on the provisions of S. 108 that it is not possible for a Court to raise a presumption that a certain person has died at any particular time anterior to the proceedings in which the question as to his being alive or dead is raised. The language of the section seems to me to make this perfectly clear. It says: "When the question is whether a man is alive or dead." This language seems to me to contemplate a decision by the Court as to whether a man is alive or dead at the time the Court gives its judgment; and all that is possible to decide by way of presumption is that, if it be shown that no news has been received for more than seven years of the person whose being dead or alive is the matter in issue, the Court may declare that such person is no longer alive at the time it gives judgment. I hold, therefore, that the decision of the lower appellate Court was right and that the first Court was wrong in raising a presumption that Deo Bakhsh was no longer in existence at the expiry of 7 years from the date of his disappearance in the year 1891. It has next been argued that apart from the presumption which is provided for by S. 108 the Court may raise a presumption of death from the existence of certain facts; and no doubt this is possible and legitimate (see S. 114, Evidence Act). At the same time I am bound to say that no facts of such cogency have been pointed out to me by the learned counsel for the appellants which would justify me in coming to the conclusion which he asks for, namely, that Deo Bakhsh was dead before the year 1908. So much for the first point raised in appeal.

It has next been argued that Jagannath had a possessory title to the share of his brother Deo Bakhsh, and that having been in possession for about 17 years at the time of the sale he was competent to transfer this possessory title to his purchaser. It is not to be doubted that what is known as "possessory title" is capable both of inheritance and transfer; but is there any ground for holding that Jagannath had a possessory title so far as Deo Bakhsh's share in the property is concerned? Possessory title in this connection signifies the possession of a trespasser, one who professes to hold for himself exclusively as against the true owner. As pointed out by the learned

3. (1886) 8 All 614.

4. (1912) 24 All 36=11 I C 474.

counsel for the respondents, there is nothing to show that Jagannath had any title of this description with regard to the share of his brother Deo Bakhsh. In the sale-deed upon which the suit of the plaintiffs is founded Jagannath professes to sell the property not only as being the his own property but as being property of his brother. There are, it is true, certain ambiguities in the language, and the actual jargon has been employed in drawing up the deed by which the vendor purports to say that he is in possession exclusively and without the partnership of any one else (*bila shirkat ghaira*). The fact, however, remains that in the deed it is distinctly stated that the property which Jagannath purports to transfer includes the share of Deo Bakhsh. We have the fact that these brothers were members of a joint family and that consequently they were cosharers; and in the absence of some clear and unambiguous evidence it is not to be assumed that Jagannath's possession during his brother's absence was in any way adverse to his brother. The proper presumption in such cases is that one cosharer holds on behalf of the other. I am not prepared to allow contention that in this case Jagannath had a possessory title with respect to the share of his brother Deo Bakhsh which he was competent to transfer to the plaintiffs' predecessor-in-interest.

Lastly, it has been contended that Jagannath was acting as the agent or manager for his absent brother and that consequently the transfer made by him is not wholly void but only voidable; and it is argued that the only persons who could attack the transfer were either Deo Bakhsh himself or his legal representatives. Deo Bakhsh, it is pointed out, never questioned the transfer and it is asked on what grounds can the defendants do so. The defendants admittedly are the nearest collateral relations of Deo Bakhsh, and are, therefore, his reversionary heirs. It is quite true that in their written statement these defendants did not admit that Deo Bakhsh was actually dead, but clearly enough they set up the case that if it should be found that Deo Bakhsh was dead then they were entitled to hold the property as being his next heirs. I cannot admit the argument that it was for these defendants to show that Deo Bakhsh died subsequent to the date

in 1913 when Jagannath died. The defendants are in possession of this property and if the plaintiffs wish to have them turned out, they can only succeed on the strength of their own title, and the only way in which it was possible for them to establish this title was by showing that Deo Bakhsh had predeceased his brother Jagannath. These are all the grounds which have been argued before me. I am satisfied that the decision of the lower appellate Court is correct and must be affirmed. The result is that the appeal fails and is dismissed with costs.

B.V./R.K. *Appeal dismissed.*

A. I. R. 1918 Oudh 336

LINDSAY, J. C. AND KANHAIYA

LAL, A. J. C.

Mohammad Abdul Hasan Khan — Plaintiff—Appellant.

v.

Ishwar Nath and others—Defendants—Respondents.

First Appeal No. 109 of 1916, Decided on 18th July 1918, against decree of Sub-Judge, Gonda, D/- 17th June 1916.

U. P. Land Revenue Act (1901) — Under-proprietary right — Cash dahiyak and birt right—Distinction between, explained.

A cash dahiyak is distinguishable from a birt right in the land entitling the birtdar to hold possession of the land and to deduct the dahiyak from its rental. The former may in a sense be an under-proprietary right but it is not an "under-proprietary right in the land," while the latter is an under-proprietary right in the land so held in possession. [P 338 C 2]

*M. Aditya Prasad—*for Appellant.

*Gokaran Nath Misra —*for Respondents.

Judgment.—The dispute in this case relates to Mahal Katsauli Nain, which is a hamlet of the village Katsauli and forms part of the Birwa Mahnou Estate. The plaintiff is the talukdar or owner of that estate. The defendants claim an under-proprietary right in the said Mahal or hamlet. The plaintiff tried to eject them through the revenue Court, treating them as tenants-at will, but was unsuccessful. The present suit was therefore filed by him for a declaration that the defendants had neither proprietary nor under-proprietary rights in the said hamlet or Mahal. The Court below dismissed the claim. So far as the claim of the plaintiff for a declaration that the defendants had no proprietary right therein is concerned, the plaintiff has really no cause of action because the defendants never

set up any proprietary right in the land in the said Mahal. The only question is whether they hold under proprietary rights therein by virtue of the decree obtained by their predecessor-in-interest from the Settlement Court on 28th August 1874, and whether anything had happened subsequently, which had the effect of detracting from or nullifying those rights.

On 14th April 1874 Hari Pande, the predecessor-in-interest of the present defendants, filed an application in the Court of the Settlement Officer, Gonda, on behalf of himself and his cosharers, stating that the village Katsuli Nain was held by him and his ancestors by right of birt zamindari from a long time, that it had never been under kham tahsil or direct management of the superior proprietor and that he had all along been getting dassaundh till the death of Thakurain Sarfraz Kaur, when the Court of Wards took charge of the Birwa Mahon Estate on behalf of her minor daughter, Thakurain Bijraj Kaur, and refused to allow him to have the same. He further stated that he was "in possession of all other rights" and prayed that a decree might be passed in his favour for birt rights in respect of that village (Ex. A-1). The property claimed was described as the entire village Katsuli Nain with the right of siwai, dassaundh, or parjout (services of raiyats), etc., and other rights. The decree, passed by the Settlement Officer on 28th August 1874, gave further particulars as to the nature of the rights set up by the then claimant (Ex. 1). It stated that the plaintiffs asked for a decree, declaratory of their right to hold the whole village Katsuli Nain as their birt on haq dahiyak terms, alleging that Duniapat, the ancestor of the then Talukdar, had sold the village in birt to their ancestor, Nain Singh; that the birt patra had been lost in 1209 Fasli, corresponding with 1802 A. D., and asserting that they had held the village pucca continuously on dahiyak terms up to 1264 Fasli. It was then admitted that Hari Pande and his cosharers were in possession of the village but had not enjoyed any haq dassaundh since the annexation. In the year 1274 Fasli or 1856-1857 A. D. following the annexation, the then talukdar apparently refused to allow Hari Pande and his cosharers to deduct the dassaundh and gave them or their representatives certain

leases, fixing the rent. In regard to those leases, the Settlement Officer observed:

"As however they have held leases of the village since 1264 Fasli, their meaning may be that the haq dassaundh has been deducted from the field payment; it may be stated at once, that they produce no wasilbaki of a later date than 1264 Fasli and that therefore the receipt of haq dassaundh, unless it was given in the mode already described, cannot be satisfactorily established. As however they are in possession of the whole village pucca, there was no possible objection to giving the plaintiffs a declaratory decree under S. 13, if they can prove enjoyment of their alleged birt rights within limitation."

He then proceeded to dispose of the objection that Duniapat had no right to grant a birt, holding that the same objection was not worth consideration and went on to say:

"The defendants further pleaded that the plaintiffs were not birtias at all, but were village residents who had long and the village as their dera. The plaintiffs produced a great many papers and affidavits, some of them signed newly written, but the defendant would not read that they were forged; he said he would call the old birtias and ask by their evidence. If those papers are proved, the plaintiffs are shown to have been holding the village on haq dahiyak terms since 1244 Fasli; these witnesses corroborate the documentary evidence, and the plaintiffs are clearly entitled to a decree unless the defendant can bring any proof sufficient to convince the Court that the documents filed are forged."

He next discussed the oral evidence produced by the then talukdar which went to support the wasilbakis or list of collections and arrears filed by the claimants, and wound up by saying:

"The Court therefore in the complete absence of any proof that the papers filed by the plaintiffs are not genuine must conclude that they are so, and as they request the plaintiffs to have regularly held the village on haq dahiyak terms, a decree must be given in their favour. In this Tahsil or at least in the Gonda Targana it has therefore (sic) been held that by custom the birtias are not of right entitled to a lease, but they can only claim one-tenth of the nikah. The defendant however has not set up this plea and therefore the Court will not disregard the long pucca holding of the plaintiffs."

In the end he passed a decree "declaring that the plaintiffs are in possession of the village and that they are entitled to hold it as their birt on haq dahiyak terms," adding that they were of course then bound by "their present lease." On the same date an order was sent to the Sadar Munsarim in the following terms:

"This case was taken up to day. Plaintiff and the general agent of the Court of Wards appeared. On the grounds recorded in the judgment in English it is ordered that a decree for possession of Katsuli on the basis of birt rights be passed in favour of the plaintiff against the defendant. The plaintiff will take one-tenth of the

gross rental on account of his rights and will pay the balance to the talukdar defendant. (Ex. A.2)."

Hari Pande and his cosharers were not however recorded as under-proprietors during the old settlement. In the wajibularz of the village Katauli it was stated that there were no under-proprietors in it (Ex. 43). In the khewat register No. 5 prepared in 1504 Fasli in accordance with S. 57 of the old Land Revenue Act (17 of 1876) the present defendants, who had succeeded Hari Pande and his cosharers, were recorded as holding the Mahal in lieu of 10 per cent. (Ex. 44).

In the recent settlement they were recorded as under-proprietors (Ex. A.6) and on an application made by the father of the present talukdar for the assessment of rent under S. 79, U. P. Land Revenue Act (3 of 1901) rent was assessed on them as such, the parties having, it is said agreed to the Court assessing the same (Ex. A.12). The defendants have been paying the rent so assessed to the plaintiff, the superior proprietor, since; and the conduct of the plaintiff in treating them as tenants-at-will liable to ejectment by notice and not even as lessees, holding under a decree of judicial decision, is to say the least disingenuous.

He sought in the present case to prove that during the first three or four years after the first Regular Settlement, the hamlet in question was held kham by the talukdar and was thereafter given in theka to Thakur Ram and Keishna Prasad, who remained in possession for about 8 years. It is added that on the termination of their theka the hamlet was restored to the defendants or their ancestors, but the evidence produced by him in support of that statement was rightly disbelieved by the learned Subordinate Judge and the learned counsel who appears for the plaintiff-appellant has made no attempt to contest his finding. The further evidence produced by him in support of his allegation that he collected the sayer income from the sale of mango harvest is equally unreliable, for the plaintiff's own witness, Nand Kishore, who was in the service of the talukdar, deposes that so far as the hamlet of Katauli Nain was concerned, the theka of that hamlet included every sayer income such as fish, mango crop, jack fruit produce, sidha and the like and that the thekadars realized and enjoyed the entire sayer income and paid the talukdar only the fixed rent

(O. P. 26). The khataunis on which reliance is placed on behalf of the plaintiff do not show that the sayer income was realized by the plaintiff on account of the land appertaining to the particular hamlet or Mahal now in question.

Nain Pande was the ancestor of the defendants and the fact that the hamlet or Mahal is connected with or goes by his income is not without its significance. The birt right, which the Settlement Officer conceded, was presumably the birt right which Hari Pande and his cosharers then claimed, namely, a bai birt or birt by right of purchase, for no other kind of birt right was asserted or set up. In fact the Settlement Officer pointed out that in the tahsil in which the village in question was situated or at least in the Gonda Pargana it had been held that by custom the birtias were not as of right entitled to a lease but could claim only one tenth of the nikasi, and that no such custom had been set up by the then talukdar and the Court could not therefore, disregard the long pucca holding of the claimants. In passing the decree the Settlement Officer had obviously in view the Record of Rights Circular No. 2 of 1861, para. 24 of which declared:

"But the Chief Commissioner is clearly of opinion that birtias who were found in direct engagement with the State at annexation or who have uninterruptedly held whole village on the terms of their patias under the taluqdars, must be maintained in the full enjoyment of their rights in subordination to the taluqdars. It is no argument that the taluqdar may not realize more than ten per cent. above the Government demand. Such birt tenures must be considered an intermediate interest between the taluqdar and the raiyat and as such entitled to be maintained."

The suggestion that the Settlement Officer only intended to grant a cash dahiyak or a dahiyak payable by deduction so long as the claimants remained in possession cannot therefore be sustained. A cash dahiyak is distinguishable from a birt right in the land, entitling the birtdar to hold possession of the land and to deduct the dahiyak from its rental. The former, as pointed out in *Deputy Commissioner, Gonda v. Bhagwan* (1) and *Parmeshwar Das v. Mohammad Aliul Hasan Khan* (2), may be in a sense an under-proprietary right, but it is not under-proprietary right in the land, while the latter is an under proprietary right in the land so

1. (1903) 12 O C 124=2 F C 237.

2. (1911) 14 O C 335=13 J C 809.

held in possession. In *Raja Muhammad Mumtaz Ali Khan v. Murad Bakhsh* (3) their Lordships of the Privy Council discussed the various kinds of birt tenures prevalent in Oudh, and pointed out that in Gonda the bai birt was spoken of as a birt zemindari and was an under-proprietary tenure. The lease referred to in the settlement decree is not forthcoming. The decree places no restriction of time on the right of the defendants to hold the village as their birt. The periodical revision of the rent is only an incident of an under-proprietary tenure or "intermediate interest between the taluqdar and the raiyat," spoken of in para. 24 of the Record of Rights Circular. The rent is under the present law liable to be revised at every Settlement, but before S. 40, Oudh Land Revenue Act (17 of 1876), which corresponds with S. 79 present U. P. Land Revenue Act (3 of 1901), was enacted, superiors proprietors used to revise the under proprietary rents more often. In stating that the then plaintiffs, while holding the village as their birt on haq dahiyaq terms, would be bound by their "present lease," all that the Settlement Officer appears to have meant was that the rent payable by the birtdara was settled by their "present lease" and did not require determination. That was the rent which the present defendants and their ancestors had been paying till the Settlement, i. when it was revised.

The defendants are in our opinion, clearly entitled to birt or under-proprietary rights in the village on haq dahiyaq terms by virtue of the above decree and to hold possession of the same by virtue of that right. Nothing has happened since to show that they or their ancestors had surrendered those rights. The construction placed by the Court below on the settlement decree is correct and is confirmed by the subsequent conduct of the predecessor in title of the plaintiff in the last Settlement. The appeal fails and is dismissed with costs.

B.V./R.K. *Appeal dismissed.*

J. (1907) 29 All 708=10 O C 318=34 I A 142 (P C).

G. A. D.
Advocate High Court
Jammu & Kashmir
Srinagar.

A. I. R. 1918 Oudh 339

LINDSAY, J. C.

Wali Mohammad Khan — Plaintiff—
Appellant.

v.

Nabi Hasan Khan and another—Defendants—Respondents.

Second Appeal No. 230 of 1917, Decided on 24th April 1918, from decree of Dist. Judge, Hardoi, D. 17th April 1917.

Pre-emption—Right to pre-empt existing at date of decree—Appellate Court cannot reverse decree on ground that plaintiff subsequently lost property qualifying him for pre-emption unless transaction leading to this loss can be referred back to antecedent date showing that plaintiff was never entitled to property.

At the date of the decree of the first Court the pre-emptor plaintiff has a right to pre-empt, then it is not open to an Appellate Court to reverse the decree on the ground that since the date on which the decree was drawn up the plaintiff pre-emptor has lost the property which qualified him for the exercise of the right of pre-emption, unless the transaction which has led to the loss of the property can be referred back to an antecedent date so as to show that the plaintiff pre-emptor had never any title to the property the possession of which qualified him for the exercise of the right of pre-emption; 16 I. C. 389, *fol.* [P 340 C 2]

Gokaran Nath Misra—for Appellant.

A. P. Sen—for Respondents.

Judgment.—This appeal has arisen out of a suit for pre-emption brought by the plaintiff appellant, Wali Mohammad Khan. The facts may be stated briefly as follows: On 4th of June 1915, defendant 2 Gur Sahai sold to defendant 1 Nabi Hasan Khan his share in three villages Nazampur, Jamalpur and Lokha. The price entered in the sale-deed was Rs. 700. At the time of this sale Wali Mohammad Khan was a cosharer in two of these villages, namely, Nazampur and Jamalpur. Consequently he brought a suit to pre-empt the sale of the shares in these two villages. He claimed that he ought to be allowed to obtain these shares by pre-emption on payment of a sum of Rs. 440. Two defences were raised to the suit. One was that the plaintiff had no preferential right to pre-empt. The second was that the plaintiff's own shares in the villages of Nazampur and Jamalpur had been advertised for sale in execution of a decree and, therefore he was no longer in the position of a cosharer. The Munsif found that the fact that Wali Mohammad's shares were advertised for sale in execution of a decree could not affect his right to pre-empt. As regards

the first plea raised for the defence, the finding was that the plaintiff and the purchaser had equal rights of pre-emption. Lots were accordingly drawn and the plaintiff was successful. Consequently the Munsif by his decree dated 19th August 1916 allowed Wali Mohammad Khan to pre-empt the sale on payment within two months of a sum of Rs. 480.

A few days after this decree was passed the shares of Wali Mohammad in the two villages Nazampur and Jamalpur were sold by auction. This sale was confirmed on 26th September 1916. On 18th October Wali Mohammad deposited the pre-emption money in accordance with the terms of the decree. It is to be noted here that on the date on which the period of two months fixed in the decree expired the Courts were closed for vacation. The money was deposited on the day the Courts reopened. On the same day, namely, 18th October 1916, an appeal against the decree of the first Court was filed in the Court of the District Judge. One of the pleas raised before the lower appellate Court was that since the date of the first Court's decree Wali Mohammad Khan had ceased to be a co-sharer in the village and consequently it was urged that the decree of the first Court in his favour could no longer be supported. The District Judge accepted this contention, relying upon the judgment of a Judge of this Court reported as *Onkar Singh v. Bhagwan Dat Singh* (1). The result was that Wali Mohammad Khan's suit for pre-emption was dismissed.

It has now been argued before me that the order of the lower appellate Court should be reversed, on the ground that the ruling reported as *Onkar Singh v. Bhagwan Dat Singh* (1) contains a wrong statement of the law. The learned Counsel for the appellant pressed me to refer this case for consideration to a Bench in order that it might be determined whether the view of the law taken by Mr. Kendall in the case just mentioned is correct. It has been pointed out that under the law of pre-emption, as it has been interpreted in many cases, three principles have been laid down: (1) that the person who seeks pre-emption must have a right to pre-empt at the date on which the sale takes place; (2) that this right of pre-emption must still be in

existence at the time when the suit for pre-emption is brought; and (3) that the pre-emptive right must still continue to exist at the date when the Court of first instance passes its decree. As regards the last principle, reference is made to the case reported as *Ram Gopal v. Piari Lal* (2) and to a ruling of this Court in *Amir Hasan v. Sardar Begam* (3), in which the ruling of the Allahabad Court was followed.

Since hearing the argument of Counsel in the case I have taken time to consider whether this case ought to be referred to a Bench in order to have a decision regarding the ruling in *Onkar Singh v. Bhagwan Dat Singh* (1). I had made up my mind to make a reference to the Bench and had drawn up an order to that effect. Meantime, I find that the question in dispute has been settled by a judgment of the Bench of this Court consisting of the first and second Additional Judicial Commissioners, dated 26th March 1918: see the decision in *Khari Singh v. Mt. Deo Kunwar* (4). In this judgment the Bench has referred to the decision in *Onkar Singh v. Bhagwan Dat Singh* (1), and I understand the effect of the ruling to be that if at the date of the decree of the first Court the pre-emptor plaintiff has a right to pre-empt then it is not open to an Appellate Court to reverse the decree on the ground that since the date the decree was drawn up the plaintiff pre-emptor has lost the property which qualified him for the exercise of the right of pre-emption, unless the transaction which has led to the loss of the property can be referred back to an antecedent date so as to show that the plaintiff pre-emptor had never any title to the property, the possession of which qualified him for the exercise of the right of pre-emption. In the Bench judgment the principle is laid down as follows:

"It is a well-settled rule of law that the right of a plaintiff to enforce pre-emption must exist not only at the time of the sale or foreclosure but also at the time of the institution of a suit to enforce that right. If he loses that right after the sale or foreclosure or at any time after the institution of the suit and before a decree for pre-emption can be passed in his favour, he is put out of Court and no relief can be granted to him. But where he obtains a decree, anything which may subsequently happen cannot affect the title which he may acquire under the decree by complying with its terms, unless what happens has the

2. (1892) 21 All 441.

3. (1902) 12 O C 223=3 I C 546.

4. (1918) 26 I C 339.

effect of invalidating the antecedent title which he held on the date of the sale or foreclosure or on the date of the suit and by virtue of which he claimed the pre-emptive right."

The Bench has followed the decision of the Allahabad High Court reported as *Sakina Bibi v. Amiran* (5). The learned Judges also relied upon a decision of the Calcutta High Court. *Nuri Mian v. Ambika Singh* (6), in which the law is laid down in the same sense. The result therefore is that applying these principles to the facts of the present case the decision of the Court below is shown to be wrong. There can be no doubt that the plaintiff pre-emptor, Wali Mohammad Khan, had a subsisting right of pre-emption on the date on which the decree of the Court of first instance was passed, and while it is true that some days after the date of this decree Wali Mohammad Khan lost his property by a sale made in execution, that fact cannot be taken into consideration by the Appellate Court in order to justify a decision that the decree of the Court of first instance is wrong. I must hold, therefore, that the decision of the learned District Judge in this case is erroneous. I allow the appeal, set aside the decree of the lower appellate Court and restore the decree of the Court of first instance. The plaintiff is entitled to his costs both here and in the Court below.

B.V./B.K. Appeal allowed.

5, (1888) 10 All 472.

6, (1917) 44 Cal 47=21 C 809.

A. I. R. 1918 Oudh 341

KANHAIYA LAL AND DANIELS, A. J. CS.

Sheo Shankar Bakhsh and others—
Plaintiffs—Appellants.

v.

Mt. Mithana Kuar—Defendant—Respondent.

First Appeal No. 71 of 1917, Decided on 27th June 1918, from decree of Sub-Judge, Unao D. 23rd February 1917.

Will—Construction—Several legatees named in succession—Will confers absolute estate on eventual legatee and not life estate on testator's death.

Where a will, after stating that the testator would remain in proprietary possession of his property till his death, provided that if he left a son that son would be "the owner and possessor" of the said property, that if he left no son his widow and the widow of his predeceased son would be "the owners and possessors" thereof, and that in the event of none of them existing, his daughter would be "the owner and possessor" of the same:

Held: that the will did not confer life-estates on any of the legatees or even successive estates on the several legatees, but conferred an absolute estate on the eventual legatee, whoever such legatee might be at the time of the testator's death. [P 342 C 2]

*Bisheshwar Nath Srivastava—*for Appellants.

*Gokarn Nath Mura—*for Respondent.

Judgment.—The dispute in this case relates to the construction of a will purporting to have been executed by Ganga Prasad on 14th May 1870. Ganga Prasad had a son, Ram Narain, who had died in his lifetime, leaving a widow, Mt. Batasi Kuar. He had also a wife, Mt. Dula Kuar, and a daughter, Mt. Mithana, both of whom survived him. By the will he declared that Mt. Dula Kuar and Mt. Batasi Kuar were to be the owners and possessors (malik wa qabiz) of his property after his death, that if a son was subsequently born to him by his present wife or by another wife whom he might thereafter marry, that son would inherit his estate and that in the event of none of these existing (our shait na hone in sabhon ke) his daughter would be the owner and possessor thereof. Ganga Prasad died on 23rd November 1880. On his death Sheo Shankar Bakhsh, the present plaintiff 1 and Mahabir Prasad, the father of the other 3 plaintiffs took possession of the entire estate of the deceased and got mutation of names effected in their favour. Mt. Dula Kuar and Mt. Batasi Kuar sued them for possession on the strength of the aforesaid will and got a decree, which was confirmed by this Court on 16th September 1890 (Ex. A 3). In that suit no question was raised as to the nature of the rights conferred by the will. Mt. Batasi Kuar died on 15th November 1903, leaving Mt. Dula Kuar surviving her. Mt. Dula Kuar remained in sole possession of the disputed property till her death on 2nd February 1905. On the death of Mt. Dula Kuar, Mt. Mithana, the daughter of Ganga Prasad, applied for mutation of names in her favour but was resisted by the present plaintiffs. She succeeded.

In the suit which has given rise to this appeal the plaintiffs sued for possession of the disputed property, alleging that according to the custom of the family and the conditions laid down in the wajib-ul-arz, daughters and their issue were excluded from inheritance and that

the plaintiffs were entitled to succeed to the estate on the death of Mt. Dula Kuar. The defendant denied the existence of the alleged custom and pleaded that she succeeded to the property on the death of Mt. Batasi Kuar and Mt. Dula Kuar under the will of Gauga Prasad above mentioned, and that the plaintiffs had no right to sue. There was a further plea that the claim was barred by the rule of *res judicata*; but that plea was later on abandoned. The learned Subordinate Judge did not go into the question of estoppel. He found that under the will of 14th May 1878 Mt. Batasi Kuar and Mt. Dula Kuar had a life interest in the property bequeathed and that on the death of the latter Mt. Mithana succeeded to an absolute interest therein by virtue of the said will. We are unable however to accept the construction put by the learned Subordinate Judge on the said will. After stating that he shall remain in proprietary possession of his property till his death and that after him his widow and the widow of his predeceased son shall be the owners and possessors thereof, the testator said:

"In the event of a son being born to me in my lifetime from my present wife or from a second wife, whom I may marry, such son shall be the owner and possessor; and in the event of none of these existing, my daughter will be the owner and possessor."

The estate, which the testator was conferring on a son, who may be born to him, or if no son was born to him, on his widow and the widow of his predeceased son, and in the absence of all of them on his daughter, was described by the same terms, namely, that they were to be the owners and possessors of his property. If the son, who might be born to him, was to be the full owner of his property after his death, his widow and the widow of his predeceased son were equally to be the full owners thereof, if no such son was born; and if those widows were to be the full owners in case no such son was born, it is difficult to conceive how an ulterior disposition in favour of the daughter could have been within the contemplation of the testator. In any case, the will does not say so. All that it provides is that in the event of there being none of the persons previously mentioned, his daughter shall get his property, implying thereby that she would only get it if she survived him and the others did not. S. 107, Succession Act

(10 of 1865), lays down that a legacy bequeathed in case a specified uncertain event shall happen does not vest until that event happens. Till that event happens, the interest of the legatee is only contingent. S. 21, T. P. Act (4 of 1882), which applies to transfers inter vivos, recognises the same principle and declares that an interest created in favour of a person to take effect only on the happening of a specified uncertain event becomes a vested interest, when that event happens or when the happening of it becomes impossible; but till then it remains contingent.

In the present case both Mt. Dula Kuar and Mt. Batasi Kuar survived the testator. He had no son born to him after the execution of the will. There was no occasion, therefore, for the contingent interest given to the daughter coming into operation. As pointed out by their Lordships of the Privy Council in *Surajmani v. Rabi Nath Ojha* (1), which was followed in *Tikram Singh v. Chet Kunwar* (2) and again in *Patek Chand v. Rup Chand* (3), the use of the word "mulik," unless qualified in any way by the context, indicates the grant of an absolute estate. Mt. Batasi Kuar was not even an heir of the testator, and as both the estates granted to the son, if any was born, and that granted to Mt. Dula Kuar and Mt. Batasi Kuar were described in the same terms, there can be no doubt that the grant of a full estate was intended by the testator, whoever the eventual legatee might be.

The learned counsel for the defendant-raspoohant contends that the testator intended to grant successive estates, but such an interpretation is absolutely inconsistent with the express terms of the will, which provides that if the testator left a son that son would be the absolute owner of the estate, that if he left no son his widow and the widow of his predeceased son would be the owners and possessors thereof, and that in the event of there being none of them, his daughter would get his property. Had a son been born and survived the testator, it could hardly have been intended that the daughter of the testator should get his property after the death of that son, in case he died

1. (1903) 30 All 84=35 I A 17 (P. C.).

2. (1909) 12 O C 157=2 I C 924.

3. A I R 1916 P C 20=38 All 445=37 I C 122 (P. C.).

leaving other heirs. Where an absolute estate is granted, the grant of an ulterior disposition is moreover void. On either ground, therefore, the defendant-respondent has no right to claim the disputed property on the strength of the will. It is suggested that even if Mt. Dula Kuar was entitled to an absolute estate under the will, the defendant-respondent would be entitled to inherit that property as an heir to her stridhan. That point was not expressly pleaded or tried by the Court below, and its determination may depend upon the decision of the question of custom upon which no evidence has hitherto been taken. On the death of Mt. Dula Kuar, the property in dispute would devolve on her daughter, if she was not excluded by custom.

Let the Court below be, therefore, directed to determine, after taking such relevant evidence as the parties may adduce: 1. Whether there was any family custom excluding the defendant-respondent from inheriting the property of her father or mother. 2. Whether the plaintiff's are entitled to succeed and have a right to any of the reliefs claimed.

It may be noted that on 11th February 1915 two applications were made by the plaintiffs for the amendment of the plaint, which were allowed by the Court below, but no amendment has actually been made. This omission should be rectified. Two months' time will be allowed for a return of the findings and ten days from the date of the findings will be allowed to the parties for filing objection.

B.V./R.K.

*Issues remitted.***A. I. R. 1918 Oudh 343**

KANHAIYA LAL, A. J. C.

Gur Bakhsh Singh and others—Plaintiffs—Applicants.

v.

Chutta Singh and others—Defendants—Opposite Parties.

Civil Revn. No. 30 of 1918. Decided on 23rd May 1918, against order of Sub-Judge, Hardoi, D/- 27th July 1918.

(a) Civil P. C. (5 of 1908), Sch. 2, Para. 17—Reference out of Court—Agreement to abide by award given by all arbitrators—Award given by majority is nullity—Evidence to prove contemporaneous oral agreement to abide by majority award is barred—Evidence Act (1 of 1872), S. 92, Proviso (2).

Where a matter was referred to the arbitration of several persons without the intervention

of a Court, and the deed of agreement to refer explicitly stated that whatever award was made by the arbitrators would be binding on the parties to the reference and the award was made only by a majority of the arbitrators:

Held: (1) that it could not be proved under S. 92, proviso 2, that there had been a contemporaneous separate oral agreement between the parties to the effect that the decision of a majority of the arbitrators would be binding on the parties; (2) that the award having been made by some only of the arbitrators was a nullity. (P 344 C 1, 2)

(b) Civil P. C. (5 of 1908), Sch. 2, Para. 20—After passing order to file or refusing to file award, Court's power is exhausted.

The powers of the Court in a proceeding under para. 20, Sch. 2 are exhausted as soon as the Court decides either to file the award or refuse to file it. (P 344 C 2)

Nabi Ullah—for Applicants.

A. P. Sen and Manni Lal—for Opposite Parties.

Judgment.—On 10th September 1917 a reference to arbitration was made by certain persons in regard to certain matter in dispute between them relating to the property left by Mt. Rani, the widow of Tilak Singh. Four arbitrators were appointed, two of whom were described as panches and the other two as sarpanches, with a provision that whatever award was made by them would be binding on the parties to the reference. On 23rd November 1917 an award was made by three of the persons above referred to. The award did not state whether the fourth arbitrator Lachhman Prasad has joined in the arbitration or not. On 1st December 1917 Arjun Singh and certain other persons, who were parties to the reference, applied under para. 17, Sch. 2, Civil P. C., for the filing of the agreement of reference to arbitration, no mention having been made therein of the fact that an award had already been made. The application mentioned that four arbitrators had been appointed, one of whom was to act as sarpanch or head arbitrator, but it did not state that the award was to be made by a majority, if the remaining arbitrators did not agree. The defendants denied having executed the said agreement and pleaded inter alia that there was no formal sitting or inquiry by the arbitrators, that two of the arbitrators made an award and got the third to sign it, that the fourth arbitrator refused to join in the arbitration or to sign the award and that the said award was invalid on account of misconduct of

the arbitrators and the failure of two of them to join in the same.

The applicants subsequently admitted that an award had been made by three of the arbitrators and asked the Court to file the award and to pass a decree in accordance with it, treating the award as having been made by a majority of the arbitrators. They asserted that the parties had agreed at the time the agreement was executed that an award by a majority of the arbitrators would be valid and binding. They wanted to produce evidence in support of that contention, but the Court below held that oral evidence inconsistent with the agreement could not be admitted. In the *United Kingdom Mutual Steamship Assurance Association v. Houston* (1) it was held that where a matter was referred for decision to three arbitrators, all three must concur in the making of the award and that the award made by only two of them could not be treated as valid. In *Lala v. Abdus Samed* (2) it was similarly ruled that on a reference to several arbitrators together, where there was no clause providing for an award made by less than all being valid, each of them must act personally in performance of the duties of his office, as if he were the sole arbitrator. The effect of these decisions is to lay down that an agreement must be taken for what it is worth, and that, if it does not mention that an award by a majority would be valid, the award should be made by all the arbitrators unanimously. S. 92, Proviso 2, Evidence Act, permits evidence to be given as to the existence of any separate oral agreement in regard to any matter on which a document is silent and which is not inconsistent with its terms. But in considering whether or not any of those provisions applies, the Court has to take into consideration the degree of formality of the document concerned.

The agreement in the present case comprises all the terms and covenants governing the arbitration. It states that whatever decision is given by the arbitrators, panches and sarpanches included, shall be acceptable to and be binding on the parties. The suggestion that there was a contemporaneous separate oral agreement to the effect that the decision

of a majority would be binding is obviously inconsistent with the tenor of the agreement, which had been reduced to writing, and the production of oral evidence to vary that agreement cannot be permitted. The award was therefore on the face of it a nullity. The matter cannot be referred back now to the same arbitrators, because, as laid down in *Mustafa Khan v. Phulja Bibi* (3), the powers of the Court in a proceeding under para. 20, Sch. 2, Civil P. C., are exhausted as soon as the Court decides either to file the award or refuses to file it. In regard to an agreement of reference to arbitration dealt with in para. 17, Sch. 2 of the Code, the situation is somewhat different. The applicants admitted soon after an application was made under that paragraph that it was irregular, inasmuch as an award had already been made before the application was filed. The Court below treated the subsequent proceeding as one under para. 20, Sch. 2 of the Code, and refused to file the award. From that order an appeal lay under S. 104 of the Code. The present application for revision is therefore, irregular. The application is accordingly dismissed with costs.

B.V./R.K. *Application rejected.*

B. (1905) 27 All 526.

A. I. R. 1918 Oudh 344

KANHAIYA LAL, A. J. C.

Bahadur Singh—Plaintiff—Appellant.
v.

Auseri Singh—Defendant—Respondent.

Second Appeal No. 135 of 1917, Decided on 9th November 1917, from order of Dist. Judge, Sitapur, D/- 15th January 1917.

(a) Custom—Custom opposed to ordinary law—Proof of cogent evidence is necessary.

Nothing short of the most cogent evidence can be accepted as proof of a custom repugnant to the ordinary rule of succession or power of disposal prescribed by it. [P 345 C 1]

(b) *Wajib-ul-arz*—Construction compatible with rules of personal law should be adhered.

If a construction can be put on a *wajib-ul-arz* which is compatible with the rules of the personal law of the parties, that is the construction to which a Court should adhere. [P 345 C 2]

(c) *Wajib-ul-arz*—Construction—Entry declaring sonless widow entitled to property for life with power to dispose for necessity—Entry did not amount to custom.

Where a *wajib-ul-arz* declared that a sonless widow was entitled to the property of her hus-

1. (1896) 1 Q B 567.

2. (1918) 16 O C 94=17 I C 320.

band for her life and had every kind of power over the same in case of personal necessity or to meet the revenue demand:

Held: that the entry did not amount to a custom under which the widow had unlimited power of disposal. [P 245 C 1]

A. P. Sen and Badri Prasad Gupta—
for Appellant.

Ram Chandra—for Respondent.

Judgment.—Lone Singh died leaving a widow, Mt. Chandra Kuar, who inherited his estate. She sold the share inherited by her from her husband in one of the villages to certain persons, from whom the defendant-respondent obtained it by pre-emption. Mt. Chandra Kuar died on 5th November 1914. The plaintiff is the next reversionary heir of her husband and claims possession of the property, comprised in the said sale, with mesne profits, alleging that the sale was effected without any legal necessity. The defence was that the sale was made for valid necessity and that according to a custom of the family Mt. Chandra Kuar had an absolute right to transfer the property in dispute in any way she liked. No evidence was produced on behalf of the defendant-respondent to prove that any legal necessity existed for the sale. The existence of the alleged custom was negatived by the Court of first instance, but affirmed by the lower appellate Court.

The question for determination in this appeal is whether the finding of the lower appellate Court is justified by the terms of the *wajib-ul-arz*, on which it has relied. Lone Singh was a resident of the village Pachora and had a share, now in dispute, in the village Saraiyan and in other villages. The *wajib-ul-arz* of the village Pachora and Saraiyan are similar in terms. Both of them declare that a sonless widow is entitled to the property of her husband for her life and has every kind of power over the same in case of personal necessity or to meet the revenue demand (*ba zarurat zati wa malguzari sarkar*). The lower appellate Court interprets these terms as implying that she has an unlimited power of disposal; but the very terms of the *wajib-ul-arz* impose limitations on that power, for outside the existence of some personal necessity or a necessity for the payment of the Government revenue, no power of transfer is recognized. It is unnecessary to refer to the unreported decisions to which reference has been made in the course of

the arguments. The principle governing the interpretation of such *wajib-ul-arz* was laid down in *Chandika Singh v. Sant Bakhsh Singh* (1), where it was stated that if a construction could be put on a *wajib-ul-arz* which was compatible with the rule of the Hindu law, that was the construction to which the Court should adhere. That principle was enforced in *Ram Dal v. Sakhia* (2). In the present instance the *wajib-ul-arz* limits the power of disposition to cases of personal necessity or necessity to pay the Government revenue. But personal necessity may be necessity in the nature of maintenance which would be perfectly valid to justify an alienation even under the Hindu law. The existence of arrears of Government revenue may equally be a good necessity to justify an alienation of a part of the estate to save the remainder. It is not possible, therefore, to treat the *wajib-ul-arz* as necessarily inconsistent with the provisions of the Hindu Law. As observed in *Chandika Singh v. Ram Dulari* (3), where it is sought to prove a custom inconsistent with the ordinary law, nothing short of the most cogent evidence can be accepted as proof of a custom repugnant to the ordinary rule of succession or power of disposal prescribed by it. If the custom had been that a widow could transfer the estate inherited by her from her husband without necessity of any kind, there would have been no occasion for the limitation placed in the *wajib-ul-arz* to regulate its disposal. No legal necessity having been proved in this case the sale made by the widow cannot be upheld.

The appeal is, therefore, allowed, the decrees of the lower appellate Court set aside and that of the Court of first instance restored with costs throughout.

B. V. R. K.

Appeal allowed.

1. (1900) 3 O C 161.

2. A I R 1914 Oudh 303=25 I C 869.

3. (1911) 12 I C 103.

A. I. R. 1918 Oudh 345

STUART AND KANHAIYA LAL, A. J. Cs.
Basdeo Ban—Plaintiff—Appellant.

v.

Ram Saran and others—Defendants—
Respondents.

First Appeal No. 2 of 1916, Decided on
16th January 1918, from decree of Sub-
Judge, Gonda, D/-8th December 1915.

(a) **Hindu Law—Religious endowment—No proof of dedication regarding village—Village for 200 years incorporated with asthan and treated as asthan property—Dedication may be presumed.**

Where there was no clear proof of dedication in regard to a village, but it was found that for more than 200 years the village had been incorporated with a particular asthan, had been held by its mahant from time to time and had been treated as a part of the asthan property:

Held: that a dedication either by the mahant to whom the village had originally been granted or by one of the persons who succeeded him might be presumed. [P 347 C 1]

(b) **Hindu Law—Religious Endowment—Transfer cannot be made without legal necessity.**

Where a tenure is in the nature of a trust for a charitable purpose, the trustee has no right to transfer the same except for legal necessity.

[P 347 C 1]

(c) **Limitation Act (1908), Art. 134—Alienation of Aathna property by Mahant—Suit for possession by setting aside alienation is governed by Art. 134.**

Article 134, governs a suit instituted by a succeeding mahant of an asthan for possession of property appertaining to the asthan by setting aside an alienation for valuable consideration made by the preceding mahant in respect of that property. If such a suit is brought beyond 12 years from the date of such an alienation, it is barred by time to the extent of the interest which the alienation purports to convey, inasmuch as each succeeding mahant does not get a fresh start of limitation on the ground of his not deriving title from any previous mahant. [P 347 C 1, 2]

*St. George Jackson, Ram Chandra and Sarju Prasad Bhatnagar—*for Appellant.

*Bisheshwar Nath Srivastava—*for Respondents.

Judgment.—The dispute in this case relates to the village Beniban, otherwise known as Benipur, which was founded by an ascetic named Beni Ban sometime in 1670 A. D. The village was granted to Beni Ban by the Emperor Aurangzeb. Beni Ban cleared the jungle and populated a hamlet there, to which he gave his name. Beni Ban died apparently without leaving any disciple and the village came into the possession of the holder for the time being of the parent asthan at Srinagar, district Gonda, which was founded by Sahaj Ban, the preceptor of Beni Ban. Upon the restoration of British rule after the Mutiny Drigraj Ban, a successor of Sahaj Ban, was found in possession of the property appertaining to the Srinagar asthan, including the village Beniban. On 27th July 1862 a sanad was granted to him in regard to the village Beniban, maintaining the muafi tenure for his life (Ex. A-1). In 1864 owing to the death of Drigraj Ban the muafi was resumed,

and the village was settled with Narindr Ban, his disciple and successor. Narindra Ban appears to have died soon after and was succeeded by his disciple Nageshwar Ban. On 27th January 1873 the Settlement Court decreed the village in favour of the heirs of Narindra Ban (Ex. A-2). In pursuance of that decree, Nageshwar Ban was in possession of the village and mortgaged it with possession for Rs. 1,000 in favour of Ghirrau Misra, the predecessor-in-title of the defendants respondents, on 30th June 1883 (Ex. A-4). On 23rd May 1892 his disciple and successor Narbadeshwar Ban mortgaged the same with possession in favour of Ghirrau Misra in lieu of Rs. 2,000, half of which went to pay the prior mortgage effected by Nageshwar Ban (Ex. A-3).

On 29th May 1898 he took a fresh loan of Rs. 1,000 from Ghirrau Misra and executed a mortgage in his favour for Rupees 3,000, out of which Rs. 2,000 went to satisfy his previous mortgage (Ex. A-5). He gave possession of the village in lieu of Rs. 2,000 and agreed to pay the balance with interest at 12 annas per cent per mensem. The mortgage was effected for a period of 51 years and one of the conditions in the mortgage-deed was that if the mortgagor failed to pay interest on Rs. 1,000 every three years, he shall be liable to pay compound interest thereon at the same rate and the mortgagee shall be entitled to recover the said money with compound interest due to him from the property mortgaged at any time he liked. The plaintiff is the disciple and successor of Narbadeshwar Ban. His allegation is that the property mortgaged appertained to the asthan at Srinagar and was endowed for the expense of the asthan and other charitable purposes, that the mahant had no right to mortgage the same, and that on his death in 1904 the plaintiff became entitled to the possession of the said property. The defendants denied that the property in suit appertained to the asthan at Srinagar or was endowed for its use. They pleaded that they and their predecessor-in-interest, Ghirrau Misra, had been in possession of the said property since 1883 and that the debts in question were contracted for legal necessity and were in any event binding on the plaintiff. The learned Subordinate Judge dismissed this claim, holding that it was barred by Art. 134, Lim. Act. It is not clear from the wajib-

ul-arz of the village Baniban (Ex. 1) whether the said village was granted to Beni Ban for religious or charitable purposes. In the wajib-ul-arz of the village Srinagar (Ex. 4) there is similarly no mention that the village was given to Sahaj Ban for religious or charitable purposes; but from the statements made at the time of the summary settlement by Deogra Ban (Ex. 5) and the report and the statement of the Qanungs then made (Ex. 5 and A-21) there can be no doubt that the property appertained to the ashra at Srinagar and was intended for the feeding of faqirs and the distribution of charity (wasta khirak ashabat faqiran).

There is no clear proof of a dedication in regard to the village Baniban, but from the fact that from more than 200 years the village has been incorporated with the ashra at Srinagar and held by its members (from time to time and treated as a part of the ashra property, a dedication either by Beni Ban or by one of the persons who succeeded him may be presumed. The deed granted to Deogra Ban merely maintained the aulad tenure for his life. It did not give him greater rights than the nature of the tenure held by him permitted. In other words, the deed left the tenure intact, and if the tenure was in the nature of a trust for a charitable purpose, Mahant Narbalaishwar Ban, who succeeded to the tenure, had, as pointed out in *Sri Dhar v. Dharam Das* (1) and *Murugesam Pillai v. Chana Sambanda Pandara Sannadhi* (2), no right to mortgage the same except for legal necessity. The plaintiff ought, however, to have sued to contest the mortgage within the period allowed by Art. 131, Lim. Act. It is true, said their Lordships of the Judicial Committee in *Prasanna Kumari Debba v. Golab Chand Baboo* (3), that the idol can hold property only in an ideal sense and that its acts relating to any property must be done by or through a manager or shebait.

But it does not follow that each succeeding manager gets a fresh start as far as the question of limitation is concerned upon the ground of his not deriving a title from any previous manager. The succeeding shebait, as pointed out in

Nilmony Singh v. Jagabandya Roy (4), form "a continuing representation of the idol's property." The same may be said in regard to property held by a trustee, and a suit brought beyond 12 years from the date of the alienation for valuable consideration by a trustee may be barred by time to the extent of the interest which the alienation purports to convey.

No question of fraud arises in this case, for the mortgage has been in possession since 1853. In *Dattagiri v. Dattatraya* (5), and *Behari Lal v. Muhammad Muttaki* (6), it was held in somewhat similar circumstances that the claim to set aside a sale or mortgage effected by a trustee and to recover possession of the property sold or mortgaged was barred, if not brought within 12 years from the date of the alienation. The mortgagor had under the deed either an absolute interest or the interest of a trustee under the trust, which the deed confirmed. He did not, in any case, hold an estate for life. The subsistence of the mortgage cannot, therefore, be impeached on that ground. In *Muthuswami v. Sree Sree Methanathi Swamikal Avargal* (7), a lease effected by the head of a math was held to subsist only for the lifetime of the lessor, but as pointed out in *Athiram Gowami v. Sayama Charan Nandi* (8), and *Ishwar Shyam Chand Jia v. Ram Kanan Ghose* (9), a lease may not amount to an alienation of the corpus of the estate and the position of a mortgage in possession is not quite analogous. The learned Counsel for the plaintiff suggests that his client might be allowed to redeem the mortgage in derogation of the term of 51 years fixed for redemption. No claim for redemption was, however, laid in the plaint and it is not consequently necessary to determine whether the term of 51 years operated as a clog on the equity of redemption or not. The appeal is, therefore, dismissed with costs.

B.V./R.K. *Appeal dismissed.*

1. (1896) 23 Cal 536.

2. (1903) 27 Bom 263.

3. (1893) 20 All 492.

4. (1915) 38 Mad 356=19 I C 691.

5. (1909) 36 Cal 1003=1 I C 419=36 I A 149 (P. C.).

6. (1911) 10 I C 683=35 Cal 526=35 I A 76 (P. C.).

1. (1909) 12 O C 236=3 I C 519.

2. A I R 1917 P C 6=10 Mad 402=33 I C 659=14 I A 98 (P.C.)

3. (1970) 11 B L R 459=2 I A 145 (P.O.)

A. I. R. 1918 Oudh 348 (1)

LINDSAY, J. C.

Mt. Sheoraja—Defendant—Appellant.

v.

Debi Din and another—Plaintiff and Defendants—Respondents.

First Appeal No. 113 of 1917, decided on 10th September 1917 from decree of Sub-Judge, Rae Bareilly, D/- 6th June 1917.

Court Fees Act (7 of 1870) S. 7 (4) (c)—Mortgage suit—Plea that property was exempted from liability in execution of mortgage decree—Appeal—Court-fee payable is *ad valorem*.

The plea raised by one of the defendants to a mortgage suit was that certain property, which was alleged to be covered by the mortgage-deed, was not liable to be sold in execution of the mortgage decree by reason of certain transfers which had been made in his favour before the mortgage-deed in suit was executed. The trial Court held a part of this property to be liable for the mortgage debt. The defendant appealed:

Held: that the appellant was bound to pay *ad valorem* Court-fee on the memorandum of appeal.

Ali Mohammad—for Appellant.

Zahur Ahmad—for Respondents.

Judgment.—I have heard the learned Counsel in support of his objection to the office report in this case regarding the question of Court fee. The matter is a simple one. The suit was a suit on a mortgage and the appellant here was impleaded as one of the defendants. Her plea was that certain lands, which are said to be covered by the mortgage-deed, were not liable to be sold in execution of the mortgage decree by reason of certain transfers which had been made to her before the mortgage-deed in suit was executed. The Court below has held a part of the property to which this appellant lays claim to be liable for the mortgage debt, and now she comes here in appeal claiming that the Court below ought to have exempted from the operation of the decree an area of 109 bighas. Only a Court fee of Rs. 15 was paid in respect of the relief claimed in appeal. The office reports that an *ad valorem* fee is chargeable and has cited three decisions of this Court and a decision of the Madras High Court reported as *Vankappa v. Narasimha* (1). It has been argued here that the relief which the appellant is asking here is in the nature of a declaratory relief. But I do not think that argument can be maintained, for clearly consequential relief is also aimed at, namely, the exemption of the property

from sale in pursuance of this mortgage decree. The whole matter has been discussed in a fairly recent ruling of their Lordships of the Madras High Court. [See the case reported as *Kesavarapu Ramakrishna Reddi v. Kotta Kota Reddi* (2) which is a Full Bench ruling.] That has been followed by the Calcutta High Court in another ruling to be found reported as *Jugal Pershad Singh v. Parbhu Narain Jha* (3). The authorities are all against the contention which is put forward by Mr. Ali Mohammad, Counsel for the appellant. I hold that the office report is correct and that there is a deficiency of Rs. 65. Mr. Ali Mohammad states that he is ready to deposit this amount. Let it be received. The appeal will be admitted on payment of the deficiency in the Court-fee.

R.V./R.K.

Order accordingly.

2. (1907) 30 Mad 96.

3. (1910) 37 Cal 914=8 I C 1145.

A. I. R. 1918 Oudh 348 (2)

LINDSAY, J. C. AND STUART, A. J. C.

Har Nath Kuar—Plaintiff—Appellant.

v.

Indra Bahadur Singh—Defendant—Respondent.

First Appeal No. 91 of 1915, Decided on 20th March 1918, from decree of Sub-Judge, Bara Banki, D/- 3rd August 1915.

(a) Oudh Estates Act (1 of 1869), S. 22 (8)—S. 22 does not contemplate descending of vested interest upon remote heirs simultaneously with devolution of life-interest upon widow.

There is nothing in the language of S. 22, Oudh Estates Act which can be interpreted as showing that simultaneously with the devolution of the life-interest in an estate upon the widow of the last holder under Cl. (8) of that section there descends a vested interest, comprising the residue of the estate, upon any of those who are declared to be the more remote heirs in the scale of succession. [P 352 C 2]

(b) Oudh Estates Act (1 of 1869), S. 22 (11)—Talukdar's widow in possession—Heirs under S. 22 (11) have no vested interest, but merely expectancy of inheritance.

Where it was found that a person was entitled to the estate left by a talukdar under S. 22, Cl. 11, Oudh Estates Act, but for the existence of the talukdar's widow who was in possession of the estate under Cl. 8 of that section:

Held: that during the widow's lifetime he had no vested interest, but merely an expectancy of inheritance in the estate which he could not transfer. [P 353 C 1; P 355 C 1]

(c) Hindu Law—Reversioners—Transfer of expectant interest is void—Transfer of Property Act (4 of 1882), S. 6 (a).

A transfer made by a Hindu reversioner of his expectant interest in an estate prior to the year

1882 was valid, not under S. 6 (a), T. P. Act, but under the Hindu law. [P 351 C 2]

(d) Oudh Estates Act (1 of 1869), S. 22—
Talukdar's widow and Hindu widow under Hindu law—Difference in possession between explained—Hindu law, widow.

Although under the scheme of inheritance propounded in S. 22, Oudh Estates Act, the widow of a Hindu talukdar has an interest which is in many respects different from the interest held by a female heir under the ordinary Hindu law, yet this fact does not make any difference in the nature of the legal position of the person who is entitled to succeed to the estate after the widow's death. [P 351 C 3]

(e) Equity—Void agreement cannot be enforced.

The principles of equity cannot be invoked for the purpose of enforcing a void agreement. [P 351 C 4]

(f) Limitation Act (19 of 1908), Art. 62—
Suit for recovery of money after 3 years from date of execution of void agreement is barred.

A suit to enforce money advanced under a void agreement is barred under Art. 62, Sch. I, Limit. Act, if it is instituted after the expiry of three years from the date of the execution of the agreement. [P 353 C 2]

Moti Lal Neeraj, Mohammad Wasim, H. G. Dutt and Waqar Hussain—For Appellants.

St. George Jackson, Ram Chandra, Kaddappa Lal and Bhadresh Prasad—For Respondents.

Judgment.—The facts, which led up to the suit out of which this appeal has arisen, may be stated as follows: One Thakur Naipal Singh was the owner of two Taluqas, named Paska and Lihar, situated in the districts of Gonda and Bara Banki respectively. Both these estates were List 2 estates under Act I of 1879, that is to say, estates which, according to the family custom, ordinarily devolved upon a single heir. Naipal Singh died on 23rd October 1873, leaving two widows Thakurain Ikias Kuar and Chhoti Thakurain. He left no issue. The widows succeeded to the possession of Naipal Singh's estate, which was taken over thereafter by the Court of Wards. In the year 1878 the defendant-respondent in the present case, Thakur Indra Bahadur Singh, brought a suit in the Court of the Deputy Commissioner of Bara Banki against the Court of Wards and the two widows of Naipal Singh for the purpose of obtaining a declaration of his right to succeed to the properties left by Naipal Singh. It is said that the two widows had set up a will purporting to have been executed by Naipal Singh on 15th October 1873, and that one or other of them had

notified an intention to adopt a son to the deceased Naipal Singh. At the time suit was brought Indra Bahadur Singh was the nearest male reversioner of Naipal Singh; and if the adoption, which was threatened, had been carried out his right to succeed to Naipal Singh's property, in case he survived both the widows, would have been destroyed. Ex. 5 is a certified copy of the judgment which was passed by the Deputy Commissioner of Bara Banki in the suit just mentioned, on 22nd October 1878.

The decree which followed the judgment declared that the will purporting to have been executed by Naipal Singh on 15th October 1873 was void and invalid. It was further declared that Indra Bahadur Singh was the person entitled to succeed to the Paska and Lihar estates on the death of the last surviving widow of Naipal Singh. The two widows remained in possession. The younger widow Chhoti Thakurain is said to have died about seven years before the present suit was brought. The elder one, Thakurain Ikias Kuar, died on 10th May 1911. On 2nd January 1889 Indra Bahadur Singh executed in favour of Thakur Raghopal Singh, son of Raja Sher Bahadur Singh, the document which forms the basis of the present action brought by Raghopal Singh's widow, Thakurain Har Nath Kuar. This document is marked Ex. 1 and purports to be a sale deed of a one-half share in the two estates of Paska and Lihar. In the body of this document a reference is made to the suit which Indra Bahadur Singh had instituted in the year 1878 and which was decided in his favour by the judgment above referred to. After this we have a statement by the executant, Indra Bahadur Singh, that he had become indebted to Raja Sher Bahadur Singh to the extent of Rs. 20,000. Part of this money, it is stated, was borrowed to meet the costs of the litigation just referred to; the rest of it had been borrowed for the purpose of defraying other expenses and for paying debts. The deed goes on to recite that Indra Bahadur Singh was at the time not in a position to pay this sum on account of his not being able to obtain immediate possession of the estates left by Naipal Singh. It is further stated that Indra Bahadur Singh had borrowed a sum of Rs. 5,000 from Raghopal Singh, the son of Raja Sher Bahadur Singh, and that consequently

the total amount of his indebtedness was Rs. 25,000. It is then recited that by way of satisfaction of this debt the executant sells absolutely a half share in the 39 villages which made up the two estates of Paska and Lilar. Indra Bahadur Singh declared that after the death of the survivor of the two widows, or at whatever time he might obtain possession over these two estates, he would put the vendee at once in proprietary possession of the half share which had been conveyed to him. There was further an undertaking on the part of Indra Bahadur Singh to get the name of Rachhpal Singh recorded in the decree which had been passed in Indra Bahadur Singh's favour on 27th October 1878.

Rachhpal Singh having died and Indra Bahadur Singh having succeeded to the possession of these two estates on the death of Mt. Iklas Kuar in the year 1911, the present suit has been brought by the widow of Thakur Rachhpal Singh for enforcement of the agreement contained in this document of 2nd January 1880. The plaintiff's claim is that in accordance with this deed of sale executed on 2nd January 1880, she is entitled to get possession over a half share in the villages specified in List B attached to the plaint. It was admitted by the plaintiff that while the estates were still under the management of the Court of Wards, 20 out of the 39 villages had been sold for the purpose of discharging debts which were due by Naipal Singh. The suit was, therefore, confined to a half share of 19 villages, which are specified in List B. Coupled with this claim for possession there was a claim for mesne profits and interest amounting to Rupees 41,000 odd. By way of alternative relief the plaintiff prayed that in case the Court should not consider it possible to give her a decree for possession, she should be granted a decree for Rs. 25,000, the principal sum mentioned in the deed of 1880, together with interest amounting to a lac and over Rs. 3,000. The suit was contested by the defendant on a variety of grounds, which are set out in his written statement. He denied in para. 9 of his written statement that at the time of Naipal Singh's death he was indebted to any one. He also denied having borrowed a sum of Rs. 20,000 from Raja Sher Bahadur Singh. He denied further that he borrowed Rs. 5,000 from Thakur

Rachhpal Singh. It was admitted that the document in suit had been executed by him, but it was claimed that the deed did not amount to a sale-deed and that it did not operate to transfer any interest to Rachhpal Singh. In paras. 17 to 22 of the written statement the defendant set out various allegations describing the circumstances which led to his bringing the suit against the two widows of Naipal Singh.

He asserted that he had been instigated to bring this suit by Raja Sher Bahadur Singh, who had been on terms of intimacy with Naipal Singh. It was stated in para. 22 of the written statement that for the purposes of this litigation Sher Bahadur Singh spent a sum of Rs. 2,000. He had, it is stated, undertaken not to make any claim for this money against the defendant, but contrary to this promise after the death of Sher Bahadur Singh, Rachhpal Singh, his son, insisted on re-payment being made. It was further alleged in para. 22 of the written statement that Rachhpal Singh took advantage of the defendants' helplessness and compelled him to execute the deed now in suit. In para. 23 of the written statement it was alleged that the deed was executed under undue influence and without consideration. In para. 24 the plea was taken that the deed of 2nd January 1880 was void in law inasmuch as it purported to transfer what was a mere right of expectancy; and in the following para. it was stated that as a simple agreement the document could not be enforced. Para. 26 raised a plea of limitation, the case for the defendant being that any suit for the refund of consideration was barred by time. On these pleadings seven issues were raised in the Court of the Subordinate Judge. Issue 1 related to the pleas of undue influence and want of consideration raised by the defendant. On this, the finding of the Court was that the defendant had failed to prove that the deed was without consideration or had been obtained by means of undue influence. Issue 1 related to the nature of the terms of the deed.

Were they extortionate and unconscionable, and if so, with what result? The Court below found that it was not established that the terms of the agreement were either extortionate or unconscionable.

Issue 3 raised the question regarding the validity of the transfer which the document purports to make, having regard to the nature of the defendant's interest at the time it was executed. The Subordinate Judge was of opinion that Indra Bahadur had nothing more than a spes successionis or a right of expectancy and that a transfer of an interest of this kind was void in law. Issue 4 which related to the title of the plaintiff to recover possession of the property, was consequently decided against her; as also was the subsidiary issue relating to the claim for mesne profits. Issues 5, 6 and 7 related to the alternative relief which had been claimed by the plaintiff. The learned Subordinate Judge disposed of these by finding that any claim for the recovery of the purchase money was barred by limitation. He relied upon Art. 62, Schedule to the Lim. Act. Issue 8 was an issue of law dealing with certain pleas put forward by the plaintiff in replication. The Subordinate Judge held that the defendant was not estopped from raising the defences contained in paras. 23, 24 and 25 of his written statement.

The result, therefore, was that the entire claim of the plaintiff was dismissed with costs. The plaintiff has now come in appeal and the decision of the trial Court is attacked on a number of grounds. The principal question raised is with regard to the decision of the Subordinate Judge on issue 3. It is claimed on behalf of the appellant that the Court below was wrong in holding that the interest which Indra Bahadur Singh purported to transfer by this document of the year 1880 was merely an expectancy. Another plea taken is that, even if it be found that at the time the document was executed Indra Bahadur Singh had nothing but a mere chance of succeeding to the estates of Naipal Singh, he was nevertheless entitled to transfer this interest inasmuch as the agreement was executed prior to the enactment of the Transfer of Property Act (4 of 1882). These pleas are in reality the backbone of the appellant's case. Another ground has been taken with regard to the plaintiff's claim for a money-decree. It has been argued that the Court below was wrong in deciding the issue of limitation against the plaintiff. The first question, therefore, for our decision is what was the legal position of the defendant Indra Bahadur Singh with respect

to the estate of Thakur Naipal Singh at the time when he executed the document upon which this suit is based. We have already mentioned that the Subordinate Judge has found that Indra Bahadur Singh had nothing more than a spes successionis. The argument which was put forward in the Court below on behalf of the plaintiff, and which has been repeated here is that at the time when this agreement was entered into Indra Bahadur Singh had in reality a vested interest in the property which was left by Naipal Singh, an interest which he was competent to transfer.

In support of this argument the learned counsel for the appellant has referred us to the scheme of inheritance which is laid down in S. 22, Oudh Estates Act (1 of 1869). Admittedly the provisions of this section contain the rule of inheritance which applies to the estates which were held by Naipal Singh at the time of his death. Cl. 7, S. 22, lays down the right of the widow of the deceased Taluqdar, or grantee, to succeed to the estate in default of any of the nearer heirs mentioned in the six preceding clauses. Cl. 7 provides, moreover, that if there are more widows than one, the estates descend in the first instance upon the widow who was first married to the deceased Taluqdar, or grantee, but for her lifetime only. We are not concerned with Cl. 8 in the present case, nor with Cl. 9, for admittedly, Thakurain Iklas Kuar was the first married wife of Naipal Singh and survived the junior widow, Chhoti Thakurain. Consequently we have it that Iklas Kuar was entitled to the estate of her deceased husband for her lifetime only, and that upon her decease the estate descended to the present defendant Indra Bahadur Singh under the provisions of Cl. 11.

It is pointed out by the learned counsel for the appellant that the estate which the widow of a Hindu Taluqdar takes under this section is of a different nature to the estate which is enjoyed by a Hindu widow under the ordinary Hindu law. The section expressly declares that she takes nothing more than a life-estate strictly speaking, and it is also the fact that under S. 2, Oudh Estates Act, the expression "heir" is defined to mean a person who inherits property otherwise than as a widow under the special provisions of this Act; and so we are asked to

hold that when Naipal Singh died in the year 1873, there came into existence what is known in English law as a particular estate in favour of the senior widow, and that the residue of the estate vested in Indra Bahadur Singh who took an interest in it in the nature of a vested remainder. The argument is that as a portion only of the full estate vested in the widow, the remainder must necessarily have vested in Indra Bahadur Singh who was the nearest male collateral relation of Naipal Singh at the time of the latter's death.

With regard to these arguments, which were advanced in the Court below also, we may note here the opinion expressed by the learned Subordinate Judge. He held that a vested interest or a vested remainder could only come into existence under a deed of grant and that there was no such deed in the present case. He was of opinion that the defendant could definitely claim to be the heir of Naipal Singh only after the death of the surviving widow, and in these circumstances he held, in accordance with the principles of English law, that Indra Bahadur Singh continued to be an heir up till the date of the death of Ikles Kuar and that consequently he had only an expectation of an inheritance and had no estate or interest in the property which was capable of transfer. Referring to the argument based upon the definition of the expression "heir" in S. 2, Oudh Estates Act, the Subordinate Judge was of opinion that that did not really affect the situation. He held that under this definition clause it is only for certain special purposes, that is of bequest and transfer, that the widow is excluded from the category of heirs. He pointed out that the widow's title to succeed her husband's property by inheritance is declared in S. 22, and certainly it seems difficult to hold that she can take the estate of her deceased husband under any other title than that of inheritance. The Subordinate Judge referred to the decision of their Lordships of the Privy Council in the case of *Bhai Narindar Bahadur Singh v. Achal Ram* (1) in support of the view that the collateral succession to a taluqa, which has passed on the death of the last male owner to his widow for her lifetime, does not open until after the widow's decease, or in case a daughter succeeds to the widow, till after the death of the daughter. Fortified by

this authority he held that up till the time when Ikles Kuar died Indra Bahadur Singh had nothing more than an expectancy of inheritance. We have come to the conclusion that in this matter the decision of the Court below is correct and ought to be maintained.

The question of the legal position of Indra Bahadur Singh with respect to the estate left by Naipal Singh must be determined with reference to the provisions of S. 22, Oudh Estates Act. In the first place, we have to notice that the estates held by Naipal Singh being entered in List 2 the rule is that they must descend to a single heir. According to the scheme of inheritance, which is defined in S. 22, there is no descent of the deceased estate in a case like this until the widow's death. In other words, the single person out of those mentioned in Cl. 11, S. 22, cannot be ascertained until the time of the widow's death. We are unable to entertain the argument that on the death of Naipal Singh the property descended so to speak piecemeal, that a life-estate descended to the widow and the residue of the estate vested at once in the defendant Indra Bahadur Singh. There is nothing in the language of S. 22 which can be interpreted as showing that simultaneously with the devolution of the life-interest in the estate upon the widow, there descends a vested interest, comprising the residue of the estate, upon any of those who are declared to be the more remote heirs in the scale of succession.

Further we cannot conceive of an interest becoming vested in an unascertained person. It is clear that at the time of Naipal Singh's death Indra Bahadur Singh was not ascertained as the person who was entitled to take immediately after the death of the survivor of the two widows. According to the language of Cl. 11 the person entitled to the estate, in default of the heirs mentioned in the preceding clauses, is to be ascertained in accordance with the provisions of the ordinary law to which persons of the religion and tribe of the taluqdar or grantee are subject; that is, in the present case the ordinary Hindu law. Under that law the right of succession after the death of a Hindu female can only be determined with reference to the state of things existing at the time of the death of the female heir; and this principle has been judicially recognized by

their Lordships of the Privy Council in the ruling to which the Subordinate Judge refers in his judgment: *Bhai Narindra Bahadur Singh v. Achal Ram* (1). We might also refer in this connexion to another judgment of the Privy Council relating to the same estate which is reported as *Lal Achal Ram v. Raja Kazim Husain Khan* (2). It has been argued before us by the learned advocate for the appellant that the judgments of their Lordships lay down no general rule of law relating to succession. It is stated that in the two cases before their Lordships there was no dispute regarding the rule, it being the case of both parties that succession to the collaterals could only open after the death of the female heir. We are of opinion, however, that the ruling of their Lordships is not to be interpreted in the narrow sense contended for by the appellant. It is quite clear from a reference to their Lordships' judgments in both the cases that they had before them the special rules of succession which are contained in S. 22, Oudh Estates Act. We hold, therefore, that the Subordinate Judge was right in his view that up till the date of Indra Kuar's death Indra Bahadur was nothing more than an heir with an expectation of succeeding to the estate. In our opinion, it is impossible to hold that at the time when Indra Bahadur Singh executed the deed upon which this suit has been brought he had vested in him any interest in the property left by Thakur Naipal Singh.

We come now to the second part of the argument put forward on behalf of the plaintiff appellant. The Subordinate Judge, having come to the conclusion that Indra Bahadur Singh had nothing more than the interest of an expectant heir at the time of the execution of the deed, held that the transfer which he purported to make was void in law by reason of the provisions of S. 6, Cl. (a), T. P. Act (4 of 1882). The criticism of the learned Counsel for the appellant upon this finding is that as the deed in suit was executed in the year 1880, the transaction could not be affected by anything contained in the Transfer of Property Act which was not enacted till the year 1882. It is strange that this plea was not advanced before the learned

Subordinate Judge. We can find no trace of any argument on these lines either in the proceedings or in the judgment of the Court below. We must, however, take notice of the fact that the Transfer of Property Act does not purport to operate retrospectively; and as the learned Counsel for the appellant points out, S. 2, Cl. (c), of the Act saves any right or liability arising out of a legal relation constituted before the Act came into force or any relief in respect of any such right or liability, and so it is argued that the question of the right of the plaintiff to enforce the agreement in suit is not to be determined by a reference to the language of S. 6 (a), T. P. Act. The argument is that even if it be held that all that Indra Bahadur Singh had in the year 1880 was an expectation of succeeding to the estate of Naipal Singh in the event of his outliving the surviving widow, there was at that time no legal prohibition against the transfer of such an expectancy or against the making of an agreement for such a transfer.

On the other hand it has been argued on behalf of the respondent that although the prohibition against the transfer of the chances of an heir succeeding to an estate was first definitely laid down by the Act passed in the year 1882, nevertheless even prior to the passing of this Act the transfer of an expectancy was forbidden by the Hindu law. A number of cases have been cited to us upon this point, the earliest of which appears to be a judgment of their Lordships of the Privy Council which is reported as *Dooli Chand v. Hary Bhookun Lal Awasthi* (3). In the concluding portion of their judgment their Lordships say (vide p. 532 of the report):—

"The point on which the lower Court in part proceeded, and which has only been treated as doubtful by the High Court, namely, whether such an interest (that is the interest of a reversionary heir under the Hindu law) could be the subject of a sale at all, is of general importance, and one which their Lordships, who do not sit here to determine abstract questions of law, would be unwilling to determine in a case in which no decree in favour of the plaintiffs can be passed. They are certainly not prepared to affirm that such an interest can be made the subject of a sale, still less that it can be made the subject of a sale highly speculative, as any such sale must be by a guardian acting or purporting to act on behalf of an infant. The decision of this Board which has been cited by the Judge of the lower Court, is not precisely in point but it goes far to show that the principle of English law which

2. (1905) 8 O C 155=27 AH 271=32 I A 113 (P.C.).

3. (1880) 6 C L R 528 (P.C.).

allows a subsequently acquired interest to feed, as it is said, the estoppel does not apply to Hindu conveyances."

The next case which has been cited before us in this connection is the judgment of their Lordships in *Sham Sundar Lal v. Achhan Kunwar* (4). There it was definitely laid down that a reversionary heir under the Hindu law has no power to sell or mortgage his interest in expectancy. At (p. 80 of 21 All) of the report it is observed:

"In 1577 neither Achhan Kunwar nor Inayat Singh, even if he had been of age, could by Hindu law make a disposition of or bind their expectant interests."

This case has been frequently followed by the Courts in India. We may refer to the following cases: *Nund Kishore Lal v. Ramee Ram Tewary* (5), *Manickam Pillai v. Ramalinga Pillai* (6), *Hargawan Magan v. Baij Nath Das* (7) and *Sumsuddin v. Abdul Husein* (8). There is thus in our opinion, abundance of authority for the proposition that the transfer by a reversioner of his expectant interest is not permitted by the Hindu law. But here again an attempt has been made to withdraw the present case from the purview of these authorities on the ground that Indra Bahadur Singh in the year 1880 was not exactly in the same position as an ordinary reversionary heir under the Hindu law, expecting to succeed to the estate on the death of the Hindu widow in possession. Stress has again been laid upon the fact that under the scheme of inheritance propounded in S. 22, Oudh Estates Act, the widow of a Talukdar has an interest which is in many respects different from the interest held by a female heir under the ordinary Hindu law. That no doubt is the case; but does the fact that there is such a difference between the estate of the widow under the special provisions of the Act and the estate of the widow under the ordinary Hindu law make any difference in the nature of the legal position of the reversionary heir? We have already touched upon this matter in dealing with the first question, namely, whether after the death of Naipal Singh any interest in his property became vested at once in Indra Bahadur Singh. We are unable to see how it can be said that

Indra Bahadur Singh during the lives of the two widows had any higher interest than that of the ordinary Hindu reversioner, for as we have pointed out it seems clear both upon the Act and upon authority that the succession to Naipal Singh's estate did not open until the death of Thakurain Iklas Kuar. While therefore, it is not correct to say that the transfer of an expectancy, which Indra Bahadur Singh purported to make in the year 1880, was void by reason of the provisions of S. 6, T. P. Act, it seems to us that upon principle it was void by reason of its being contrary to the provisions of the Hindu law. Indra Bahadur Singh, at the time the agreement was entered into, was subject to the Hindu law and his position so far as we can see, was no different from that of the ordinary reversionary heir. On the authority of *Achhan Kunwar's* case (4), therefore we hold that the transfer of the mere spes successions, which Indra Bahadur Singh had was prohibited by the Hindu law and that consequently no interest was transferred to Rachhpal Singh under the deed in question.

The learned counsel for the appellant has laid stress upon a certain passage to be found in the judgment of the Bombay High Court reported as *Sumsuddin v. Abdul Husein* (8). That was a case in which a Muhammadan lady had in the year 1895 executed a deed in favour of her father by which she purported to release her rights to the share of her father's estate, which would in ordinary course have come to her on her father's death. There the terms of S. 6 (a) T. P. Act were referred to, and it was held that such a release was prohibited by the statute. The passage to which the appellant's learned Counsel has drawn our particular attention is to be found on p. 172 (of 31 Bom). It reads as follows:

"Then we come to S. 6 which provides that property of any kind may be transferred except as otherwise provided by the Act and the first exception named is the chance of an heir apparent. But this implies that but for the exception, the chance of an heir apparent would be property that might be transferred under the Act."

We are asked to hold that the learned Judge who made these observations intended to convey that it is only by reason the enactment of S. 6, T. P. Act that

4. (1890) 21 All 71=25 I A 123 (F.C.).

5. (1902) 29 Cal 355.

6. (1905) 29 Mad 120.

7. (1910) 32 All 88=4 I C 144.

8. (1907) 31 Bom 165.

the transfer of the chance of an heir-apparent succeeding to the estate has been prohibited by law. Having regard to what is to be found in other passages in the judgment, we can hardly think that the learned Chief Justice intended to lay down the law in this sense, for at p. 173 of 31 Bom. we have a reference to the authority which we have already quoted, namely, the case of *Sham Sundar Lal v. Achhan Kunwar* (1). The learned Chief Justice points to that ruling as declaring that a Hindu reversioner cannot either dispose of or bind his expectant rights. It was argued before the learned Chief Justice that the opinion expressed in the judgment just mentioned was only a dictum. But Sir Lawrence Jenkins pointed out that it was a dictum of the highest judicial authority and that in at least two later cases effect had been given to the opinion so expressed. It can hardly be said therefore that it was intended to lay down that the transfer of an expectancy by a Hindu reversioner only became unlawful for the first time after the enactment of the Transfer of Property Act.

To sum up this part of the case, it appears to us that the proper view to take is that Indra Bahadur Singh in the year 1880 had no right higher than that of a reversionary heir under the Hindu law and that the transfer of an expectancy which he professed to make in favour of the plaintiff's husband was void, being contrary to the provisions of the Hindu law. This finding disposes of the case of the plaintiff-appellant. If it be argued, as it has been argued, that this Court as a Court of Equity, ought to enforce the agreement entered into between the defendant and Rachhpal Singh on 2nd January 1880, the answer is that the principles of equity cannot be invoked for the purpose of enforcing a void agreement. Under the provisions S. 23, Contract Act, which was in force at the time this document was executed, every agreement of which the object or consideration is unlawful is void, and the section provides inter alia that the consideration of an agreement is unlawful if it is forbidden by law, or is of such a nature that if permitted it would defeat the provisions of any law. In our opinion this document, viewed as an agreement to transfer in futuro, was a void agreement, and it is impossible for the plaintiff to argue that it should be enforced upon the principle

that equity considers that done which ought to be done.

There remains the question of the other relief which the plaintiff sought, namely, relief in the shape of a money decree for one lac and twenty-eight thousand rupees. All that seems necessary to say with regard to this is that a claim for the return of the money with interest is barred by limitation for the reasons given in the judgment of the Court below. The Subordinate Judge applied Art. 62, running lim. Act, which gives a period of 3 years, from the date when the money is received, for a suit to recover money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use. If there was a failure of consideration in the year 1880 at the time the deed was executed by which the whole agreement was rendered void, then limitation under this Article began to run at the very latest from the date upon which the deed was executed. Art. 97, Sub. 1 to the Limitation Act, does not help the plaintiff-appellant. That Article relates to suits for money paid upon an existing consideration which afterwards fails and gives a period of 3 years from the date of the failure, but here there never was any existing consideration in the eye of the law nor can it be said that there was any failure of consideration within a period of three years before the date of the present suit. For these reasons we have come to the conclusion that this appeal must fail.

We have only to remark before concluding our judgment that the counsel for the respondent made a feeble attempt to support the judgment of the Court below, on the ground that it was proved that the document in suit was obtained from the defendant-respondent by the exercise of undue influence. The only particulars regarding the undue influence which the defendant put forward in his written statement are to be found in para. 22 of the document. There all that is made to appear is that Indra Bahadur Singh was in a helpless condition at the time he executed the deed and that the plaintiff's husband took undue advantage of the circumstances. The only evidence in support of this plea, to which the learned Counsel for the respondent has thought proper to refer us, is to be found in the deposition of the defendant himself who gave evidence in the case. The

learned Subordinate Judge has given convincing reasons in his judgment for disbelieving the story put forward by Indra Bahadur Singh for the purpose of explaining the circumstances in which this document came to be written. We may say without further discussion, that we agree entirely with the estimate formed by the Court below of the value of the defendant's evidence. It is not in our opinion, worthy of credit. We have not been referred to any evidence which would convince us that in the year 1880 Indra Bahadur Singh was in such a helpless condition that he was unable to resist the influence of the plaintiff's husband. He was at the time a man of about 38 years of age, for we find in the copy of the judgment delivered in the suit brought by him in the year 1878 that he was described there as having been 36 years of age at the time the suit was brought. Indra Bahadur Singh, according to his own statement, although he was not in affluent circumstances at this time, was nevertheless able to support himself from the income of certain *sir* lands which were in his possession. No facts have been brought to our notice from which it could reasonably be inferred that Thakur Rachhpal Singh was in any way in a position to dominate Indra Bahadur Singh's will. As for the argument that on the face of it the terms of the agreement were harsh and unconscionable, we are not prepared to say that they can necessarily be characterized in this language. It is true that the property which Indra Bahadur Singh purported to convey was of considerable value. On the other hand he had received a substantial sum of money from Sher Bahadur Singh and his son Rachhpal Singh and his chances coming into possession of Naipal Singh's estate were somewhat remote, considering the fact that both the widows left by Naipal Singh were young at the time of his death. As it turned out, Indra Bahadur Singh had to wait 33 years before he was able to enter upon possession of the estate left by Naipal Singh. Without discussing this question at greater length, we are content to say that we think the finding of the Court below upon the issue relating to undue influence is correct. For the reasons given above the appeal fails and is dismissed with costs.

B.V./R.K.

Appeal dismissed.

A. I. R. 1918 Oudh 356

STUART AND KANHAIYA LAL, A. J. Cs.
Fakhr Jahan Begam—Defendant—Appellant.

v.

Muhammad Abdul Ghani Khan and others—Plaintiffs and Defendants—Respondents.

First Appeal No. 85 of 1915, Decided on 19th December 1917, from decree of Offg. Sub-Judge, Kheri, D/- 13th July 1915.

(a) Mahomedan Law—Gift of corpus with reservation of usufruct for life is valid under Hanafi Law.

Wherein a deed of gift executed by a Mahomedan lady subject to the Hanafi law the donor excepted some of the property, retaining possession over it free of rent and revenue, and stated that after her death the donee would be its proprietor and that donor would have no power to transfer it by mortgage, sale, or gift:

Held: that even in respect of the excepted property the deed operated as one of gift, inasmuch as the donor transferred the corpus of the property to the donee, reserving for herself the usufruct for life which was not prohibited under the Hanafi law. [P 353 C 2]

Held further: that the stipulation not to transfer her interests in the property during her lifetime satisfied the conditions of the Hanafi law with regard to the delivery of possession. [P 353 C 2]

Per Stuart, A. J. C.—There are three essentials of a gift under the Hanafi law—declaration, acceptance, and seizin. With regard to seizin, however, the rule is that where everything reasonable has been done to perfect a contemplated gift, nothing more is required. There is nothing in Hanafi law to prohibit a gift of the corpus combined with the retention of the usufruct inasmuch as such a transfer does not create a limited estate. [P 353 C 1, 2]

Per Kanhaiya Lal, A. J. C.—Where the intention to make an absolute transfer in present of all proprietary right is clear, any condition which derogates from the immediate completeness of the gift is regarded as void. Where the condition, however, may be given effect to without in any way interfering with or detracting from the immediate completeness of the gift, or rather the immediate transfer of the right in the substance of the gift, the condition as well as the gift are valid. Any reservation of proprietary rights in the corpus would be inconsistent with an intention to make a gift, but the reservation of a right to the usufruct of a portion of the property given would not be inconsistent, if the intention to give the corpus be otherwise manifest. [P 353 C 1]

(b) Transfer of Property Act (1882), S. 41
Disclaimer by real owner—Transfer by ostensible owner—Real owner cannot set up title.

A person who has disclaimed a title cannot be allowed to set it up afterwards to the prejudice of third parties, who have purchased the disclaimed property from the ostensible owner in good faith and for value. [P 354 C 1, 2]

(c) Oudh Estates Act (1869), S. 22 and 23
—Primogeniture sanad to Talukdar who died before Act—Succession is governed by

sanad in case of succession under testamentary disposition.

Where a primogeniture sanad had been issued to a talukdar who died before the Oudh Estate Act came into force, succession to the estate would be governed by the terms of the sanad in the case of succession under a testamentary disposition. [P 38 C 1]

(a) **Mahomedan Law—Will—Consent of heirs to bequest of more than third is ratification of conduct.**

Per Kishinji Lal, A. J. C.—The consent or acquiescence, express or implied, of the heirs of a Mahomedan to a will by him in excess of two-thirds of his property is treated as a ratification by them of his conduct. Such consent may be express or may be implied from unequivocal conduct. [P 264 C 1]

Muhammad Nasim, Wazir Haidar, Shahenshah Hussain, Rizvi and Muhammad Wasim—for Appellant.

John Jackson, Sami Ullah Beg and Chhotey Lal—for Respondents.

Stuart, A. J. C.—*Niamat Ullah Khan, Lutf Ullah Khan and Ibrahim Khan* were the sons of *Ismat Ullah Khan*. They were the members of a family who had originally been Thakurs of the Ahhin clan. Several centuries ago the members of that family were converted to the Muhammadan religion. Their personal law of succession is now admitted to be that of the Hanafi school. They were residents of the village Jalalpur in the Kheri district. After the reconquest of Oudh, *Niamat Ullah Khan* received from the British Government the taluka of Agar Buzurg. He died on 29th August 1867. His name was nevertheless entered in the list prepared under Act 1 of 1869 and is found at No. 116 on List No. 1 and at No. 47 on List No. 2. Instance of the name of a deceased person being entered in the lists are not uncommon. His taluka is described in these lists as the taluka of Agar Buzurg. He received a primogeniture sanad which is filed in this case as Ex. A-1. The estate is there described as the estate of Jalalpur. The amount of land revenue is given as Rs. 5,752. *Niamat Ullah Khan* executed a will on 20th May 1865, by which he devised the whole of his talukdari property to his wife *Mt. Munni Bibi*. This lady succeeded on his death to the talukdari property. On 15th November 1876, Government granted share of a village called Gundia to *Mt. Munni Bibi* in her own right. The grant was contained in a deed Ex. G. On 7th March 1884, *Mt. Munni Bibi* executed a deed in favour of *Lutf Ullah Khan*, her

husband's elder surviving brother. Under the terms of this deed she transferred absolutely to *Lutf Ullah Khan* the whole of her talukdari estate with the exception of two villages in the estate, *Mundia Mir* and *Gungepur*. She retained possession of the two latter villages and of the share of *Gundia* which had been granted to her by Government. Under the terms of this deed she undertook not to transfer the property which remained in her possession. This deed is Ex. A-4. All the property except *Mundia Mir*, *Gungepur*, and the share in *Gundia* was at once transferred to the possession of *Lutf Ullah Khan*. *Mt. Munni Bibi* died on 15th June 1906. *Lutf Ullah Khan* then obtained possession of *Mundia Mir*, *Gungepur* and the share in *Gundia*. He died and was succeeded by his son *Hamid Ullah Khan*.

In 1910 the four sons of *Ibrahim Khan*, the younger brother of *Niamat Ullah Khan*, instituted a suit against *Hamid Ullah Khan* who had succeeded *Lutf Ullah Khan*, his two wives, and *Muhammad Abdul Ghani Khan* and *Muhammad Abdur Rahman Khan*, the persons who would have been the heirs under the Hanafi law of *Mt. Munni Bibi* had she died intestate, for possession of the property transferred to *Lutf Ullah Khan* by *Mt. Munni Bibi*. They asserted title on the basis of an alleged will, dated 10th June 1906. Their suit was finally dismissed by the Court of the Judicial Commissioner under a decree, dated 13th March 1912, Ex. B-9. The suit out of which these appeals arise was filed on 20th February 1914 by *Muhammad Abdul Ghani Khan* and *Muhammad Abdur Rahman Khan* (the same persons who were defendants in the previous suit) against *Hamid Ullah Khan*, his wives, the widow of *Lutf Ullah Khan* and a certain *Pandit Sheo Dyal*. This suit was for the possession of the property over which *Mt. Munni Bibi* had reserved possession during her lifetime and which had not passed at once to *Lutf Ullah Khan* under the provisions of the deed of 7th March 1884. The case for the plaintiffs was that the succession to the estate of *Mt. Munni Bibi* was governed by the rules of Hanafi law, that they were her heirs under Hanafi law, that the property in question had not been validly transferred during the lifetime of *Mt. Munni Bibi* and that they were entitled to it. The de-

defendants set up a variety of pleas, to the effect that the law of succession of the parties, although they were converted to Mahomedanism, was the Hindu law, and that thus the property would revert in any circumstances to the family of Niamat Ullah Khan and not to the family of Mt. Munni Bibi, that Mt. Munni Bibi was a talukdar, that the property had passed by valid gift and that the plaintiffs were estopped. There were also other pleas. The learned Subordinate Judge decided all these pleas against them. He held, however, that the disposition by the deed of 7th March 1884 had the effect of a will with respect to the property in suit, and that, such being the case, the plaintiffs could only challenge its disposition with regard to two-thirds of the property. He decreed their claim with respect to two-thirds. Against this decision Fakhr Jahan Begam, defendant 2, has filed Appeal No. 85 of 1915 and Pandit Sheo Dayal has filed Appeal No. 89 of 1915. The plaintiffs-respondents have filed cross-objections.

The first point to be decided is whether the property (other than the share in Gundia) is covered by the terms of the primogeniture sanad Ex. A-1. This point was barely considered in the Court below, as nothing particular depended upon its decision at the time that the case was tried. As the law was understood at the time of the decision of the learned Subordinate Judge, the provisions of S. 15, Act 1 of 1869, applied to the property, and the terms of the primogeniture sanad would not have affected the rule of succession. Subsequently on 5th July 1915 a Bench of this Court, of which I was a member, delivered judgment in *Ghulam Abbas Khan v. Bibi Ummatul Fatima* (1). The existence of the judgment was not likely to have been brought to the notice of the learned Subordinate Judge, when he decided the present suit on 13th July 1915. In that decision I took the view that where a primogeniture sanad had been issued to a talukdar who died before Act 1 of 1869 came into force, succession to the estate would be governed by the terms of the sanad in the case of succession under a testamentary disposition. If this view were adopted the successor would have an unrestricted power of alienation. My reasons are stated at length in that decision and need not be

repeated. If my interpretation of the law be correct, Mt. Munni Bibi had a power of devise unrestricted by the provisions of the Hanafi law with regard to all the property in suit with the exception of the share in Gundia, should that property be included in the property covered by the primogeniture sanad.

It is thus of importance to ascertain whether this property was or was not included under the primogeniture sanad, and we have accordingly permitted a certified copy of the kabuliyat to be produced in evidence during the hearing of the appeal. Its production corrects the omission to produce it in the Court below. The respondents admit that they are unable to produce anything to controvert it. They contest however the allegation that the property in question is talukdari property, basing their objection on the circumstance that in Ex. A-1, the estate is called Jalalpur whereas the kabuliyat is the kabuliyat of Agar Buzurg. The property in question is included in the kabuliyat. There can be no doubt to my mind as to the fact that the sanad and the kabuliyat refer to the same property. There is no taluka of Jalalpur. There seems to have been a Jalalpur estate because in Ex. 27 we find that there was a suit between Imdad Ullah Khan, the son of Rahmat Ullah Khan, and Habib Ullah Khan and Kudrat Ullah Khan with regard to shares in the Jalalpur property. Habib Ullah Khan, Rahmat Ullah Khan, and Kudrat Ullah Khan were brothers of Ibad Ullah Khan. To that suit Ibad Ullah Khan was no party. The circumstances of that case show clearly that there was no taluka of Jalalpur. The settlement decree of Jalalpur was passed in favour of Mt. Munni Bibi on 17th April 1869, Ex. 4. But the circumstance that such a settlement decree was passed in her favour does not indicate that there was any taluka of Jalalpur. What confirms my decision that the primogeniture sanad refers to Agar Buzurg and that the description of the estate as Jalalpur is merely a clerical error is the circumstance that both in the sanad and in the kabuliyat which refers to Jalalpur the revenue is given at the same figure, i. e. Rs. 5,752.

What apparently happened was that the clerk who prepared the sanad inadvertently wrote the name of the estate as Jalalpur because Nismat Ullah Khan

lived in Jalalpur. I find therefore that the property with the exception of the share in Gundia is covered by the primogeniture *snad*, and, as Mt. Munni Bibi was according to my view a successor of her husband within the meaning of the words of the *snad* she had full power to alienate under its terms. If the matter rested there, there would be some difficulty in decision for my learned colleague does not share my view of the law upon this point. We are however in accord as to the decision of these appeals upon another point. The learned counsel for the appellants have completely abandoned the position that the personal law of this family is the Hindu law. The only alternative is that it is Hanafi law. On the assumption that the personal law is the Hanafi law the terms of the deed of 7th March 1904 must be construed. The learned Subordinate Judge regarded this deed as a will with respect to the property in suit. After considering its terms we have come to a contrary opinion. We consider this deed a deed of gift with respect to the property in suit. It is true that the lady in one place accepts the property in suit and goes on to state that after her death the donee will be the proprietor. But at the same time she states that she will have no power to transfer the property left in her possession by mortgage, sale or gift, and I read the deed as meaning that she transferred the corpus of the property in suit to Latif Ullah Khan, reserving for herself the usufruct for life.

The learned Subordinate Judge takes the point that, even if such were the case, the gift would be invalid under the Hanafi law owing to failure to deliver possession. I proceed to consider this point, which has been argued with skill on both sides. There are three essentials of a gift under the Hanafi law—declaration, acceptance, and seizin. It is clear that here we have both declaration and acceptance. The remaining point is, was there seizin within the sense contemplated by law? This subject has been treated in detail in Ameer Ali's well-known work on Mahomedan Law, Ch. 2, p. 62 et seq., Ed. 3. According to the view taken therein the delivery of possession required under the Hanafi law varies according to the nature of the property transferred, and, where the donor is only in symbolical possession, the transfer can also be symbolical

and may be effected under the terms of the deed of transfer itself. Where a donor transfers the corpus of the property retaining a usufruct for life, physical possession must necessarily remain with the donor. There is nothing in the Hanafi law to prohibit a gift of the corpus combined with the retention of the usufruct. Under the Hanafi law a limited estate cannot be created but such a transfer does not create a limited estate.

The old view which takes place in some of the illustrations of *Mulla* when must be considerably modified in the light of the more recent authoritative pronouncements on the subject. I refer in particular to the decision of their Lordships of the Privy Council in *Mahomed Hakeem Khan v. Hossein Bibi* (2), where at pp. 701 and 702 their Lordships lay down that, where everything reasonable has been done to perfect a contemplated gift, nothing more is required. In the circumstances of the case physical possession could not be given. Possession by the enjoyment of rents could not be given. It would have been difficult even to effect mutation of names for the lady would have been prejudiced in making collections from tenants if the name of Latif Ullah Khan had been entered in the revenue papers. What then could she do? The transfer of title deeds (if any) already in her possession would have been purely formal for the title was contained in the deed of transfer itself. She did this much that she covenanted in the deed not to transfer her interests in the property in question during her lifetime, and this stipulation satisfies the conditions of the law with regard to the delivery of possession. Some stress has been laid by the learned Counsel for the plaintiffs respondents upon a deposition made by the lady, Exs. A7 and B5, as showing that she was under the impression that she had only a life estate in the property.

I agree with the learned Subordinate Judge that this deposition is of no value. There the lady in one place described herself as the holder of a life-estate, and in another place described herself as absolute owner. She was apparently confused as to what her real position was at the time she made the deposition. Nothing of value can be derived from the statements therein made. It was urged by the learned Counsel for the appellants

that, even if the transfer of the property in suit was taken to be by a devise, the devise would be good as the present plaintiffs had consented thereto. As I regard the transfer to have been by a valid gift this point is unimportant. But I should refer to the facts, on which this argument is based. When a suit was brought by the sons of Ibrahim Khan, they wrote to the present plaintiff-respondents asking what position they intended to take in the case. One of them, Muhammad Abdul Ghani Khan, replied on 14th November 1910 (Ex. A 6) that he had no objection whatever to the provisions of the will, and that the then plaintiffs were at liberty to take the said property by virtue of the will. Here he was however clearly referring to the alleged will of 1808, the execution of which was found not to have been established. But in his deposition in the same case (Ex. A-5) we find him making the following statement:

"I never thought of the matter whether I am entitled to the assets of Mt. Munni Bibi or not. I disclaim a share in the property if I am entitled to it. I do not know about others."

Whether this can or cannot be held to be a valid relinquishment under Mahomedan Law is not of much importance in view of our decision as to gift, especially as it could only affect the man who made it. But in the case of the appellant Sheo Dayal, who is a transferee for value, reliance could be placed in any circumstances on the provisions of S. 41, Act 4 of 1882, for both the plaintiffs permitted Lutf Ullah Khan to enter into possession of the village transferred to him. It is to be noted that my view with regard to the effect of the sanad has no bearing on the position of Sheo Dayal because the property transferred to him was a share in Gundia which was granted by Government to Mt. Munni Bibi herself. Had she died intestate succession to that property must certainly have been governed by the Hanafi law. I have already found that she executed a valid transfer by gift of this property during her lifetime. But even had she not done so, I consider that the plaintiffs-respondents would be out of Court with respect to this property. The deed which purported to transfer it was executed in 1884. That deed was of the nature of a deed of gift, was considered by the transferee as a deed of gift, and

was utilized by him as a deed of gift. When the lady died in 1906, both the plaintiffs took no steps to oppose Lutf Ullah Khan succeeding to possession. They made no attempt whatever to assert title to the property. In subsequent proceeding, when they had an opportunity to assert title they did not do so. They permitted transfers of the property to take place, and did not assert a claim until two thirds of the period of limitation had expired. Such being the case, I consider that the provisions of S. 41, have certainly application to protect the transferee. He appears to me to have acted with due care and caution, and I fail to see what more could have been expected from him as a reasonable man. On the above findings I decree both appeals and dismiss the cross-objections. The contesting respondents will pay their own costs and those of the appellants both with regard to the appeals and the cross-objections in all Courts.

Kanhaiya Lal, A. J. C.—The dispute in this case relates to the village Mundia Miar, a 4-annas 5-pies share in the village Gundia and some land and groves in the village Jalalpur. The village Mundia Miar and the land in Jalalpur belonged to Niamat Ullah Khan, who was the talukdar of Agar Buzurg. His name was entered at No. 116 in List No. 1 and No. 47 in List No. 2 appended to Act 1 of 1869. The sanad granted to Niamat Ullah Khan was a primogeniture sanad and purported to convey to him the Jalalpur estate in the district Mohamdi, which, as the kabuliya executed by his father at the time of the summary settlement shows, was identical with the Agar Buzurg estate. The revenue of the Agar Buzurg estate, as entered in the list attached to the kabuliya, was Rupees 5,752; and that was the revenue which is described in the sanad as having been then payable by Niamat Ullah Khan. Niamat Ullah Khan lived in Jalalpur, by reason probably of which his estate was described in the sanad as the Jalalpur estate; but in the lists appended to Act 1 of 1869 it was rightly described as "Agar Buzurg." He had some share in Jalalpur too, in regard to which his widow, Mt. Munni Bibi, obtained a decree from the settlement Court on 17th April 1869, Ex. 4.

The share in the village Gundia was granted to Mt. Muni Bibi by a sanad,

dated 15th November 1876. She was the absolute owner of that share under the sanad and had a right to dispose of it in any manner she liked. On 20th May 1865 Niamat Ullah Khan bequeathed his entire estate to his wife, Mt. Munni Bibi. He died on 29th August 1867, leaving Mt. Munni Bibi surviving him. On 7th March 1884, Mt. Munni Bibi made a gift in favour of Lutf Ullah Khan, the eldest surviving brother of her deceased husband, giving him the entire estate belonging to her, with the exception of the property now in dispute, which she retained for herself for life without any power of alienation, coupled with a direction that it should revert after her death to the donee. The construction and validity of that deed of gift is one of the main points at issue in this case. Mt. Munni Bibi died on 16th June 1906. On her death possession of the disputed property was obtained by the donee, who was subsequently succeeded by his son Hamid Ullah Khan. In 1910 a suit was brought by the sons of Ibrahim Khan, another brother of Niamat Ullah Khan, claiming the estate on the strength of another will, alleged to have been executed by Mt. Munni Bibi on 10th June 1906. This suit was dismissed by this Court on 13th March 1912. After its dismissal Abdul Ghani Khan and his brother Abdur Rahman Khan filed the present suit for possession of that portion of the property, which Mt. Munni Bibi had retained for herself without any power of alienation for her life and which was to go to the donee after her death. They alleged that they were the heirs of the said lady and that Hamid Ullah Khan and the other persons who had obtained transfers from him and his father were in possession of the same without any right. They also claimed mesne profits.

The learned Subordinate Judge found that the deed of gift executed by Mt. Munni Bibi in favour of Lutf Ullah Khan operated, so far as the disputed property was concerned, as a bequest and was invalid except as to a one-third share. He decreed the claim accordingly for possession of a two-thirds share in the said property with the mesne profits appertaining to that share. It has been argued on behalf of the contesting defendants that by virtue of the bequest made by her husband, Mt. Munni Bibi had obtained

only a life-interest in the property bequeathed; but the terms of the bequest clearly conveyed to Mt. Munni Bibi full proprietary rights in the manor possessed by the testator (*malik wa mukhtar mist zat khas mire ke begi*). On behalf of the plaintiffs it is contended that the village Mundia Mier did not form part of the Agar Buzurg estate and was not affected by the primogeniture sanad granted to Niamat Ullah Khan. But the *kabuliyat* of the Agar Buzurg estate, which was inadvertently described as the estate of Jalalpur in the sanad, includes and refutes that contention. In the list appended to Act I of 1869, no estate, known as the estate of Jalalpur, is entered as having been held by Niamat Ullah Khan, and the identity of the property comprised in the sanad with that entered in the *kabuliyat* cannot therefore be disputed. The main point for consideration is whether Mt. Munni Bibi made a gift or a bequest of the disputed property in favour of Lutf Ullah Khan and whether that gift or bequest was valid or not.

The family to which Niamat Ullah Khan belonged was a family of Abhan Thakurs, converted to Mahomedanism. It was at one time asserted that the family was governed by the Mitakshara school of the Hindu law, but the finding of the learned Subordinate Judge is against it and that contention is no longer pressed in appeal. It is conceded that the succession to the estate of Mt. Munni Bibi is not governed by Act I of 1869, inasmuch as the estate had vested in her before that Act came into force. Her name was entered in the lists, and it is unquestionable that if there was no valid gift or bequest in favour of Lutf Ullah Khan, the plaintiffs would be her heirs under Mahomedan law, because as held by me in *Ghulam Abbas Khan v. Bibi Ummatul Fatima* (1) and by this Court in *Thakur Sital Singh v. Thakur Sital Bakhsh Singh* (3) and *Mt. Balraj Kuer v. Mahadeo Pal Singh* (4) the rule of succession laid down in the sanad would not apply to her, as she was not a successor, that is, a person deriving title by inheritance within the meaning of that sanad. The reasons in favour of that view, based largely on the context and contemporaneous exposition, have been discussed at length in those cases and need not be recapitulated here. The vali-

3. (1917) 40 I C 469.

4. (1917) 20 O O 260=44 I C 59.

dity of the deed of gift or bequest so far as it relates to the disputed property, depends entirely on how far it complies with the provisions of the Mahomedan law bearing on the point. After referring to the will executed by Niamat Ullah Khan, her husband, the testator goes on to say:

"Now in sound health and full possession of my senses without any persuasion or compulsion and of my own accord I have gifted my moveable property, all my zamindari and landwardri estate, etc., to Muhammad Latif Ullah Khan, son of Mahmood Latif Ullah Khan, the brother of my husband, according to the details given below with the exception of the villages and sir land, etc., set out below, name by name which will remain in my possession for the duration of my life and my dependent relatives (sic) free of rent and Government revenue, out of the aforesaid estate. At this time having exempted them I have made a gift and by virtue of this deed have authorized the donee to get mutation of names in his favour, and now I have nothing to do with the estate and property gifted, and such villages and sir land aforesaid, as have been at this time for the duration of my life excepted (left out), will be kept by me without transfer by mortgage or sale or gift for my lifetime, and after my death the donee will be the proprietor (malik) of the aforesaid excepted property; and of the excepted property the donee will pay the revenue from the Habs except of the Patti Mung Gaudia. Of the Patti Gaudia, I will pay the revenue from my own pocket, and the donee will pay all the debts outstanding against the estate. I have nothing to do with them. Therefore, these few words have been written by way of a deed of gift of inheritance and proprietorship on a stamp of Rs. 600-8-0 on a stated value of Rs. 7,000 as a title-deed which will be useful at the time of need."

Then follows a detail of the immovable property gifted in Parganas Bhur and Palla and another detail of "the property excepted", which is described as the village Mundia Misr, standing in the name of the donor for her life without any liability for the payment of the revenue, and the other property now in dispute.

The language of the deed is very inartistic. At one place it seems to suggest that the property described in the second list was excluded from the gift, while at another place it suggests that it was only excepted from the possession of the donee for the lifetime of the donor and that all that the donor retained was dominion over the usufruct or possession for life without any power of transfer by sale, mortgage or gift, with an ultimate reversion on after her death, if reversion it can be called, in favour of the donee. Read as a whole, the document leaves little room for doubt that though the disputed

property was described as "excepted," it was only excepted from the possession of the donee for the lifetime of the donor and that the donee was to be owner thereof subject to the right of the donor to enjoy the usufruct for her life. The restriction placed by the donor on her power of transfer by mortgage, sale or gift can have otherwise no significance. The reference in two different places to the property having been excepted "at this time" (is waqt) also indicates that the exception was intended to be temporary or for a definite terminable period, and it is significant that the revenue on the "excepted property" other than the share in the village Gaudia was made payable by the donee from the date of the gift. An intention to convey the corpus of the estate to the donee from the date of the gift, subject to the right of the donor to remain in possession for her life without any power of transfer by mortgage, sale or gift, is thus manifest.

Under the Hanafi law such conditions are invalid as render the gift nugatory or defeat its very purpose. But as pointed out by Syed Ameer Ali,

"an analytical examination of the principles with due regard to the main purpose of the Mussalman law shows that where the intention is clear to transfer the entire right of property in the corpus of the gift, a mere reservation of interest in its rents and issues, or any profit accruing therefrom or a subordinate share in its enjoyment, does not affect the validity. (Ameer Ali's Mahomedan Law, Vol. 1, Edn. 4, p. 186)."

It was accordingly held by their Lordships of the Privy Council in *Nawab Umjad Ally Khan v. Mt. Mohumdee Begum* (5) that a gift inter vivos of Government promissory notes by a father to his only son, accompanied by a delivery of possession and a transfer into the son's name, without any reservation of the dominion over the corpus by the donor, except a stipulation for the right to the accruing interest on the notes during the donor's life, to be applied by him to certain religious and charitable purposes, was a valid gift according to the Mahomedan law. Their Lordships were dealing there with a case governed by the Shia law, but the authority on which they relied was the Hedaya, in which an objection that a participation of property in the thing given invalidates the gift was answered as follows:

"The donor is subjected to a participation in a thing which is not the subject of his grant,

namely, the use (of the whole indivisible article), for his gift related to the substance of the article, not to the use of it" Hamilton's *Heda* a by Grady p. 483

Discussing this decision, Syed Ameer Ali observes:

"This decision may, at first sight, seem to be in conflict with the doctrine of the Hanafi lawyer, Abul Kadir-as-Saffar, but it must be borne in mind that, in the Hanafi law, much of the voidableness of conditions arises from the character of the Arabic expressions. As a general rule it may be stated that, where the intention to make an absolute transfer in present of all proprietary right is clear, any condition which derogates from the immediate completeness of the gift is regarded as void. Where the condition, however, may be given effect to without in any way interfering with or detracting from the immediate completeness of the gift, or rather the immediate transfer of the right in the substance of the gift, the condition as well as the gift are valid. If a man were to give absolutely his property to another and place the donor in possession thereof so far as its name stands to him the language of the Muslim and Andalus, with the condition that the whole or a portion of the income should be given to him, the donor, or to anybody else during his lifetime, now a reservation or condition would not prevent the property vesting immediately in the donee. The condition, therefore, would be valid. So also, if a person were to make a gift away of to the donee paying the donor's debts, and place the donee in possession of the subject-matter of the gift, the condition would be valid. Or, if a donor were to make a condition that the donee should give a part of the income or pay an amount to his heirs in perpetuity, and give effect to the condition by transferring the subject thereof to the foundation of the donee, as the condition in no way interferes with the completeness of the gift, both the gift and the condition would become operative in law". Ameer Ali's *Mahomedan Law* (2nd Ed., Vol. I, pp. 198 and 199.

Any reservation of proprietary rights in the corpus would be inconsistent with an intention to make a gift, but the reservation of a right to the usufruct of a portion of the property given would not be inconsistent, if the intention to give the corpus be otherwise manifest. And would it make any difference if the usufruct was received directly by the donor and not through the donee, for as pointed out by their Lordships of the Privy Council in *Baqar Ali Khan v. Anjuman Ara Begam* (6) the substance and not the form should be looked to. The decisions in *Mahomed Buksh Khan v. Hosseini Bibi* (2) and *Chaudhri Mehdi Hasan v. Mahomed Hasan* (7) establish that a donor should give such possession as the nature of the property or interest given admits of. If

the property given includes a portion over which the donor wants to retain his or her possession for a definite time, it would be unreasonable to hold that he or she should deprive herself of the possession of that portion before the gift can be validated. To require her to withdraw her possession forthwith is to compel her to give more than what she intended to give or in other words, to disqualify her from retaining anything for herself though it may fall short of proprietary rights. Her possession, as long as the rights so reserved are exercised, is virtually possession on behalf of the owner, for a donor would refuse to accept a gift burdened with such a condition, if he did not assent to it. Assuming, however, that the gift so far as it related to the disputed property is inoperative, the disposition can in any event be upheld as bequest, if the intention of the testator be deemed to have been that the property should go to Lutf Ullah Khan in the event of his surviving her. The consent of heirs validates a bequest in excess of a one-third share. Lutf Ullah Khan survived Mt. Munni Bibi and got possession of the disputed property on her death without any question having been raised as to his title by the present plaintiff. When the sons of Ibrahim Khan determined to file a suit for the estate of Mt. Munni Bibi on the strength of a will alleged to have been executed by her, they consulted the present plaintiff, one of whom, Abdul Ghani Khan, wrote in reply

"After prayers for your long life I have to tell you that with regard to the property left and possessed by sister Munni Bibi deceased, wife of Nizam Ullah Khan, Talukdar and Rais of Jalalpur, about which you have made inquiries, I have no objection whatsoever to the provisions of her will. You are at liberty to take the said property by virtue of the will, either by means of a suit or any other way possible. I have no objection at all. You can take steps with pleasure. Dear Muhammad Abdur Rahman Khan, may God protect him, also holds the same opinion. I have inquired from him."

(Ex. A-6). This letter was sent on 14th November 1910. In the course of the suit which was subsequently filed, this letter was produced and Abdul Ghani Khan was examined as a witness on behalf of the sons of Ibrahim Khan. He then admitted having sent the above letter with the permission of Abdur Rahman Khan, who, he said, was joint with him, and further stated, on being cross-examined,

6. (105) 25 All 236=30 I A 91 (P C).

7. (1906) 9 O C 196=28 All 439=33 I A 65 (P C).

"I never thought of the matter whether I am entitled to the estate of Mt. Munni Bibi are not. I disclaim a share in the property, if I am entitled to it (Ex. B 8)."

The heirs of Lutf Ullah Khan were parties to that suit, and it is significant that no claim was then set up by either of the present plaintiffs in that suit or any written statement filed in assertion of the title which they now seek to enforce. The express disclaimer of Abdur Ghani Khan and the conduct of Abdur Rahman Khan in allowing the donee and his heirs to obtain and retain possession and in not asserting any title in himself when a claim was made by others to the estate, show that they felt no concern and have acquiesced in the property going either to the sons of Ibrahim Khan under the will set up by them or to the heirs of Lutf Ullah Khan under the gift or bequest, whatever it may be called, which Mt. Munni Bibi had made in favour of Lutf Ullah Khan. The consent or acquiescence of heirs is treated as a ratification by the heirs of the conduct of the testator and, as pointed out in *Daulatram Khushalchand v. Abdul Kalam Nuradin* (8), it may be express or be implied from unequivocal conduct such as has been proved in this case (Ameer Ali's Mahomedan law, Edn. 4, Vol. 1, p. 590). It is contended on behalf of the plaintiffs that the statement in the deed of gift by the donor that after her death "the donee will be the proprietor of the aforesaid exempted property" does not amount to a testamentary disposition. But it is difficult to say what other meaning can be assigned to it, if the words preceding be treated as excluding the disputed property from the gift altogether.

Lutf Ullah Khan and his heirs have, moreover, been holding the property in dispute as ostensible owners since at least 1906 and if the circumstances set forth be accepted as sufficient evidence of the disclaimer, consent or acquiescence of the present plaintiffs, their claim as against the transferees of Lutf Ullah Khan and his son Hamid Ullah Khan would be barred by S. 41, T. P. Act. The earliest transaction was one of a mortgage made in 1907, and another transaction took place thereafter by which the transferees were placed in possession of the property transferred. A person who has disclaimed a title cannot be allowed to set it up

afterwards to the prejudice of third parties, who have purchased the property from the ostensible owner in good faith and for value. The letter and the deposition of Abdur Ghani Khan above referred to show that the attitude taken up by both the plaintiffs was identical. The defendants-appellants ought, therefore, to succeed. Their appeals are accordingly allowed with costs here and below and the suit of the plaintiffs dismissed with costs throughout. The cross-objections filed by the plaintiffs will be dismissed with costs.

B.V./R.K.

Appeal allowed.

A. I. R. 1918 Oudh 364

LINDSAY, J. C. AND KANHAIYA LAL,
A. J. C.

Sheoraj Bahadur Singh—Defendant
—Appellant.

v.

Gajadhar Singh and another—
Plaintiffs—Defendants—Respondents.

Miscellaneous Civil Appeal No. 23 of 1917, Decided on 10th July 1917, against the order of Addl. Sub-Judge, Fyzabad, D/- 21st February 1917.

Mortgage—Decree for redemption—Decree defective—Subsequent suit for redemption is barred.

A decree for redemption once obtained bars a subsequent suit for redemption, although the decree be defective in so far as it neither fixes any definite time for payment of the mortgage money nor provides for the consequences of non-payment. 14 O. C. 227, G. O. C. 367, Folio 6 O. C. 239; 8 O. C. 361. *Dist.* [P 365 C 2]

A. P. Sen—for Appellant.

Bisheshwar Nath Srivastava, Lachman Prasad Varma and Daya Kishen Seth—
for Respondents.

Judgment.—This appeal arises out of a suit for redemption in respect of a mortgage executed by Kanhaiya Bakhsh Singh in favour of Balwant Singh, the father of the defendant appellant, on 12th April 1882. In 1885, Kanhaiya Bakhsh Singh filed a suit for the redemption of that mortgage and got a decree, allowing him to redeem the mortgage on paying Rs. 43 on or before a certain date. The mortgagee appealed and succeeded in getting the mortgage money payable to him raised to Rs. 100. Kanhaiya Bakhsh Singh then appealed to this Court, with the result that on February 1886 a decree was passed by this Court in accordance with a compromise by which it was provided that

"when after three years the mortgagor redeems the property in suit, he shall pay Rs. 100 and if Balwant Singh, the second mortgagee, may pay Rs. 43 to Panchos Murari and Arjun Singh, the first mortgagees then the mortgagor should pay Rs. 57, the remaining sum after deducting Rs. 43, to the mortgagee Balwant Singh, and if Balwant Singh may not pay Rs. 43 to the first mortgagees then Kanhaiya Bakhsh Singh, mortgagor, should pay Rs. 43 to the first mortgagees and Rs. 57 to Balwant Singh."

Kanhaiya Bakhsh Singh did not, however, pay the mortgage money, as directed by the decree. The decree contained no direction that in case of non-payment the mortgagee shall be entitled to bring the mortgaged property to sale. Kanhaiya Bakhsh Singh died, and was, according to the plaintiff, succeeded by Ram Prasad Singh. On the 28th March 1905 Bhagwant Singh and Ram Singh instituted a suit for redemption of the mortgage, alleging that they were the heirs of Ram Prasad Singh and further stating that Kanhaiya Bakhsh Singh had made a will in favour of Gajadhar Singh and that the latter had executed a deed of gift in favour of Bhagwant Singh, one of the then plaintiffs. Ram Singh subsequently withdrew from the claim and Bhagwant Singh gave up the right which he asserted under a deed of gift from Gajadhar Singh. The suit of Bhagwant Singh was eventually dismissed, on the ground that he was not proved to be an heir of Ram Prasad Singh. The present suit was then filed by Gajadhar Singh for the redemption of the same mortgage. His allegation was that he was the heir of Ram Prasad Singh and was also in possession of certain property left by him under a will, dated 19th October 1899. In regard to the deed of gift executed by him in favour of Bhagwant Singh, his statement was that Bhagwant Singh had relinquished his rights under the gift in his favour. The Court of first instance dismissed the suit, holding that the claim was barred by reason of the dismissal of the previous suits. The lower appellate Court gave a decree and remanded the suit to the Court of first instance for disposal on the merits.

The decree passed in the suit filed by Kanhaiya Bakhsh Singh was obviously not a decree passed in accordance with S. 92, T. P. Act then in force, for it did not fix any definite time for the payment of the mortgage money and contained no provision declaring that if such payment was not made on or

before the date fixed, the mortgaged property shall be sold in satisfaction of the mortgage money. But all the same it was an effective decree, giving the then plaintiff, Kanhaiya Bakhsh Singh, a right to redeem the mortgage after three years on payment of a definite sum of money. It was capable of execution, and if Kanhaiya Bakhsh Singh failed to enforce it within the time allowed by law, his remedy became barred by time. The matter is concluded by the decision of this Court in *Bhola Singh v. Jai Gohind* (1), which followed a previous decision in *Ram Dyal v. Raja Rampal Singh* (2), and a second suit for redemption is not, therefore, maintainable. The decree was not of a declaratory nature and the decisions in *Gur Pershad v. Rattan Singh* (3) and *Lajja Parbati Bahadur Singh v. Raji Surat Singh* (4), do not apply, because the terms of the settlement decrees passed in those cases were not similar. The decree also did not constitute a new mortgage. The effect of the compromise merely was to postpone redemption for three years and give the mortgagor a right to redeem after the expiry of that period. In *Narayan Gurud v. Anand Ram Kojiram* (5), it was held that a decree for redemption, giving no fixed time for payment, could be executed at any time by paying the mortgage money within the time usually allowed for an application for execution. The appeal is, therefore, allowed and the suit dismissed with costs throughout.

B. V. (B. K.)

Appeal allowed.

1. (1917) 14 O.C. 257 = 12 I.C. 993.
2. (1903) 6 O.C. 267.
3. (1903) 6 O.C. 239.
4. (1905) 8 O.C. 261.
5. (1932) 16 Bom. 480.

A. I. R. 1918 Oudh 365

LINDSAY, J. C. AND DANIELS, A. J. C.

Ram Harakh — Defendant — Appellant.

v.

Ambika Dutt Ram — Plaintiff — Respondent.

Second Appeal No. 107 of 1918, Decided on 4th June 1918, from decree of Dist. Judge, Gonda, D/- 23rd January 1918.

(a) Landlord and Tenant—Tenant occupying house in abadi—Presumption is that he holds site as appurtenant to tenancy—Site

cannot be retained on determination of tenancy.

Where a tenant is found in occupation of a house in the abadi of an agricultural village, the village site being the landlord's property, there is a presumption that he holds the site as appurtenant to his tenancy and has no right to retain it against the wish of the landlord on ceasing to be a tenant in the village: *SO 1 C 782 Foll.* [1906 C 1, 2]

(b) **Landlord and Tenant—Suit for ejectment of tenant from abadi site—Landlord must prove cessation of interest in village entitling him to retain site.**

Where a landlord sues to eject a tenant from a house in the abadi of an agricultural village, he must establish his right to eject the latter by showing that the latter has ceased to retain any interest in the village entitling him to retain the site.

Gokaran Nath Misra, Ishwari Prasad and Harkaran Nath Misra—for Appellant.

Pattoo Lal—for Respondent.

Judgment.—This was a suit for the ejectment of the defendant from the site of a kachcha house and a cattle shed in the village of Kurcha, Kasimpur with permission to remove the materials. The plaintiff, the Taluqdar of Singha Chanda, is the proprietor of the entire village while the defendant appellant was a tenant in the village. The plaintiff's allegation was that the defendant was allowed to occupy the house in the capacity of the plaintiff's tenant, that the defendant has now been ejected from his entire holding, that he was asked by the plaintiff to vacate the site of the house and remove the materials but did not do so, and that he was liable to ejectment. The defendant replied that he and his predecessors had occupied the house and cattle shed for several generations, that it was not appurtenant to the tenancy, and that while it was true that he had been ejected from his cultivatory holding, he still held some grove land in the village and some further land as sub tenant, for all these reasons he was not liable to ejectment.

On the case coming into Court neither party produced any evidence. The learned Munsif, following the law as laid down by Sir George Knox in the well known case of *Shohrat Singh v. Jhagru* (1), held that there is in cases like this, where a tenant is found in occupation of a house in the abadi of an agricultural village, the village site being the landlord's property, a presumption that he holds the site as appurtenant to his tenancy and

has no right to retain it against the wish of the landlord on ceasing to be a tenant in the village. The learned Munsif placed on defendant the burden of proving that he still retained any interest in the village sufficient to enable him to resist ejectment and, as no evidence was produced, decided against him. The learned Munsif accordingly decreed the suit allowing three months' time for removal of the materials. This decision was upheld in appeal by the learned District Judge. In second appeal the defendant contends, as he contended in the Court below, first, that the decision in *Shohrat Singh v. Jhagru* (1) is wrong and should not be followed, but that the plaintiff should be required to prove by definite evidence that the site was originally occupied as appurtenant to the holding, second, that it certainly lay on the plaintiff to show that the defendant had become liable to ejectment by ceasing to have any status in the village and that the Courts below were wrong in placing the burden of proof on this point on the defendant.

He asked us that issues might be remitted on both these matters. On issue I, we see no reason to differ from the law as laid down in *Shohrat Singh v. Jhagru* (1) by a Judge whose knowledge of the conditions of agricultural life in these provinces is probably unequalled. On the contrary we think that this ruling represents the generally accepted law alike in Agra and in Oudh, and the reason that the case law on the subject is so scanty is mainly that the law is so well understood that it has rarely occurred to any one to dispute it. We have been treated to a disquisition on the origin of zamindari rights and it has been pressed on us that zamindars were in most cases originally mere farmers of revenue. Historically this may be true but in the present day there is no question that the zamindar's position is that of proprietor subject only to his liability to pay Government revenue, and that his proprietorship extends just as fully to the village site as to any other portion of the village area.

No person can occupy any part of the village site except by his permission or acquiescence, and such permission is normally only given either to a tenant or to a person having some definite position or duty in the village; and in the case of a tenant it is an implied condition of the

permission that the right of occupation is co-extensive with the continuance of the tenancy. The presumption made by Sir George Knox is simply the presumption of S. 114, Evidence Act, that the usual course of conduct has been followed in a particular instance. In this view of the law, even if the tenant be regarded as a licensee, S. 60, Easements Act, which has been pleaded before us, ceases to have any application. The license was a limited license and ceases to be in force in accordance with S. 62 (c) as soon as the licensee ceases to be a tenant. *Shohrat Singh v. Jhagra* (1) has been followed by Sir Edward Chamier, another Judge of exceptional experience, in *Mt. Phul Bibi v. Zahur Ali* (2). It has also been followed by the senior member of this Bench in Second Civil Appeal No. 259 of 1917, decided on 3rd January 1918 [*Gharrara v. Sardar Karam Singh* (3)]. A very similar view was taken by Stanley, C. J., and Burkill, J., in an earlier case, *Nozair Hosan v. Shibli* (4). The learned Judges say:

"It is admitted, and appears to be undoubtedly the rule in these provinces, that a tenant is given a right of house in the abadi to live in during the existence of this tenancy."

In the particular case before them their Lordships dismissed the suit on the ground that the either the defendants had acquired title by adverse possession or that held the house or room in dispute as appurtenant to their tenancy, which at the time of the suit was still subsisting. This ruling was subsequently followed in *Dubri Lal v. Dholu Rai* (5). In *Net Ram v. Tej Ram* (6) a piece of land in the abadi used for cattle and for storing manure was held to be an appurtenance to the tenancy. In none of these cases was the plaintiff required to prove the fact by direct evidence. To require him to do so would be obviously in most cases to throw on him an impossible burden. On the second issue we think that the appellant is right. It was for the plaintiff to establish his right to eject the defendant by showing that the latter had ceased to retain any interest in the village entitling him to retain the site of his house. Mere cultivation as sub-tenant would not, we think, be such an interest,

but a grove-holder is a quasi tenant who is by custom ordinarily not liable to eviction so long as the land he occupies retains the character of a grove. As the plaintiff was misled by the term in which the issue was framed, we remit an issue under O. 41, R. 25. Does the defendant retain any grove-land in the village and, if so, of whom does he hold it and on what terms? On receipt of the findings which should be submitted within six weeks, ten days will be allowed for objections.

Issue remitted.

Final Order.

Lindsay, J. C. and Kanhaiya Lal, J. C., (13th September 1918).—By an order of a bench of this Court dated 4th June last, an issue was remitted to the Court of the District Judge, the object being to ascertain whether or not the defendant appellant here retained any grove-land in the village and whether, if he did so, he was liable to be ejected from his house. The suit as brought was a suit for the ejectment of the defendant appellant from his house in the village on the ground that he had been ejected from his holding and had no longer any connexion with the village. The learned Judge after remand received evidence on both sides and came to the conclusion that the defendant-appellant failed to prove that he still had in his possession any grove-land in the village. The case came up before us a few days ago and as then appeared that the learned District Judge had misread one of the entries in the village papers, we thought it desirable to allow the defendant-appellant an opportunity of putting in another piece of documentary evidence in order to explain the entry which had been misconstrued. Mr. Dewhurst, seeing the figures 1306 in one of the entries, seems to have been of opinion that these related to the date of the defendant-appellant's occupation of the particular plot described, whereas it appeared to us that the No. 1306 refers back to an earlier number in the Settlement Khasra. We have now had a copy of the entry relating to No. 1306 of the Settlement Khasra placed before us. The result of the documentary evidence on the record appears to us to be this: At the time of the last Settlement this defendant-appellant was in possession of a holding in this village. It is admitted that he has been ejected by a

2. (1915) 28 I C 843.

3. (1918) 47 I C 645.

4. (1905) 27 All 81.

5. (1906) 3 A L J 619.

6. (1913) 20 I C 260.

notice which was issued for the year 1324 Fasli. It is admitted that when the notice of ejectment was issued it did not relate to a plot 1373/3. According to the Kasra of the year 1323 Fasli, the defendant-appellant is still in possession of this plot which is shown as a grove, and it is further to be noticed that this number seems to have been a part of the agricultural holding as it stood at the time of the last Settlement. It seems to us, therefore, that the situation is this, namely, that the defendant-appellant has converted a portion of his holding into a grove and that the landlord, when he took ejectment proceedings against the appellant, either negligently or designedly abstained from issuing a notice of ejectment with regard to this plot now described as a grove and the result, therefore, is that the defendant-appellant is shown by the evidence on the record to be in possession of a grove plot. If he is in there either through the negligence of the Talukdar to eject him or because the Talukdar has not thought fit to eject him, then it seems to us, that the Talukdar is not in a position to say that this man Ram Hirakh has lost all connexion with the village and is, therefore, liable to be turned out of his house. The result, therefore, is that we hold that it is not shown that the defendant-appellant ceased to have any connexion with the village, and consequently he is not liable to be turned out of his house. We allow the appeal, set aside the decree of the lower appellate Court and dismiss the plaintiff's claim with costs to the defendant-appellant in all three Courts.

R.V./R.K.

*Appeal allowed.***A. I. R. 1918 Oudh 368**

LINDSAY, J. C.

Dwarka Prasad — Plaintiff — Appellant.

v.

Prithipal Singh and another—Defendants—Respondents.

Second Appeal No. 161 of 1917, Decided on 16th January 1918, from decree of Dist. Judge, Sitapur, D/- 26th March 1917.

(a) *Hindu Law — Alienation — Widow — Loan advanced for necessity—Lender need not enquire of nature of necessity.*

Where a loan is advanced to a Hindu widow for legal necessity, the lender is not bound to ascertain how the necessity for the loan was brought about. Even if it is found that the neces-

sity arose owing to the mismanagement of the estate by the widow the lender is entitled to recover the loan, unless it is shown that he acted mala fide. [P 369 C 2]

Where the necessity for the loan is apparent, the lender is not required to make any particular inquiry about it. [P 369 C 1, 2]

(b) *Hindu Law—Alienation—Widow—Interest—Loan for legal necessity—High rate of interest should not be allowed.*

A creditor who advances money to a Hindu widow for legal necessity at a high rate of interest is not entitled to recover interest at that rate, unless he explains why that rate was fixed. In such cases the creditor should be allowed a reasonable rate of interest. [P 370 C 2]

A. P. Sen—for Appellant.

Gokaran Nath Misra—for Respondents.

Judgment.—The suit out of which this appeal has arisen was brought by the plaintiff-appellant Dwarka Prasad to enforce a mortgage executed in his favour by a lady, named Mt. Kailas Kuar. This lady was the widow of one Ram Bakhsh deceased. She has died and Ram Bakhsh's property has descended to the two defendants Prithipal Singh and Jadu Nath Singh, who were the reversioners. The mortgage was executed on 9th March 1911 in favour of the plaintiff to secure a loan of Rs. 900. The plaintiff claimed that the mortgage debt was a charge upon the property in the hands of the defendants and that the defendants were bound to satisfy the same. Various defences were raised. It was alleged that the deed had not been executed by Mt. Kailas Kuar. It was also pleaded that even if it had been executed by her, she did not understand the purport of the deed; and lastly it was pleaded that in any case there was no legal necessity for the loan advanced to Mt. Kailas Kuar. We are no longer concerned with any question of the execution of the deed. It has been proved, and is now admitted, that Mt. Kailas Kuar did execute the deed in the plaintiff's favour and it has also been found, and the finding is not disputed, that Kailas Kuar, when she executed the deed of mortgage, knew what she was about. The only question which I have to determine is whether in the circumstances disclosed the plaintiff was entitled to recover. The Court of first instance found that the deed had been executed for legal necessity and that the plaintiff was entitled to a decree. This decision has been reversed in appeal by the District Judge. The view taken by

the learned Judge was that there was really no necessity for Mt. Kailas Kuar to borrow this money from the plaintiff.

According to the Judge, Mt. Kailas Kuar had been left in possession of a comfortable estate which brought in a considerable income, that there was no excuse for her incurring the debt and that consequently the defendants, who are the reversioners, were not responsible for any money which Mt. Kailas Kuar had borrowed from the plaintiff. In order to determine this question of legal necessity we have to look to the facts as disclosed by the evidence and there is no difficulty whatever in ascertaining the purpose for which the money was borrowed. It is admitted that defendant 1, in this case Prithipal Singh, was the lambardar of the whole of the property in which Kailas Kuar's husband had a share. It is proved that at or about the time when this money was borrowed Prithipal Singh was temporarily of unsound mind and that his wife Mt. Raj Kuar had been appointed his guardian. It is admitted that prior to the execution of the deed Mt. Raj Kuar had obtained a decree against Mt. Kailas Kuar for arrears of revenue and that this decree was outstanding at the time the money was borrowed from the plaintiff. It is further admitted that at the date of the deed further arrears of revenue were owing from Mt. Kailas Kuar and that for the purpose of realising these arrears Mt. Raj Kuar, as the guardian of her husband the lambardar, had applied to the Deputy Commissioner for attachment of Mt. Kailas Kuar's property in order that the demand for the arrears of revenue might be satisfied. It is proved that after the execution of this deed the plaintiff himself deposited in Court the money which was required to satisfy the decree. It is also proved that he deposited in the Court of the Deputy Commissioner the other sum which was owing for revenue and in respect of which Mt. Kailas Kuar's share in the property had been attached. As a result of these payments the decree was discharged and Kailas Kuar's property was released.

In these circumstances there can, I think, be no doubt that the plaintiff has succeeded in establishing that at the time this money was advanced to Mt. Kailas

Kuar there was a legal necessity for the loan. The observations of the learned Judge in his judgment regarding the circumstances in which Mt. Kailas Kuar appears to have been extravagant and to have mismanaged the estate of her husband all appear to me to be beside the mark in dealing with the present claim. The plaintiff is a person who lent money to a widow in possession of her husband's estate; and in those circumstances, unless it is shown that he acted mala fide, he cannot be affected by any mismanagement on the part of the widow, although it may be possible to say that with better management the estate might have been kept free of debt. It is not suggested in any way that the plaintiff here encouraged Mt. Kailas Kuar in her extravagance, if she was guilty of any. Indeed there is nothing at all to show that the plaintiff had any reason to suppose that Mt. Kailas Kuar had been living beyond her means. It seems to me, therefore, that the decision of the learned Judge is wrong. Whether it be the case or not that Mt. Kailas Kuar was living beyond her means, that is not a circumstance which can, in my opinion, affect the rights of the plaintiff. In order to entitle the plaintiff to recover it was for him to show that he had inquired into the necessity for the loan and had satisfied himself, as well as he could, that the lady was acting in the particular instance for the benefit of the estate, or at least that he was led on reasonable ground to believe that there was necessity for the alienation. It has been pointed out on behalf of the respondents here that the plaintiff did not go into the witness box and that there is no direct evidence that he made such inquiry as the law demands. That is true.

On the other hand, there is some evidence to show that representations were made to the plaintiff by the lady's brother who was acting as her general attorney. This man admits that he negotiated the loan on behalf of the lady; and it is idle to suppose that the money was advanced without some inquiry being made. After all it is difficult to see what necessity there could have been for any particular inquiry in the matter for there can be no doubt that an unsatisfied decree was in existence at the time and that

there can equally be no doubt that the plaintiff must have been made aware of the fact that the estate in the hands of the widow had been or was about to be attached by the Deputy Commissioner for arrears of revenue. The necessity for the loan was apparent and indeed the defendants here are hardly in a position to raise the question at all, when we find that one of them was the lambardar and that it was his action in enforcing his claim to recover arrears of revenue which was the immediate cause of the loan being taken. The defendants can certainly not be heard to say that they did not receive these moneys direct from the plaintiff and that the sums were not due on account of arrears of revenue for which Mt. Kailas Kuar's estate was liable. It certainly is not the law that the lender is bound to ascertain how the necessity for the loan was brought about; and in the absence of any allegation or proof of bad faith on the part of the plaintiff it seems to me that, on the law as laid down in the well-known case of *Hunoomanpersaud Panday* (1) the plaintiff was entitled to recover.

According to the judgment of the learned Subordinate Judge out of the sum of Rs. 900 mentioned in the deed Rupees 864-7-3 were actually paid by the plaintiff himself to the lambardar or his representative on account of arrears. The other small sum of Rs. 35 odd seems to have been absorbed principally in the costs of the execution and registration of the deed. As the learned Judge observes, this small sum is negligible for the purpose of this claim. I hold, therefore, that the plaintiff is entitled to recover this sum of Rs. 900. There only remains for consideration another point, namely, the rate of interest to be awarded to the plaintiff. It was pleaded in the written statement that the rate of interest was exorbitant and should in any case be reduced. The learned Subordinate Judge overruled this objection and held that the plaintiff was entitled to recover interest at the stipulated rate. The learned Judge in view of his other findings did not touch this question. He merely remarks that it was admitted by the plaintiff, who was the respondent before him, that the high rate of interest was partly due to famine conditions and partly also to the fact that the loan to the widow was a risky proceeding.

1. (1854-57) 6 M I A 393 (P C).

The plaintiff himself did not go into the witness-box to explain the circumstances in which the rate of interest was fixed at 24 per cent. per annum, compoundable with yearly rests. No doubt the law on the subject of reducing the interest provided by a contract has been laid down in a long series of authorities. The general principle is that unless it can be shown that the plaintiff exercised undue influence within the meaning of that expression as defined in S. 16, Contract Act, interest can be recovered at the full rate. It seems to me, however, that this general proposition is subject to certain exceptions, and my attention has been drawn to a ruling of their Lordships of the Privy Council which is to be found reported as *Hurro Nath Rai Chowdhri v. Randhir Singh* (2). That was also a case in which a creditor brought a suit against the reversioners to recover a sum which had been advanced by him to a Hindu widow while in possession. The bonds in the case before their Lordships stipulated for interest at the rate of 18 per cent. per annum. The learned Judges of the High Court held that the plaintiff was not entitled to this high rate of interest, which they reduced to 12 per cent. Before their Lordships the objection was taken that the High Court ought not to have reduced the rate. As to this, the observations of their Lordships are to be found at p. 315 of the report. They are as follows:

"Then comes the question—Was 12 per cent. a sufficient rate of interest? The widow was borrowing in a case of necessity. It was for the plaintiff to see whether there was really and fairly a ground of necessity. Was there a necessity to borrow at the rate of 18 per cent? That is a question to which he ought to have applied his mind and if it were unreasonable to suppose that the widow could not borrow the money at a less amount than 18 per cent. he ought not to have charged her at that rate."

It seems to me, therefore, that in view of these observations of their Lordships it was for the plaintiff to explain why he had fixed the rate at 24 per cent. per annum compound interest. As the plaintiff did not go into the witness-box to give his reasons why this rate was fixed, I consider myself entitled, in accordance with what is laid down in this judgment, to reduce the rate to the rate allowed by their Lordships, namely, 12 per cent. The result is that I allow the appeal and give the plaintiff a decree of Rs. 900 with

2. (1831) 15 Cal 211=18 I A 1 (C C).

simple interest at the rate of 12 per cent. The usual sale decree will be prepared and the period allowed for payment will be six months from the date of this Court's decree. The plaintiff is entitled to his costs both here and in the Court below.

B.V./R.K. *Appeal partly allowed.*

A I. R. 1918 Oudh 371

STUART AND KANHAIYA LAL, A. J. CS.

Har Bahadur Lal—Defendant—Appellant.

v.

Chand Raj Bahadur and another—Plaintiff and Defendants—Respondents.

First Appeal No. 37 of 1917, Decided on 11th September 1918, from decree of Addl. Sub-Judge, Lucknow, D/-17th February 1917.

(a) Evidence Act (1872), Ss. 32 (6), 158 and 159—Horoscope is admissible and can be used both as corroborative or rebutting evidence and for purpose of refreshing memory.

Where a full horoscope prepared from a short horoscope was produced in evidence and the person who had prepared it was examined as a witness:

Held: that so far as the date of birth and the parentage were concerned, the horoscope represented what had been stated to the witness who prepared it before the present dispute had arisen and could be used by the court as corroborative or rebutting evidence and for the purpose of refreshing memory. [P 371 C 2]

(b) Hindu Law—Marriage—Kanyas—Inter-marriage is not prohibited.

Ordinarily a Kanyas belonging to one sub-division does not marry into another sub-division, but no such restriction is recognised by the Hindu law. [P 371 C 2]

Where a Kanyas whose parents belonged to different sub-castes is assimilated into one of these sub-castes, his marriage with a girl of such sub-caste is not open to objection. [P 371 C 2]

John Jackson and Ram Bharose Lal—for Appellant.

Gokaran Nath Misra, Rup Narain and Ram Chandra—for Respondents.

Judgment.—This appeal arises out of a suit for partition, brought by the plaintiff-respondent who claims to be the son of the defendant-appellant. He sued for the partition of a half share out of what he described to be the ancestral property of the family, asserting that his mother, who was defendant 2, was entitled only to maintenance. The suit was resisted by the defendant appellant on various grounds. He denied that the plaintiff was his son or that the property in dispute was his ancestral property. His version was that he was married to the sister of defendant 2, that instead of her defendant 2 was sent with him after the marriage by fraud,

that the fraud was discovered when the defendant 2 reached his house and that it was further found that she was pregnant. It was also stated that the defendant-appellant and his mother lodged her in a separate house and gave her maintenance to avoid a public scandal and that she gave birth to the present plaintiff five months after her arrival. It was moreover contended that the defendant-appellant was a Kayasth of the Mathur sub-division and could not have been lawfully married to defendant 2, who belonged by birth to a Srivastava family and that the defendant appellant was a minor on the date of his marriage and on the date on which the plaintiff-respondent was born and was impotent and unable to beget a child. Defendant 2 supported the claim of the plaintiff-respondent, except to this extent that she claimed a one-third share in the disputed property. The learned Subordinate Judge found that defendant 2 was lawfully married to the defendant-appellant and that the plaintiff-respondent was their legitimate son. He accordingly decreed the claim for the partition of a one-third share in the disputed property, which he found to be the ancestral or joint family property of the plaintiff-respondent and the defendant-appellant.

The grounds of appeal traversed the entire ground taken in the Court below, but the only points to which the learned counsel for the defendant-appellant has addressed himself are (1) that defendant 2 was pregnant at the time of her marriage—her son the plaintiff-respondent, having been born five months later; and (2) that there could not have been a lawful marriage between her and the defendant-appellant according to law and custom. He does not contest the finding that the defendant appellant was married to defendant 2 and concedes that he is unable to substantiate the plea of fraud set up in the Court below. There is no satisfactory evidence to show that defendant 2 was pregnant at the time of her marriage or that the plaintiff was born 5 months after it. The statement of defendant 1 on this point is entirely unreliable. He says that he was married in the month of Asarh 1954 Samvat, i. e., between 15th June 1897 and 14th July 1897. But in the application made by him to the Commissioner of the Fyzabad Division on 2nd June 1897 (Ex. 19), wherein he asked

that his estate might be released from the Court of Wards on the ground that he was already 21 years old, he distinctly admitted that he had been married prior to that date.

This application was sent by post and both from the postal seal on the envelope showing that the application reached Fyzabad on 8th June 1897 and the date borne by the application, there can be no room for doubt that defendant 1 was married some time before 2nd June 1897. Defendant 2 and the witnesses produced by the plaintiff depose that the marriage of defendant 1 with defendant 2 took place in Baisakh 1954 Sambat, which lasted from 18th April 1897 to 16th May 1897. Mt. Mahadei (P. W. 2), the elder sister of defendant 2, for instance, states that the marriage of defendant 2 with defendant 1 took place in the beginning of Baisakh. Mt. Ramdei (P. W. 11), the sister of the mother of the plaintiff, says the same. They are corroborated by Mata Prasad, (P. W. 5), the brother of defendant 2, and Munnu (P. W. 7), who was one of the priests who officiated at the marriage ceremony. The evidence produced by defendant 1 to the contrary is unreliable. The defendant-appellant has also failed to establish that the plaintiff was born in the month of Kartik 1954 Sambat or five months after the marriage and that defendant 2 was pregnant at the time she was married. Mt. Gurdei (D. W. 7), has been produced to supply direct evidence of the fact that defendant 2 was pregnant at the time of her marriage; but she is a rent-free tenant and raiyat of the defendant-appellant and one of her sons is in his service, and her statement cannot therefore be trusted. The defendant-appellant alleges that when defendant 2 was discovered to be pregnant she was made to live in a separate house and given maintenance; but in his statement before Mr. Ajudhia Pershad, Deputy Magistrate, in a case under S. 107, Criminal P. C., he admitted that defendant 2 lived with him for 20 or 22 years.

His allegation that the plaintiff was born in Kartik is not borne out by any reliable evidence. Defendant 2 deposes that he was born in Phagun and her statement is corroborated by the horoscopes produced (Exs. 17 and 18). Munnu (P. W. 7), has given evidence in support of what he called the ishtkal or short

horoscope prepared by him when the plaintiff was born. Mahadeo Prasad (P. W. 13), deposes that he prepared a full horoscope of the plaintiff in Sanskrit and Urdu in 1903 and that the teva or ishtkal showing the time of birth was given to him by the defendant-appellant, who had sent for him to prepare his and his son's horoscopes. The defendant-appellant has taken objection to the admission of these horoscopes in evidence, but so far as the date of birth and the parentage are concerned these horoscopes represent what was stated to the witnesses who prepared the horoscopes before the present dispute had arisen, and they can be used both as corroborative or rebutting evidence and for the purpose of refreshing the memory.

It has also been pointed out that the time of birth mentioned in the teva or ishtkal prepared by Munnu is 24 gharis after dawn, and that prepared by Mahadeo Prasad is 48 minutes after midday or 16 gharis 6 pals from sunrise. This variation may be due to the nature of the information supplied by the defendant-appellant at the time when the bigger horoscope was prepared and is rather a proof of its genuineness than of its having been concocted during the progress of the suit. Defendant 2 tells us that the plaintiff was born about two hours after midday. She deposes that her simant or seventh month of pregnancy ceremony was performed in Pus and that the plaintiff was born in Phagun. She is corroborated by her sister, Mt. Mahadei, who was examined by Commissioner, and by her brother Mata Prasad (P. W. 5). Behari Lal (P. W. 6), who attended the barha ceremony of the plaintiff which took place on 12th day after his birth, and Mt. Maharaja (P. W. 8) and Mt. Ramdei (P. W. 11), who were present in the house of the defendant-appellant at the time of the birth of the plaintiff, bear testimony to the birth of the plaintiff in Phagun, 11 months after the marriage of defendant 2 with the defendant-appellant. Mt. Maharaja is the niece of the mother of the defendant-appellant. Lalta Prasad (D. W. 5), who has been examined on behalf of the defendant-appellant, admits that Mt. Maharaja used to live with Mt. Raghuraj Kuar, the mother of the defendant-appellant, in Keolapur.

Both Mt. Maharaja and Mt. Ramdei depose that the statement that defen-

dant 2 was pregnant when she came to the house of the defendant-appellant after her marriage is untrue. The tonsure or mundan ceremony of the plaintiff took place in the third year of his birth. It was attended by Mata Pershad, Bibai Lal, Mt. Maharaja, Mt. Ramdei and other relations. The estate of the defendant-appellant was then in charge of the Court of Wards. The accounts books of the Court of Wards show that on 3rd October 1901 the defendant-appellant took Rs. 200 from the Court of Wards, saying that he required the same on account of the tonsure ceremony of his son (Ex. 20). The defendant-appellant tries to explain this entry by stating that he required the money for the purchase of a horse and that he referred to the tonsure ceremony of his son as a pretence for taking it. But the account-books show that another item of Rs. 50 was taken on 27th May 1901 for the purchase of a horse. The learned Subordinate Judge was thoroughly justified in the face of the above facts in discrediting the evidence adduced by the defendant-appellant.

It is argued on behalf of the defendant-appellant that the marriage of defendant 2 was celebrated in a more or less private manner, that even some of the nearest relations of the bride were not invited and that after her marriage she did not visit the house of her parents for 8 or 9 years and was granted by her husband a separate residence and an allowance for her maintenance. It is admitted that Raja Bahadur, the husband of Mt. Naraindei, a sister of defendant 2, attended the marriage. There might have been good reasons, not ascertainable at this distance of time, why the other relations were not able to join the marriage. Mata Prasad states that defendant 2 visited his house on the occasion of the marriage of Mt. Gaura, his younger sister, and thereafter on other occasions too. There is nothing to show that the defendant-appellant lived separately from defendant 2 till about 10 years prior to the suit, when possibly on account of some quarrel or other cause he made a separate provision for her maintenance, giving her later on an allowance of Rs. 10 per mensem in addition to the sir land assigned to her.

Had defendant 2 been found pregnant a day after she was brought to the house of the defendant-appellant and a son born

to her five months later, it is hardly likely that the defendant-appellant would have described that boy as his son when he obtained Rs. 200 from the Court of wards for the expenses of his tonsure ceremony. It is still more unlikely, when disputes arose between the plaintiff and the defendant-appellant in consequence of the former having given evidence for Abdul Ghafur Khan in his suit against the latter that the defendant-appellant should have described the plaintiff as his son in his deposition before the arbitrator to whom the said suit was referred for decision (Ex. 14). The evidence of Nawab Ali, an old pleader of Bara Banki, shows that the defendant-appellant had entrusted the plaintiff to his guardianship for 3 or 4 years in order that the plaintiff might stay at Bara Banki and receive his education there. The defendant-appellant used to supply the expenses of his education and maintenance, while he was studying in the High School at Bara Banki. Nawab Ali states that the defendant-appellant told him that the plaintiff was his son and used to send the pay of the cook and the kahar who attended him and the expenses of his maintenance to Abdul Ghafur Khan, clerk. The suit filed by Abdul Ghafur Khan related to money which he claimed to have expended in excess of what he had received from the defendant-appellant and was decreed by the arbitrator to whom it was referred (Ex. 15). The defendant-appellant did not then repudiate his liability as the father of the plaintiff. In a suit filed by the defendant-appellant against Sumer Singh for damages for malicious prosecution it was expressly admitted by the defendant-appellant that the plaintiff was his son, born of lawful wedlock (Ex. 16). These admissions, read with the other evidence adduced in the case, strengthen the presumption raised by S. 112, Evidence Act (I of 1872) in favour of the legitimacy of the plaintiff, and the fact that defendant 2 was receiving a separate allowance from ten years prior to the suit is insufficient to rebut it.

It was contended in the Court below on behalf of the defendant-appellant that he was born impotent and was incapable of begetting issue. But as the learned Subordinate Judge has pointed out, no evidence of any value has been produced by him on that point and the learned Counsel who appears for him has made no attempt

to support that contention here. There is also no satisfactory proof that it was impossible for the defendant-appellant to have access to defendant 2 at the time when the plaintiff could have been begotten. Defendant 2 swears that after the birth of the plaintiff another daughter was born of her who died shortly afterwards and though that fact is denied by the defendant-appellant, it is hardly likely that her statement on that point could be incorrect. From the time the plaintiff gave evidence for Abdul Ghafur Khan in support of his suit against the defendant-appellant the plaintiff and the defendant-appellant have been at loggerheads. The story told by the defendant-appellant is inconsistent with his previous conduct during that litigation and prior to it and cannot be accepted. The next point for consideration is whether the defendant-appellant could have been lawfully married to the mother of the plaintiff. The grandfather of the defendant-appellant was a person named Naubat Rai, who was a Mathur Kayasth. On the death of his first wife he took into his keeping the widow of a Srivastava Kayasth and had a son, Bachchu Lal, born of her.

He possessed certain landed property and was anxious that his property should devolve on Bachchu Lal after his death. But he was conscious that the mother of Bachchu Lal stood in no better position than that of a concubine and that Bachchu Lal was his illegitimate son. At the first Regular Settlement Naubat Rai tried to have it recorded in the *wajib-ul-arz* that where a person had no children by his lawfully married wife, the son born of a woman not lawfully married would get possession of the entire property left by his father, but the other co-sharers of the village objected. Eventually an order was passed that the wishes of Naubat Rai should be recorded so far as his interest in the village was concerned and this was actually done (Ex. A-8). It is noticeable, however, that Bachchu Lal was then admitted by Naubat Rai to have been born of a woman who was not lawfully-married and who was of a different family. There is also evidence to show that that woman was a Srivastava Kayasth by birth, that Bachchu Lal got married in a Srivastava family and that his daughter was similarly married to Behari Lal (P. W. 6), who was a Sri-

vastava Kayasth. It is clear, therefore, that although Bachchu Lal was of illegitimate birth, he was treated and accepted by Srivastava Kayasths as a member of their community and as pointed out in *Daryai Singh v. Narpal Singh* (1) and *Ram Kumari*, In the matter of (2), the assimilation of such a person into a particular caste renders his marriage with a girl of such a caste open to no objection. The Kayasth community is divided into 12 sub-castes; but Bachchu Lal, the father of the defendant-appellant, was not of pure descent. His mother was a Srivastava and his father was a Mathur. Ordinarily a Kayasth of one sub-division does not marry in another sub-division, but no such restriction is recognized by the Hindu law. Assuming, however that there is such a custom, the evidence about which is not very clear, it cannot apply to persons born of mixed descent. They are treated as belonging to the sub-division which accepts and assimilates them, and the marriage of the defendant-appellant with defendant 2 cannot, therefore, be treated as invalid. It is not disputed that Bachchu Lal was lawfully married, and if Bachchu Lal was lawfully married to a Srivastava girl, though he was illegitimate, as the evidence shows he was so married, the marriage of the defendant-appellant with the mother of the plaintiff cannot be regarded as invalid. The appeal fails and is dismissed with costs.

E.V./R K. *Appeal dismissed.*

1. (1910) 13 O C 375=9 I C 71.
2. (1891) 18 Cal 264.

A. I. R. 1918 Oudh 374

STUART AND MOHAMMAD ALI, A. J. CS.

Bharat Singh—Defendant—Appellant.
v.

Binda Charan and others—Plaintiffs
—Respondents.

First Appeal No. 88 of 1913, Decided on 9th September 1915, from decree of Sub. Judge, Unao, D/- 22nd May 1913.

Transfer of Property Act (1882), S. 6 (e)
—Transfer of right to receive profits actually accrued due is valid.

A transfer of a share of the profits of a village which have at the time actually accrued due is an assignment of a debt and not of a mere right to sue and is, therefore, not bad in law under the provisions of S. 6 (e) although the transfer of a right to sue is a necessary incident of the transaction: 9 Cal 625; 2 C W N 43; 5 All 207 and 35 Cal 345, *Dist from*. [P 375 O 2]

J. Jackson and Aditya Prasad—for Appellant.

Gokaran Nath Misra and Lakshmi Narayan—for Respondents.

Judgment.—The learned Counsel for the appellant has confined his arguments in appeal to two points only and contests the decision of the lower Court on no other point. The first point is with regard to the legality of the assignment to plaintiffs 6-8. He contends that this assignment is bad in law under the provisions of S. 6, Cl. (a), Act 4 of 1882. The second point is with regard to the amount of profits to be awarded. He contends that the terms of the sulahnama of 1865 are still in force and that they confine the profits to Rs. 1,200 a year, the enjoyment of certain land rent-free, and the financing of certain family ceremonies. The respondents argued that the appellant cannot take up the first point, as he definitely abandoned it, according to their assertion, in the lower Court. We could not go so far as to say that he definitely abandoned it, and we allowed the counsel for the appellant to argue it. The facts are as follows:—Plaintiffs 1-5 applied to the Revenue Court for partition of a 4/5th share in six villages. The appellant disputing their proprietary title, they filed a suit in the Civil Court on 29th June 1909, and satisfactorily established their title. The decree affirming their title and their right to partition was finally affirmed by the Court of the Judicial Commissioner on 17th February 1913. This decree impliedly gave title to plaintiffs 1-5 to recover the profits of a 4/5th share of the six villages from the appellant from March 1904, the date of his father's death. The right of recovery was subject, of course, to the provisions of the law of limitation. On 8th March 1912 plaintiffs 1-5 transferred to plaintiffs 6-8 (the present respondents) their rights in the profits of the three years preceding the date of the transfer, that is to say, for the three Faslī years 1317, 1318 and 1319, the Rabi profits of 1319 being in existence on 8th March 1912. The deed of transfer provided that the transferees might retain excesses in certain events, and should in other events be remunerated on a sliding scale.

There is nothing objectionable in the terms of the deed of transfer. It assigns profits actually in existence for valuable

consideration. The learned counsel for the appellant argues that it is bad in essence as a transfer of a right to sue. If it were a transfer of a mere right to sue it would be bad in law, but we consider that it is not a transfer of a mere right to sue, but an assignment of a debt. The transfer of the right to sue was a necessary incident of the transaction, but does not affect the essence of the transaction which was an assignment of a debt. That debt, though not an ascertained amount, or liquidated, was definitely ascertainable. It was not an amount awardable at the discretion or volition of a Court. It was not of the nature of damages. The appellant as *tribhaddar* was under an obligation to disburse to the other co-sharers their legal profits, but he had to disburse them not as damages personal to himself, but as their share of the collections that he made on their behalf and his own. There is nothing in common between such profits and *mesne* profits in which reference is made in *Shyam Chand Kousalia v. Land Mortgage Bank of India Limited* (1) and *Darya Chunder Roy v. Kailas Chunder Roy* (2), which were damages due from a trespasser, or compensation for the wrongful attachment or moveable property in execution of a decree: *Pragi Lal v. Fateh Chand* (3) or damages for breach of contract: *Abu Mahomed v. S. C. Chunder* (4). In all the latter cases the transfers were clearly transfers of the right to sue and nothing else, but here the situation is completely different. We, therefore, find against the contention of the learned Counsel for the appellant upon the first point. Our decision upon the second point is that the limitations of profits under the terms of the Sulahnama of 1865 existed until the death of Lachhman Singh only. After the death of the latter the remaining sharers took the rights to profits of ordinary members of a coparcenary body of revenue payers. This was not a case of members of a joint Hindu family. This concludes all the points argued in the appeal. We dismiss the appeal. The appellant will pay his own costs and those of the respondents.

B. V./R.K. *Appeal dismissed.*

1. (1883) 9 Cal 935.
2. (1398) 2 C W N 43.
3. (1883) 5 All 207.
4. (1903) 36 Cal 345=1 I C 827.

A. I. R. 1918 Oudh 376

LINDSAY, J. C.

Mushaf Husain—Appellant.

v.

Mohammad Jawad—Respondent.

Misc. Civil Appeal No. 5 of 1918, Decided on 27th May 1918, against order of Dist. Judge, Rae Bareilly, D/- 19th January 1918.

(a) *Guardians and Wards Act (8 of 1890)*, Ss. 19 and 25—Appointment of father as guardian of person is without jurisdiction.

A Court has no power under the *Guardians and Wards Act* to appoint a father the guardian of the person of his children, and where such appointment is made, the order of appointment is without jurisdiction. [P 377 C 1]

(b) *Guardians and Wards Act (8 of 1890)*, S. 25—"Guardian" need not be de facto guardian.

The expression "guardian," as used in S. 25 is not confined to statutory guardians appointed under the Act, but includes any person having the care of the person of a minor or of his property or of both. Such a person need not necessarily be the de facto guardian of the minor. [P 377 C 1]

(c) *Guardians and Wards Act (8 of 1890)*, S. 25—"Custody."

The "custody" referred to in S. 25 includes both actual and constructive custody. [P 377 C 2]

(d) *Guardians and Wards Act (8 of 1890)*, S. 25—Duty of enquiry cannot be delegated.

The duty of inquiry under S. 25 is cast upon the Court and cannot be delegated. [P 378 C 1]

(f) *Guardians and Wards Act (8 of 1890)*, S. 25—Father can entrust custody and education of children to another but not guardianship.

A father may in his discretion entrust the custody and education of his children to another but by doing so, he does not cease to be his children's guardian that being an office which in his lifetime he cannot delegate to a third person. [P 377 C 1]

M. Wazim—for Appellant.*Ali Mohammad*—for Respondent.

Judgment.—This is an appeal against an order of the District Judge of Rae Bareilly, which purports to have been made under S. 25, *Guardians and Wards Act (8 of 1890)*.

The facts are as follows :

Syed Mushaf Husain, the appellant, had a daughter who was married to the respondent, Syed Mohammad Jawad. Three male children were born of this marriage, and it seems to be the fact that since the time of their birth they have been living with their maternal grandfather. Some time ago Syed Mohammad Jawad applied to the Court under the *Guardians and Wards Act* to be appointed guardian of the person and property of

his minor sons. This application was opposed by the maternal grandfather. The result was that Mohammad Jawad was appointed the personal guardian of the children : the grandfather was appointed guardian of their property. The application out of which the present proceedings have arisen was then made by Mohammad Jawad under S. 25 of the Act : he asked for an order directing that the minors should be made over to his custody. The application was resisted on the ground that Mohammad Jawad had no authority under the Act to make it. The District Judge has decided in favour of the applicant and it is against his order directing that the minors should be transferred to their father's custody that this appeal has been filed. It is argued here, in the first place, that Mohammad Jawad is not the "guardian" of his children within the meaning of that expression as defined in the Act : S. 4, Cl. (2). This objection was raised in the Court below, but was overruled on the ground that the Court had already appointed Mohammad Jawad to be the guardian of the persons, of his minor sons, that the order of appointment had become final and could no longer be called in question.

It is not denied here that such an order was made, but the contention is that it was made without jurisdiction. S. 19, Cl. (b), of the Act is referred to in support of this argument, and to me it appears that the language of the clause does sustain the case put for the appellant. It lays down that, subject to the special provisions of the Act relating to European British subjects, the Court has no authority to appoint and declare a guardian of the person of a minor whose father is living and is not in the opinion of the Court unfit to be guardian of the person of the minor. This does not mean that where the father is a fit person the Court has power to appoint him to be the guardian. There is no necessity for doing so, the fact being that under the personal law the father is generally the authorized guardian of his minor children. It is admitted in the present case that under the Mohamadan (Shia) Law which governs the relations between Mohammad Jawad and his minor sons, he is their natural and lawful guardian. This view of the law is laid down in a ruling of the Judicial Committee reported as *Mrs. Annic*

Besant v. Narayaniah (1), where it was held that the Act does not authorize the Court to appoint the father of a minor to be the guardian of his person. The learned Judge of the Court below was wrong, therefore, in thinking that the order appointing Jawad to be the personal guardian of his minor sons could not be called in question; as a matter of law the order is inoperative, having been made without jurisdiction.

This, however, does not dispose of the question whether the father was legally competent to apply to the Court under S. 25 of the Act, for having regard to the language of the definition clause such an application may be made by a "guardian," that is, "a person having the care of the person of a minor or of his property, or of both his person and property." Such a person need not necessarily be a statutory guardian appointed under the Act. The appellant, however, maintains that Jawad is not such a "guardian" on the ground that he has never had the actual custody of the minor children. In other words, the case is that the "guardian" referred to in the Act must be at least a *de facto* guardian. I am not disposed to assent to this proposition, for the definition does not, in my opinion, justify the notion that the "guardian" must be a person having actual custody of the minor. The word used in the definition is "care" and not "custody"; as their Lordships point out in the Madras case cited above, *Mrs. Annie Besant v. Narayaniah* (1), a father may in his discretion entrust the custody and education of his children to another but by doing so he does not cease to be his children's guardian, that being an office which in his lifetime he cannot delegate to a third person. It cannot, therefore, be argued that Mahomed Jawad, the father of these three children, is not the guardian of their persons merely because the actual custody of them is with their maternal grandfather. I hold accordingly that as their guardian, Jawad was legally competent to present the application under S. 25.

There remains, however, a more difficult question, and that is whether in the circumstances disclosed Mahomed Jawad had lawful grounds for asking the Court to make an order in his favour under this section. According to the language of

the enactment such an order can only be made "if a ward leaves or is removed from the custody of a guardian of his person". Here it is pointed out that the minors have never since the time of their birth been in the custody of their father, and so it is argued that there can be no case of their having "left" or "been removed from" such custody. A case very similar to the present one came before the Madras High Court a little while ago: cf. *Mohideen Ibrahim Nochi v. Mahomed Ibrahim Sahib* (2). There as here the applicant under S. 25 had never had the actual custody of his minor son. The language of the section was discussed at length in the judgment and it was held that the word "custody" as used in S. 25 ought to be held to include both actual and constructive custody. It was admitted that this interpretation could only be arrived at by some straining of the language, but it was considered that it was justified because it would serve to carry out the intention of the legislature in framing the Act. It certainly would be strange if we were to take it that the law, while it provides for and insists upon the due discharge by a guardian of his duties towards his wards, should deny him the means of doing those duties, and I agree that for the purpose of enabling the guardian to do his duty by the ward it should be assumed that the Court can make an order for the delivery to him of custody of his ward, even if it is the case that he has not previously had the ward in his actual keeping. And this can only be done by adopting the liberal interpretation of the term "custody" accepted by the Madras Court.

There remains only one other matter. Even if Mahomed Jawad is entitled to make the application under S. 25, and if he has a lawful occasion for applying, no order can properly be made unless the Court is satisfied that it will be for the welfare of the ward to return to his guardian's custody, and the Court must arrive at this conclusion after a judicial investigation. It is not made to appear that any due inquiry has been made upon this point. I was informed in the course of arguments that either during the present proceedings or in connexion with the earlier proceedings which resulted in Jawad's being appointed the personal guardian of the minors, there was some

1. A I R 1914 P C 41=38 Mad 807=24 I C 290 (P C).

2. (1916) 39 Mad 608=33 I C 894.

inquiry and report by a Tahsildar. All that need be said on this score is that the duty of inquiry under S 25 is cast upon the Court and cannot be delegated. In order to enable me to come to a right decision it is necessary for me to remand the following issue for determination by the District Judge:

'Is it for the welfare of the minors that they should be delivered over to the custody of their father and guardian, Syed Mahomed Jawad.

The Judge will receive any evidence which the parties may desire to produce and will return his finding within six weeks from the date of his receiving this order of remand. Fifteen days to count from the date of the lower Court's finding, will be allowed to the parties for the filing of objections.

R.V./R.K. *Issue remanded.*

A. I. R. 1918 Oudh 378

KANHAIYA LAL AND DANIELS, A. J. Cs.

Lallu Ram—Plaintiff—Appellant.

v.

Jot Singh—Defendant—Respondent.

Second Appeal No. 245 of 1917, Decided on 21st June 1918, against decree of Dist. Judge, Hardoi, D/- 10th April 1917.

Limitation Act (1908), Art. 181—Application for final decree under O. 34, R. 5—Limitation commences from time fixed for payment or date of appellate decree—Civil P. C. (1908), O. 34, R. 5.

The right to apply to have a decree for sale made absolute arises when the time fixed for payment by that decree has expired or where there has been an appeal, when that appeal is decided, the date of the appellate decree, which finally determines the rights of the parties, being taken to be the starting point of limitation within the meaning of Art. 181, Lim. Act, if it does not extend the time originally fixed or if the time so fixed has not expired. (P 379 C 1)

Bishambhar Nath Srivastava—for Appellant.

Mirza Samiullah Beg—for Respondent.

Judgment.—In a suit filed by the plaintiff-appellant for the recovery of money due on a mortgage, a preliminary decree for sale was passed on 30th July 1911, allowing the judgment-debtor time for its payment till 8th January 1912. The plaintiff was not satisfied with that decree and filed an appeal, claiming that the interest due to him was chargeable on the mortgaged property, but was unsuccessful. An appeal filed by one of the defendants was, however, successful and the decree of the Court of first instance was varied. There was a further appeal

to this Court by the plaintiff, which was dismissed on 19th December 1913. On the plaintiff applying on 19th December 1916 for a final decree for sale, an objection was raised that his application was barred by time. The Court of first instance disallowed that objection but the lower appellate Court gave effect to it. The question involved in this appeal is, whether the limitation for an application for a final decree for sale under O. 34, R. 5, Civil P. C. is to be computed from the date fixed for payment by the decree of the Court of first instance or from the date of the decree of the final Court of Appeal.

If the view taken in *Madho Ram v. Nihal Singh* (1), which was adopted in *Jagdish Singh v. Ram Adhin Singh* (2), be regarded as correct, the date on which the appellate decree was passed will have to be left out of account. But where a decree is confirmed or varied on appeal, the appellate decree is the only decree which is capable of execution or operative. For the purpose of ascertaining its terms, a reference has sometimes to be made to the decree of the Court of first instance or the decree appealed from; but the decree of the final Court of Appeal, where there has been such an appeal, is the decree in which the decree passed by the Court of first instance or the decree under appeal merges and which is capable of being enforced. In *Bhup Indar Bahadur Singh v. Bijai Bahadur Singh* (3), where a decree was passed by a District Court for the possession of land with future mesne profits and that decree was reversed by the High Court but restored by the Privy Council, and the question arose whether the decree-holder was entitled to recover mesne profits for more than three years from the date of the decree of the Court of first instance, it was held by their Lordships of the Privy Council that the effect of their decree, by which the decree of the District Court was affirmed, was to adopt its terms and to carry on their operation with reference to its own date. In *Abdul Majid v. Jawahir Lal* (4) their Lordships of the Privy Council recognised that an application to make absolute a

1. (1916) 38 All 21=30 I C 494.

2. (1917) 20 O C 505=41 I C 858.

3. (1901) 23 All 152=27 I A 209 (P C).

4. A I R 1914 P C 66=36 All 350=31 O 619 (P C).

decree for sale could be made within three years from the date of the order of the High Court confirming that decree. In *Gajadhar Singh v. Kishen Jiwan Lal* (5) a similar view was taken and the previous decisions bearing on the point were overruled.

It was pointed out in that case that O. 34, R. 5, Civil P. C., did not contemplate more than one decree absolute for sale. Under O. 34, R. 10, of the Code any costs, incurred after the passing of such a decree, can be taken into account in finally adjusting the amount to be paid to the mortgagee. But the result of the appeal may, however, be to vary, that is, to increase or decrease the amount due to the mortgagee materially and in that case the final decree for sale may have to be varied or altered to bring it into conformity with the final appellate decree or a fresh decree may have to be prepared in its place. Where the propriety of a decree is challenged on appeal either by the mortgagee or by the judgment-debtor, it is open to the mortgagee to wait till the result of the appeal is known, for it is the decree of the final Court of Appeal, where there has been such an appeal, which declares the rights which each party holds. The right to apply to have a decree made absolute for sale arises when the time fixed for payment by that decree has expired or where there has been an appeal, when that appeal is decided, the date of the appellate decree, which finally determines the rights of the parties, being taken to be the starting point of limitation within the meaning of Art. 181, Lim. Act (9 of 1908), if it does not extend the time originally fixed or if time so fixed has not expired. The application made by the plaintiff-appellant to have the decree made absolute is, therefore, clearly within time. We allow the appeal accordingly and setting aside the decree passed by the lower appellate Court, restore that of the Court of first instance with costs here and hitherto. The defendant-respondent will bear his own costs throughout.

B.V./R.K. *Appeal allowed.*

5. (1917) 39 All 611=12 I C 93.

A. I. R. 1918 Oudh 379

KANHAIVA LAL AND DANIELS, A. J. Cs.
Kaniz Mehdi Begam and others—Plaintiffs—Appellants.

Rasul Beg and others—Defendants—Respondents.

First Appeal Nos. 8 and 33 of 1916, Decided on 19th June 1918. (from decree of Sub-Judge, Lucknow, D/- 3rd January 1916).

(a) Mahomedan Law—Wakf—Transfer of property with direction to continue certain religious celebration—Wakf is not created so as to render property inalienable.

Where a will transferred a certain property in full proprietary right to a legatee and his representatives in perpetuity with a direction to continue a certain religious celebration in connection therewith:

Held: that the will did not constitute the property wakf so as to render it inalienable.

[P 393 C 2]

(b) Mahomedan Law—Wakf—Private mosque is not wakf.

The mere construction in a private house of a mosque, which is used for worship by the members of the family occupying that house, is not sufficient, without any other act or declaration on the part of the owner, to constitute a wakf.

[P 393 C 2]

(c) Evidence Act (1872), S. 115—Promise does not constitute estoppel.

In the absence of any representation deceiving the opposite party and thereby causing him to alter his position for the worse, a mere promise does not constitute an estoppel [P 387 C 1]

(d) Evidence Act (1872), S. 116—Tenancy created by guardian-de-facto on behalf of minor—Minor benefitted—Minor is estopped from denying title of landlord

Where it was found that a minor had derived benefit from a tenancy created to his advantage by a sarkhat executed on his behalf by a person who was his guardian in fact though not in law:

Held: that the minor was estopped under S. 116 from denying the title of the man in whose favour the sarkhat had been executed.

[P 384 C 1]

(e) Civil P. C. (1908), S. 47—Sale in execution proceedings—Validity of proceedings impeached by judgment-debtor—Remedy to set aside sale is by application under S. 47—Separate suit is barred.

Where a judgment-debtor impeaches the validity of execution proceedings which preceded and led up to the sale of his property, and thus seeks to have the sale set aside, his remedy lies by application under S. 47, and not by means of a separate suit: 31 All. 82 (F. B.) and 14 O. C. 70, Dist. from.

[P 385 C 1]

(f) Civil P. C. (5 of 1908), S. 47—Auction-purchaser (though decree-holder) suing for possession on basis of purchase—Questions in suit are questions between judgment-debtor and his representatives and not covered by S. 47.

Where an auction-purchaser though, he be also the decree-holder, sues to recover possession on

the basis of his purchase, he does so as the representative of the judgment-debtor and therefore the questions that arise in the suit are questions between the judgment-debtor and his own representatives and are not covered by S. 47. [P 385 C 1]

(g) Practice—Right to apply.

The right to bring an application within a certain period is not a vested right but a matter of procedure. [P 385 C 2]

(h) Civil P. C. (1908), O. 32, R. 4—Guardian ad litem need not be natural or certificated guardian.

There is no rule that only the natural or certificated guardian of a minor can act as his next friend for the purpose of legal proceedings. [P 386 C 1]

(i) Civil P. C. (1908), O. 32, R. 4—Guardian ad litem is fully entitled to represent minor in execution proceedings.

A duly appointed guardian for a suit is fully entitled to represent the minor in connection with all subsequent proceedings which take place in the course of the execution of the decree passed in the suit. [P 388 C 1]

(j) Oudh Laws Act (18 of 1876), S. 20—Execution—Sale of ancestral property—Sanction of Commissioner is essential preliminary to legal sale.

The Commissioner's sanction under S. 20 is not a mere formality, but an essential preliminary to legal sale being held, and, therefore, parties to a decree cannot dispense with the necessity for it. [P 386 C 2]

Where the Commissioner's order on an application for permission to sell ancestral land under S. 20 was, "considering the character of the buildings I think permission might be refused at present. If the judgment-debtor takes no steps to arrange, they might be sold afterwards":

Held: that the order was not intended to dispense with the necessity for any further application for sanction but meant that the refusal was not necessarily permanent and that sanction might be granted in future if the judgment-debtor took no steps to satisfy the decree. [P 386 C 2 ; P 387 C 1]

(k) Oudh Laws Act (18 of 1876), S. 20—Applicability.

Section 20 applies to sales in execution of mortgage decrees. [P 387 C 1]

(l) Civil P. C. (5 of 1908), O. 21, R. 21—Mortgage decree—Omission to issue notice under R. 21 does not render sale void.

In cases of mortgage decrees the omission to issue notice under O. 21, R. 21, Civil P. C., does not render the sale of the mortgaged property absolutely null and void; *A. I. R. 1914 P. C. 120, Dist. from.* [P 388 C 2]

Wazir Hassan and Mohamad Farzand Ali—for Appellants.

Gokaran Nath Misra and Bhairon Prasad—for Respondents.

Judgment.—These two appeals arise out of two connected suits. One was brought by five of the children of Mirza Farukh Muhammad Taki Ali Bahadur deceased for a declaration that compound No. 75, measuring 5 bighas 17 biswas 17 3/5 biswas in Muballa Talab Gangni

Shukul in the city of Lucknow containing a mosque, an Imambara and a number of tombs, was not liable to sale in execution of a mortgage decree obtained by Rasul Beg and Karim Beg and that the respondent Rasul Beg, one of the decree-holders who purchased the same on 10th March 1903 in execution of his decree, obtained nothing by his purchase. The other was brought by Rasul Beg for the ejectment of all the nine children and the widow of Farukh Muhammad Taki Ali Bahadur and for arrears of rent on the basis of a sarkhat executed by them as tenants of the same compound. Rasul Beg's suit is the earlier in point of time. He sued for arrears of rent and ejectment in November 1914. The declaratory suit was filed in February 1915.

The main issue in the case is whether the property in suit is wakf. But there is a further plea raised by the appellants that the sale under which the respondent Rasul Beg acquired the property was invalid on three grounds: 1. want of the Commissioner's sanction to the sale; 2. that the sale was held without proper notice to the appellants under S. 248, Civil P. C., 1882; 3. that the representatives of Farukh Muhammad Taki Ali Bahadur were not brought on the record as required by S. 234 of that Code.

On the other hand it was contended, and has been found, that these technical pleas are barred by S. 47, Civil P. C., and by limitation, and further that the entire suit is bad by reason of the fact that the plaintiffs, having become the tenants of the respondent in respect of the property in suit, are estopped from denying their landlord's title. The compound in suit admittedly belonged prior to the Mutiny to Nawab Malka Geti, widow of Amjad Ali Shah, and it is proved by an inscription still in existence and is common ground between the parties that the mosque and the Imambara which it contains were constructed by her in the year 1850. It is said that she used to live in another house known as Kothi Zabur Bakhsh but that she removed her residence to the compound in suit after the Mutiny in consequence of the confiscation of the other property to Government. The following brief pedigree will show the relationship of the appellants (A fuller pedigree is given in the plaint):

Nawab Malka Geti, widow of Amjad Ali Shah, Fourth King of Oudh, Died 1866.

Prince Dara Sitwat Muhammad Raza Ali Bahadur

Farukh Muhammad Taki Ali Bahadur, died 11th July 1900.

= Khurshed Jahan Taqiya Begam, defendant No. 8

3 sons, 6 daughters.

All the nine children of Faruk Muhammad Taki Ali Bahadur are defendants in the suit brought by Rasul Beg. Four of the daughters and one son are plaintiffs in the declaratory suit while the remainder are arrayed as defendants. Faruk Muhammad Taki Ali Bahadur's widow is arrayed as a defendant in both cases. The plaint contains no statement as to when or under what circumstances the alleged endowment was made or whether it was made in writing or orally. In the proceedings of 30th March 1913 prior to settlement of issues in the suit in the Subordinate Judge's Court, their pleadings stated that it was made in 1860 by means of a registered document which has since been lost. The plaintiff's principal witness Asaf Ali Khan, an old man of 81 connected with the family of the appellants, asserts that Nawab Malka Geti who built the mosque and the Imambara executed a deed of wakf in the presence of the Mujtahid and her relations, immediately after the construction of the Imambara was completed, i. e., about 1852 or 1853. This deed, if it ever existed, is not forthcoming, nor is there any satisfactory evidence of its loss. The statements on the latter point of Gajadhar Prasad, D. W. 5, a servant of the appellants whom the respondent had to put into the witness-box to prove the sarkhats, were rightly rejected by the trial Judge as unreliable, relating as they do to details which it was most unlikely that the witness should remember regarding a suit filed 27 or 28 years ago. In this Court the appellants have tacitly thrown over the evidence of their own witness and asked the Court to infer an oral dedication or to hold that a wakf was constituted under the will of Nawab Malka Geti referred to below. For this purpose they rely on; (1), the will of Nawab Mulka Geti, who died on 12th April 1866; (2), a reference to the property as wakf in a letter, dated the 9th December 1860, addressed by her to the Chief Commissioner; (3), instances in which her grandson Faruk Muhammad Taki Ali asserted

the property to be wakf in his lifetime; (4), the existence of the mosque and the Imambara and evidence of the use of the compound as a graveyard for members of the family. The clause of the will dealing with the suit property is as follows:

"The house of the Imambara with the grove and all the houses and land appertaining thereto which are known as Chhainadapurse and three notes relating to the Imambara of the value of Rs. 10,500 shall be saved by my worthy son Mirza Dara Sitwat Muhammad Raza Ali Bahadur, may God keep him safe, and his representatives, without any coherer therein, and he and his representatives shall remain in proprietary possession thereof in perpetuity. But it shall be incumbent upon the said son and his representatives that they shall continue to hold majlis-e-azadi (i. e., the Muharram celebration) for ever in the same manner as I hold during my lifetime; rather they shall improve the same from time to time; in short, they shall not make any distribution thereof."

The appellants rely principally upon the direction to the legatee to continue the annual Muharram celebration. Apart from this, they attempt to derive support from the fact that the "representative" and not the heirs of the legatee are mentioned, from the fact that the land is left to him and his heirs "in perpetuity" and from the expression "three notes relating to the Imambara of the value of Rupees 10,500." Apparently the interest of these notes has been used by her for the upkeep of the Imambara and so they are described as notes relating to the Imambara. These notes were subsequently released by the decree-holders in favour of the appellants by the compromise of 12th December 1898 (vide *File of Execution Case No. 405 of 1901, Subordinate Judge, Lucknow*). The other expressions are expressions which it is perfectly usual to find in wills where nothing but proprietary right is in question, and the appellant's counsel must have been heard to put it to support his argument when he was driven to rely on them. The document not merely makes no mention of the property being trust property but it expressly leaves it to Prince Dara Sitwat the only son of the testator, in full proprietary right. The case that this will constituted the property wakf was never set up in the lower Court indeed it is inconsistent with the case which the appellants there set up. It is a new case set up for the first time in appeal.

Not much assistance either way can be obtained from the conduct of Faruk Muhammad Taki Ali. When the property

was threatened with sale by creditors, he did undoubtedly on two occasions between 1888 and 1890 put forward the plea that it was wakf and not liable to sale, and this plea was accepted. The Courts appear on these occasions to have been mainly impressed by the fact that there were a large number of graves in the area in dispute. As these pleas were put forward to save the property from the hands of creditors, no great reliance can be placed on them on the ground that they were against the interest of the maker. Faced with a choice of evils he might consider it better to keep the property as wakf than run the risk of losing it altogether. On the other hand, we have the fact that Farkh Mohammad Taki Ali on two occasions mortgaged the property as property belonging to him over which he had power of disposal. On 14th November 1895 he executed in favour of Rasul Beg and his brother Karim Beg the mortgage which has given rise to the present proceeding, and on 5th February 1900 he executed a further mortgage of the suit property in favour of the Delhi and London Bank. The Bank obtained a decree for sale which it put in execution, though in the event no sale actually took place. In none of the proceeding was any plea of wakf ever taken. The most important document in support of the appellant's case is a petition addressed by Nawab Malka Geti to the Chief Commissioner of Lucknow on 9th December 1860 in which she undoubtedly spoke of the property as wakf. The actual text is as follows:

"Secondly, that Kothi Zahur Bakhsh, our residential house, was confiscated from us without any reason and that a building worth six or seven laes of rupees along with glass furniture, carpets, tents, etc., were confiscated without any fault, and we were ruined, so much so that we are living in great inconvenience in an Imambara house of insufficient accommodation and a wakf property situate in Muhalla Talab Gangui Shaukul."

This is no doubt a substantial piece of evidence in the appellant's favour. But a consideration of the document as a whole deprives the expression relied on of much of its significance. Nawab Malka Geti was asking for the assistance of the British Government, on the ground that practically all her property had been confiscated and that she was left without means for her own subsistence and the support of her dependents. The suggestion that even the house in which she was

living was not her own but she had been forced by destitution to take refuge in the appurtenances of an Imambara, adds a valuable touch towards heightening the impression of misery which it was her object to produce.

The appellants have, however, a second line of attack. They urge that, even if the will of Nawab Malka Geti (Ex. F.1) did not constitute a wakf it had the effect of burdening the property with a trust for the maintenance of the Muharram celebration and thus rendered the property inalienable. In support of this contention they rely on the Privy Council decision in *Bishen Chand Basawat v. Nadir Hossein* (1). The facts of that case were, however, widely different. Whether the endowment amounted technically to a wakf or not, the property had been constituted trust property in unequivocal terms and made over to trustees appointed by the trust deed, and what their Lordships decided was that the mere fact that the objects of the trust did not absorb the whole income of the trust property was not sufficient to render the property liable to be sold in execution of a decree. The case of *Bishen Chand Basawat v. Nadir Hossein* (1) was considered by the Bombay High Court in a case *Dassa Ramchandra v. Narasimha Damodar Bhatt* (2) which is reported in 9, Indian Cases, p. 769. In that case certain property was burdened with a charge for the maintenance of certain religious services and the same argument was put forward as in this case, namely, that the Privy Council judgment above referred to prevented any part of the property from being sold in payment of debt. The learned Judges say:

"The controversy turns upon the meaning of the partition deed, Ex. 59 R. Is there by that deed a complete dedication of this property to a religious trust or is there merely a gift to Vithoba of the property subject to an obligation to perform certain services? If there was a complete dedication, then admittedly the property is not liable to attachment. If there was merely a gift burdened with an obligation, then an attachable interest was admittedly left to Vithoba. The cases illustrating the two extremes are *Bishen Chand Basawat v. Nadir Hossein* (1) and *Baroo Dhul v. Kishen Chunder Geer Gossain* (3)."

It is unnecessary to determine whether the direction regarding keeping up of the annual Muharram celebration constituted

1. (1888) 15 C.L. 324=15 I.A. 1 (P.C.).

2. (1911) 35 Bom. 155=9 I.C. 768.

3. (1870) 13 W.R. 200.

a binding trust or was merely of the nature of an exhortation addressed by Malka Geti to her son, but even assuming the former the interest on the Government promissory notes, which, as has been already stated, was released by respondents in favour of the judgment debtors by the compromise of 1898, should be amply sufficient for its upkeep. In his last argument on this part of the case the appellants' counsel takes a bold stand. He urges that whatever may be the case with the rest of the property, any mosque which is used for worship must necessarily be wakf even though, as in this case, it is built inside the walled enclosure of a private house for the exclusive use of the members of the family, and though the general public have no access to it. In high class Mahomedan families where the women necessarily remain secluded, it is no uncommon thing for a mosque to be constructed inside a private house to enable them to perform their devotions without publicity. Counsel would like also to extend his argument to the scattered tombs of the Imambara, in spite of the admission of one of the appellants' own witnesses that every house of a Shia Mahomedan contains an Imambara for *tazias*. The doctrine if accepted would lead to every serious consequences. As another of the appellants' witnesses says,

"all the well-to-do Shias keep a place apart in their houses as Imambara. There are *masjids* (mosques) in many ordinary houses."

Even if the character of inalienability is to attach in such cases only to the mosque or Imambara, its existence would largely destroy the value of the remainder of the house as a security for a creditor. No judicial authority has been cited in support of this, to us, novel proposition. Counsel relies on certain passages from Mahomedan authorities, and in particular on a passage from the *Sharaya-ul-Islam* reproduced on pp. 219-220 of Baillie's *Imamis*. The sentence relied on reads:

"If one should appropriate a *masjid* or place of worship, it is valid though only one person should pray in it. So, also if the appropriation is of a cemetery, it becomes a wakf by the interment in it of a single corpse."

Read in connection with its context this passage is far from supporting the appellants' argument. The learned author is speaking of the *seisin* necessary on the part of those for whom the

appropriation is made, and the passage assumes a prior appropriation. The sentence immediately following that relied on by the appellants makes the matter clear. It runs—

"But though people should pray in a *masjid* or bury in a cemetery without the formal words of wakf being pronounced, neither would pass out of the property of the original owner. So also, the result would be the same, though the proper words were used, if possession were not also given of the subject of the wakf."

The same passage is cited in p. 432 of Tyabji's *Mahomedan Law*. These passages are no authority for the proposition that the mere construction of a mosque in a private house with evidence that it had been used for worship by the members of the family occupying that house is sufficient, without any other act or declaration on the part of the owner, to constitute a wakf. Agreeing with the lower Court we find that the appellants have failed to establish that any part of the property in suit is wakf, or otherwise unalienable, and we decide the issue accordingly. The next issue is whether the appellants are estopped from denying the respondent's title to the property by reason of the fact that they are at the present time occupying the premises in suit as tenants of the latter. Immediately after the dismissal of Kazim Ali's application to set aside the sale, three successive attempts to get it set aside having failed the judgment-debtors executed a *sarkhat* by which they were permitted to continue in occupation of the land as tenants of the successful decree-holders. This *sarkhat* was executed on behalf of Kazim Ali by his major brother Muhammad Ali Mirza and on behalf of the remaining plaintiffs by their mother, Mt. Taqiya Begam. The *sarkhat* sets forth that whereas Rasul Beg has obtained a sale certificate in respect of the house, and whereas the executants are still living in it and are unable to find any other place in which to reside, therefore, in order that they may be provided with a residence they have agreed to rent the premises in question from the decree-holder for one year at Rs. 35 a month. This was admittedly a favourable rent, the premises being valued in the plaint at Rs. 12,000. Successive *sarkhats* in renewal of this agreement were executed on 14th December 1905, 15th March 1907 and 2nd April 1908 respectively. The last *sarkhat* was for three years. The judgment-debtors have con-

tinued to reside in the house up to the present time and paid rent up to March 1914.

The cross suit brought by the decree-holder in the Munsif's Court was for rent for the period subsequent to that date. Under S. 116, Evidence Act, no tenant of immovable property is permitted to deny that the landlord had a title thereto at the commencement of the tenancy. The plaintiffs seek to exclude the effect of the section by pleading that their brother and mother respectively had no authority to execute the sarkhats on their behalf. They say further that there was no person living who had such authority and that only a guardian appointed by the Court could have done so. Now conceding that a mother and brother respectively have no legal right of guardianship under Mahomedan law even when the father is dead, it appears to us that the question of estoppel would depend on whether the minors derived benefit from the tenancy which the agreement created. The mother and the older brother, though they might not be the legal guardians, were the persons on whom the care of the minors and of their interests naturally devolved. It has been urged with great force on behalf of the appellants that no such benefit could result as they were in possession, and if the respondent had attempted to turn them out they could have raised in answer to such attempt the same pleas which have been raised in this suit. It is, however, right to look at the position as it stood at the time. About two months after the sale was confirmed three of the judgment-debtors Taqiya Begam, Kaniz Hussaini Begam and Kaniz Shappari Begam, put in an application under S. 244 of the Code of 1882 asking for the setting aside of the sale on the very same objections which have been pressed in this suit. The application was rejected, the learned Subordinate Judge holding that if intended as an application under S. 311 of the Code, which it was not, it would have been beyond time and that it did not lie under S. 244.

While this application was pending, two of the major sons of Farukh Muhammad Taki Ali filed a regular suit to set aside the sale on the ground of fraud, irregularities and want of jurisdiction. The learned Subordinate Judge held that on the merits the suit could not succeed, but

he gave the plaintiffs an opportunity to pay up the decretal amount and directed that if they did so, the sale should be set aside but if not, the suit should stand dismissed with costs. They failed to avail themselves of the opportunity given to them. Finally on 12th August 1904, Kazim Ali presented through his next friend, Wala Kadar, the application which will be hereafter referred to and which was ultimately struck off for default. Three several attempts had thus been made to get the sale set aside and those attempts had included all the grounds which have been put forward in the present litigation. All those attempts had failed. Possession was about to be delivered to Rasul Beg (vide evidence of the Court Bailiff, D. W. 1). In fact possession was delivered in accordance with the sarkhat by the officer of the Court. There was no prospect whatever that any further attempt would have any different fate from its predecessors. The plaintiffs and their brothers and sisters with their mother were faced with the alternative of coming to an agreement with the respondents or of being turned out of the property and rendered homeless. As circumstances stood at the time—and it is to this that we have to look—it can hardly be doubted that the agreement was to their advantage, and under it and the subsequent agreements, they have retained undisturbed possession of the property from 1904 down to the present time, both during and subsequent to the minority of the plaintiffs. It is said that there is nothing to fix the plaintiffs individually with any payment of rent since they have come of age. This is true. The rent appears to have been paid in a lump. But on the other hand until the institution of the present suits they have made no attempt to repudiate the tenancy.

They continued to occupy the house jointly with the other tenants and it was not till the rent fell into arrears and the suit for ejectment on this ground had been filed against them, that it occurred to them to set up adverse title and to try their luck with the pleas which their brothers and sisters and their mother had unsuccessfully urged more than ten years before. Before we go on to consider the various technical objections to the execution sale, we are met at the outset by the question whether the appellants' remedy was not by application under S. 47, Civil

P. C., rather than by suit, and if so, whether it is not time-barred. There appears to be no question that the remedy was under S. 47 or rather, as the Code of 1882 was in force when the right to apply accrued, under S. 214 of the Code. The sale decree on the basis of the mortgage was obtained against the plaintiff's father, Farukh Muhammad Taki Ali, on 20th September 1897 and made absolute on 16th May 1898. The sale took place on 23rd December 1902 and was confirmed on 21st February 1903. The plaintiff-appellant claims as Farukh Muhammad Taki Ali's heirs and legal representatives. There is, therefore, no question of their not having been parties to the suit. Their predecessor-in-interest was a party and their rights only accrued after the suit was decided, Farukh Muhammad Taki Ali having died in the year 1900. There are authorities which lay down that where an auction-purchaser even though he be also the decree holder, seeks to recover possession on the basis of his purchase, he does so as representative of the judgment debtor, and, therefore, the questions that arise are questions between the judgment-debtor and his own representatives and are not covered by S. 214 (now S. 47), Civil P. C.

This was the decision of the majority of a Full Bench of the Allahabad High Court in *Bhagwati v. Banwari Lal* (4), Stanley, C. J., and Knox, J., dissenting. This case was cited with approval in *Maharaj Singh v. Jagan Nath* (5), a case in which the question was whether the auction-purchaser had taken possession of property to which his sale certificate gave him no right. Here the facts are entirely different. The plaintiffs impeached the validity of the execution proceedings which preceded and led up to the sale and they have impleaded, as they were bound to implead, not only the auction-purchaser, but the representatives of both the original judgment-creditors. If their objection should prevail, the judgment-creditors would be put back in the position of having a decree which was incompletely executed and they would be entitled, so far as limitation allowed, to have the property put up to sale afresh so as to bind the interest of the plaintiffs.

The appellants perceived this difficulty in their way; indeed the fact that

S. 141 applied has hardly been contested. Their plea is that the suit should be treated as an application under S. 47 in accordance with Cl. 2 of that section. When the history of this litigation is considered, prolonged as it has been over a period of 21 years since the decree-holders obtained a decree for sale, the appellants could have considerable difficulty in satisfying the Court that they were fit subjects for the Court's discretion, but at the outset they were met by the further difficulty that such discretion can only be exercised "subject to any objection as to limitation." The reason for this is clear. If the judgment-debtors were allowed to attack execution proceedings for suit nearly 12 years after the sale, the decree holder, on attempting to remedy his mistakes and putting in a fresh application for execution in accordance with the law, might find his way barred by the provisions of S. 48, Civil P. C., which forbids any fresh application for execution to be entertained after the expiry of 12 years from the date of the decree. The period of limitation for an application under S. 47, is three years under Art. 181, Lim. Act, which would have allowed ample time for fresh sale proceedings to be taken, whereas the declaratory suit was not filed till 13th February 1915, just short of 12 years after the sale was confirmed.

The appellants were minors at the date of the sale. They rely on Ss. 6 and 8, Lim. Act. But in order to do so successfully it was necessary for them, even under the old law, to show that they attained majority within three years of the institution of the suit. S. 7, Act 15 of 1877, which was in force in 1903, extended to all applications, whereas S. 7 of the present Act does not extend to applications other than applications for execution of the decree. As the right to bring an application within a certain period is not a vested right but a matter of procedure [as was held, among other cases, in *Jia Bibi v. Hahi Bkash* (6)] they were no longer entitled to an extension of time on account of minority when the present Limitation Act 9 of 1908, came into force. Moreover, even if the old Act had continued to apply they have failed to establish their case. Their oral evidence was disbelieved by the Subordinate Judge and we have not

4. (1909) 41 All 82=1 I C 416

5. (1911) 14 O C 70=10 I C 714.

1918 O/49 & 50

6. (1915) 37 All 597=30 I C 573.

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been asked to consider it. Such documentary evidence as is available goes to show that even the youngest plaintiff Kazim Ali was at the time of suit at the lowest computation somewhere between 21 and 22 years old or, as the Subordinate Judge says, not less than 22 years. As the learned Subordinate Judge points out, his age was given as 14 years in an application presented on his behalf through his next friend in August 1904. It is admitted that no guardian had ever been appointed for any of the plaintiffs under the provisions of the Guardians and Wards Act. They, therefore, attained majority at the age of 18 under the provisions of the Majority Act.

The appellants' remedy being barred by efflux of time, it is not, strictly speaking necessary to go into the various technical objections which have been raised in the sale proceedings. As, however, these objections have been argued before us at great length, it may be well to record briefly the findings at which we have arrived upon them, it being premised that these objections would in any case only affect the shares of the female appellants (amounting in all to 4 annas 8 pies out of 16 annas), as the remaining heirs of Farukh Muhammad Taki Ali are barred by the rule of res judicata from contesting the validity of the sale. As regards those heirs who are not plaintiffs this is admitted. Kazim Ali also through his next friend Mirza Wala Kadar put forward on 12th August 1904 an objection to the sale on the same grounds as are now put forward. This objection was dismissed on the merits on 30th August 1904. It is contended on his behalf that he is not bound by this decision, on the ground that his next friend was not the natural guardian of his property under Mahomedan law. Admittedly there was no natural guardian in existence since that office only belongs to a paternal ancestor and Kazim Ali had no paternal ancestor living. There is, however, no rule that only the natural or certificated guardian can act as a next friend for the purpose of legal proceedings. Mirza Wala Kadar, who acted as his next friend in this case, was the husband of Kazim Ali's sister who had a common interest with himself in the subject matter of the application. The proceedings were taken in good faith in the minor's interest and there is no rea-

son why they should not be binding on the minor. The first of the technical pleas is that the sale was invalid, because it was made without obtaining the sanction of the Commissioner as required by S. 20, Oudh Laws Act, 1876. On a previous application for execution sanction had been applied for and the Commissioner passed an order in the following terms:

"I happen to know about this case. The buildings are a mosque, Imambara and graveyard. The judgment-debtor has a large pension and could pay off all debts with interest in seven or eight years. Considering the character of the buildings I think permission might be refused at present. If the judgment-debtor takes no steps to arrange, they might be sold afterwards.

"(Sd) H. Fraser, Commissioner.

22nd August 1898."

Subsequent on 12th December 1898 the parties entered into a compromise arrangement for the payment of the debt by instalments with the following condition added:

"If the aforesaid instalments are not paid the decree-holder shall have power, without regard to his obligation to proceed first against the mortgaged property, to immediately realise his money in execution proceedings against the persons and the entire property of every description of us, the judgment-debtors. We shall have no right to put forward any objection of fact or law in respect of it and the Court will have power to cause our property to be sold by auction without obtaining the sanction of the Commissioner."

A fresh application for execution was presented on 26th October 1900 and without any fresh application being made to the Commissioner for sanction, the property was sold and knocked down to Rasul Beg decree-holder for Rs. 705 on 23rd December 1902. The respondents' contention is, first, that the Commissioner's order was intended to dispense with the necessity for any further application for sanction, a view adopted by the learned Subordinate Judge, and, secondly, that in any case the necessity for applying for sanction was waived and that the appellants are now debarred from raising this plea. We are unable to accept the interpretation placed on the Commissioner's order by the lower Court. All that is meant by the concluding sentence is that the refusal was not necessarily permanent and that sanction might be granted in future if the judgment-debtor took no steps to satisfy the decree. We have frequently had to deal with, and have ourselves passed orders in, somewhat similar form, and we are quite clear

that the order was not intended to authorise the decree-holder to sell the property at his own pleasure whenever he might think it convenient to do so. It is also clear from their own subsequent conduct that the parties themselves did not regard the order in this light. Cl. 3 of the compromise of December 1898 above referred to runs thus:

"I agree in good faith and give trustworthy assurance that on non-payment of the aforesaid Rs. 250 the decree-holder and the creditors may act on the conditions in Cl. 2. At that time the Commissioner's order of 21st August 1898 refusing to sanction sale shall not stand in the way of the sale."

The order is thus distinctly an order refusing sanction and the parties treated it as such in the very compromise which the respondents rely on. If the Commissioner's sanction was a mere formality, the parties were at liberty to dispose with it. If on the other hand such sanction was an essential preliminary to sale into public sale, it is clear that a sale of the parties could dispense with the necessity for it. The latter is the view taken in *Sheikh Abdul Ghafur v. Daghbar Singh* (7). This & 21 applies to sales in execution of a mortgage decree was decided as far back as 1893. *Syed Fida Hussain v. Kailash* (8). It is contended, however, that having denied the decree-holder the belief that he was entitled to get the property sold without sanction, they are now estopped from pleading want of sanction as invalidating the proceedings. This plea equally fails. There was no representation deceiving the opposite party and thereby causing him to alter his position for the worse. A mere promise does not constitute an estoppel. What the parties did was to enter into an agreement to dispense with a sanction which under the provisions of S. 20, Oudh Laws Act, could not be dispensed with. Such an agreement is forbidden by S. 23, Contract Act, as intended to defeat the provisions of S. 20, Oudh Laws Act. If indeed we could hold that the requirement of sanction under that section was inserted purely in the interest of the debtor, it would be possible to hold that he had power to waive it. That however is not the view which has prevailed, and even apart from authority it was probably quite as much in the public interest as in that of the individual

debtor that the restraint on the sale of land in execution of decree was enacted.

It is admitted that prior to the sale of the property no notice under S. 248 of the Code of 1882, to show cause why the decree should not be executed, was issued to the judgment-debtors. The first application for execution was that dated 21st May 1898, on which Mr. Fraser's order was passed and which resulted in the compromise of 12th December 1898, already discussed. Farukh Muhammad Taki Ali, the original judgment-debtor, died on 11th July 1900. On 26th October 1900 the Respondents-Deceased-Indebted applied to have the names of his widow and children brought on the record as his legal representatives under S. 231 of the old Code. On the same date a separate application was made under S. 235 of the Code for the appointment of a guardian ad litem of the minor judgment-debtors, the present plaintiffs. Originally their mother, Mt. Taqiya Begam was named as guardian of the female plaintiffs and his elder brother Muhammad Ali Mirza as the guardian of Kazim Ali. The application contained a statement duly verified that the proposed guardians had no interest adverse to that of the minors. Muhammad Ali Mirza declined to act as his brother's guardian, and ultimately Mt. Taqiya Begam agreed to act as the guardian ad litem of all the plaintiffs and was formally appointed by an order which runs:

"Taqiya Begam is appointed guardian of the minors Kazim Ali, Jawwadi Begam, Zakia Begam, Michal Begam and Hafiza Begam."

The application under S. 234 was however, ultimately dismissed as premature on the ground that on execution was applied for, the judgment-debtors having regularly paid the instalments due from them under the compromise of 1898. S. 234, it may be noted, did not provide for an application to bring on the record the representatives of a deceased judgment-debtor, but for executing a decree against the legal representatives where the judgment-debtor had died after the passing of the decree, but before it was fully satisfied. The appellants' argument is that because the application under S. 234 was ultimately dismissed, the appointment of Mt. Taqiya Begam as guardian ad litem of the plaintiffs should be treated as being only for the purpose of deciding whether that application should

7. (1905) S O C 403.

8. (1900) S O C 1.

he allowed or not and though she was treated as their guardian ad litem in all the subsequent proceedings, the plaintiffs should be deemed to have been unrepresented. This is to take much too narrow a view. S. 456 provides for the appointment of a guardian "for the suit," and when once such a guardian had been duly appointed and had accepted the office, she was fully entitled to represent them in connexion with all the subsequent proceedings which took place in the course of the execution of the decree. This disposes of the question of non-representation.

The next application for execution was made on 3rd November 1902. The decree-holders in their application stated the previous history of the case, and actually inserted a prayer for the issue of a notice under S. 248. They asked for execution by sale of the property. This was more than a year after the disposal of the previous application for execution, and both on this account and because it was the first application for execution against the legal representatives notice under S. 248 should have been issued. In fact no such notice was issued. The decree-holders gave in their application a summary of the previous proceedings in connexion with the execution of the decree. The Court however merely asked the office to report whether sanction to the sale by the Commissioner had been received or not. The office put up a report drawing attention to Mr. Fraser's order of 22nd August 1898 and the Court, being apparently satisfied with this, issued a sale proclamation, with the result that the property was put up to sale and purchased by the decree-holder on 23rd December 1902. In all these proceedings the minors were duly represented by their mother *Mt. Taqiya Begam*.

It has been strenuously contended on the strength of the decision of the Privy Council in *Raghunath Das v. Sundar Das Khetri* (9) that the omission to issue notice under S. 248 rendered the sale absolutely null and void. It will be noticed, however, that the decree which was before their Lordships in that case, though based originally on a mortgage, was not a decree for sale under the mortgage but a simple money decree. Now there is a broad distinction to be drawn

between a sale under a mortgage decree and an attachment and sale under a simple money decree. A mortgage decree directs the sale of the particular property described in it and the jurisdiction to sell is derived from the decree itself. On the other hand, a simple money decree confers in itself no jurisdiction to sell any property whatever. A valid attachment is necessary before the Court can acquire such power. If therefore, attachment is made without the necessary notice being given to the judgment-debtors to show cause against it, this is sufficient to invalidate the subsequent sale. But in the case of a mortgage decree which expressly directs the sale of the property, the omission to issue notice, unless it can be shown that the judgment-debtors were prejudiced by it, may be no more than an irregularity which might have entitled the judgment-debtors to apply to set aside under S. 311 of the Code of 1882. For the reasons given above both appeals fail and they are accordingly dismissed with costs.

In *Rasul Beg's* suit a cross-objection has been filed on the ground that the learned Subordinate Judge wrongly rejected the claim for arrears of rent. It is difficult to follow the learned Subordinate Judge's finding on this point and the learned advocate for the appellants has been unable to support it. The learned Subordinate Judge, while decreeing the claim for ejectment, dismissed the claim for arrears of rent on the ground that "no arrears of rent as claimed have been proved." The tenancy and the rate of rent having been established, it was for the defendants to show what part, if any, of the rent alleged to be in arrears had been paid up. The defendants did not even allege that the rent in suit had been paid. On the contrary they disputed the sarkhats and denied the existence of a tenancy. Under these circumstances the claim for arrears of rent should have been decreed in full and we allow the cross-objection in Appeal No. 33 of 1916 with costs and modify the decree accordingly. The plaintiff will be entitled to his full costs in the lower Court instead of only to proportionate costs.

B.V./R.K.

Appeals dismissed.

A. I. R. 1918 Oudh 389**LINDSAY, J. C. AND KANHAIYA****LAL, A. J. C.***Rudra Pratap Singh and another—
Plaintiffs—Appellants.***v.***Mt. Umrai Kunwar and another—De-
fendants—Respondents.*First Appeal No. 2 of 1918, Decided on
10th June 1918, from decree of Sub-
Judge, Bera Banki, Dt. 15th December
1917.**(a) Will—Construction—Vested remainder
subject to maintenance grant to plaintiff—
Plaintiff becomes entitled to property de-
vised immediately on termination of life-
estate.**A Hindu testator devised a life-estate in favour
of his widow, and on her death, a vested remainder
in favour of his grandson by a predeceased
daughter, whom he had brought up as his own
son, subject to certain devises for maintenance in
favour of the plaintiffs, who were also his grand-
sons by another daughter.*Held:* that the intention of the testator was to
provide immediate means for the maintenance of
the plaintiff after his death, and that therefore
the plaintiff became entitled to the properties
devise to them immediately on the happening
of that event. [1918 O C 1]**(b) Hindu Law—Widow—Surrender in
favour of remainderman accelerated devolu-
tion.**A transfer of his entire interest effected by the
holder of a life-estate in favour of the remainder-
man operates as a surrender accelerating the de-
volution of the estate in favour of the latter. [1918 O C 1]*Bayudas Lal, Gokaran Nath Misra
and Gopal Sahai—for Appellants.**Wazir Hasan and Ali Mohammad—
for Respondents.***Judgment.**—The dispute in this case
relates to the village Madarpur Bahadur
Singh, which formed part of the estate
belonging to Sarabjit Singh. Sarabjit
Singh was a talukdar whose father was
entered at No. 41 in List 1 and No. 7 in
List 2, appended to Act I of 1869. He
had a wife, Mt. Umrai Kunwar, who is
defendant 1, and 4 daughters, Mt. Bal-
raja, Mt. Sheoraja, Mt. Dilaram and Mt.
Sirtaja. Mt. Balraja was a widow. Mt.
Sheoraja had died, leaving two sons,
Rudra Pratap Singh and Daserath Lal,
who are the plaintiffs appellants. Mt.
Dilaram died, leaving a son, Piare Lal,
who is defendant 2. Mt. Sirtaja is said
to have had no issue. On 16th February
1904 Sarabjit Singh executed a will by
which he gave to his wife, Mt. Umrai
Kunwar, a life estate in all the immov-
able property belonging to him without
any power of alienation, with a vestedremainder in favour of Piare Lal, the son
of the deceased daughter Mt. Dilaram,
whom he had brought up as his own son,
subject to a devise in favour of the pre-
sent plaintiffs of the village Madarpur
Bahadur Singh for their maintenance
without any power of alienation, free
from the payment of Government reve-
nue, generation after generation, so long
as their line of descendants continued to
exist, and an annuity of Rs. 300 per year
to Mt. Balraja for her life and of Rs. 1,000
per annum to Mt. Sirtaja and her male
descendants, so long as the male line of
the descendants did not become extinct,
and thereafter of Rs. 100 per annum to
her female line. The will recited a pre-
vious gift of some property in favour of
Mt. Jafri Begum, his concubine, and the
grant of a *guzara* to her son, Kirat Singh,
and further stated that all the moveable
property and effects in the house, which
Mt. Jafri Begum occupied, were hers and
that none of his successors shall have any
power to interfere with her possession of
the same.Sarabjit Singh died on 6th March 1916.
Mt. Umrai Kunwar got mutation of
names effected in her favour on his death
in respect of the entire estate, but sub-
sequently surrendered her life-estate in
favour of Piare Lal, the remainderman
mentioned in the will, by a document
which she executed in his favour on 17th
May 1917. The plaintiffs state that under
the aforesaid will they became entitled to
the possession of the village Madarpur
Bahadur Singh on the death of Sarabjit
Singh; but the defendants contend that
the will gave no right to the plaintiffs to
claim the said village, so long as Mt.
Umrai Kunwar was alive. The Court be-
low accepted the contention of the defen-
dants and dismissed the claim. The
interpretation put by the Court below on
the will is not however justified by its
terms. Excluding the preamble, the op-
erative part of the will is divided into two
paragraphs, the first of which states that
by virtue of that will the testator cancelled
his previous will of 26th October 1895,
and the second proceeds to make a devise
of a life-estate in favour of Mt. Umrai
Kunwar without any power of alienation
and a vested remainder in favour of Piare
Lal on her death, subject to certain be-
quests which were described in four sub-
paragraphs or clauses. By one of these
clauses the village Madarpur Bahadur

Singh was given to the present plaintiffs and their descendants for their maintenance without any power of alienation. By the other clauses annuities were provided for Mt. Balraja and Mt. Sirtaja and the descendants of the latter and a provision made for the exclusion of certain property or rights previously given to Mt. Jafri Begam and her son, Kirat Singh, and the effects or goods lying in the house occupied by Mt. Jafri Begam, from the operation of the will in favour of Mt. Umrai Kunwar and Piare Lal.

Each of these clauses restricts or controls the main bequests made by para. 2 of the will in favour of Mt. Umrai Kunwar and Piare Lal. The contention of the learned counsel for the defendants-respondents that these clauses restrict and control only the vesting of the estate in favour of Piare Lal on the death of Mt. Umrai Kunwar and do not affect the intermediate life-estate granted to Mt. Umrai Kunwar, is on the face of the document entirely untenable. So far as Piare Lal is concerned, no immediate bequest was made in his favour, because as the testator says in his will and Mt. Umrai Kunwar affirms in her deed of surrender, Piare Lal was brought up and maintained by the testator as his own son and Mt. Umrai Kunwar was expected to look after him after his death. The construction adopted by the learned Subordinate Judge is entirely unnatural, and does not carry out the intention of the testator, which was to provide immediate means for the maintenance of the plaintiffs and his surviving daughters after his death. The transfer effected by Mt. Umrai Kunwar of her life-interest in favour of the remainderman, moreover, operates as a surrender, accelerating the devolution in favour of the latter: *Behari Lal v. Madho Lal Ahir Gayawal* (1). We allow the appeal accordingly and decree the claim of the plaintiffs for possession and mesne profits to be ascertained hereafter with costs here and hitherto and direct that the amount of the said mesne profits shall be determined by the Court below in the manner provided by O. 20, R. 13 (c), Civil, P. C. The defendants-respondents shall bear their own costs throughout.

B.V./R.K. *Appeal allowed.*

1. (1892) 19 Cal 236=19 I A 30 (P C).

A. I. R. 1918 Oudh 390

KANHAIYA LAL AND DANIELS, A. J. CS.
Bisheshwar Nath—Plaintiff—Appellant.

v.

Hamid Mirza Beg and others—Defendants—Respondents.

First Appeals Nos. 5 and 137 of 1916, and No. 12 of 1917, Decided on 27th June 1918, from decree of Sub-Judge, Sitapur, D/- 30th October 1916.

Deed—Construction—Succession to taluqa settled by agreement—Interpretation of agreement—Transferable interest held acquired.

A dispute regarding succession to a taluqa belonging to a Muhamedan gentleman A in respect of which proceedings under S. 145, Criminal P. C., had been taken against its three claimants, B, C and D, was settled by mutual agreement the relevant terms of which were as follows: (1) The taluqa will not for the present be divided. (2) The taluqa will be released in favour of all the three claimants and the evidence adduced in the proceedings under S. 145, Criminal P. C., will be regarded as proof of possession of all of them. (3) Mutation of names in respect of the taluqa will be made in favour of all the three claimants subject to the conditions laid down in the agreement. (4) Each of the three claimants will take a few villages for his personal expenses. (5) Each of the three claimants will in succession hold the office of the taluqdar of the entire taluqa without the power of alienation. (6) All the debts due from A will be a charge on the taluqa and the taluqdar for the time being will utilize the net income of the taluqa in payment of these debts. (7) After payment of the entire debts the net profits will be divided equally between the three claimants. (8) If the taluqdar for the time being neglects the payment of debts or commits any breach of trust, the man next after him may get him ousted and may himself assume that office. (9) In case of urgent necessity, prior to the payment of the debts due by A, if the writing of a deed of alienation or hypothecation becomes necessary, then the deed will be valid only when it is signed and executed by all three claimants. (10) The male children of B by non-biradari wife will get maintenance, and if C and D happen to have no male children by biradari wives, the former will have such heritable interest as may be permitted to them under the Mahomedan law.

Held: that under the above agreement C and D took a transferable interest in the villages assigned to them as well as in their shares in the taluqa, which they were competent to transfer even during the time when B was the taluqdar.

[P 591 C 2]

Ram Chandra—for Appellant.

Mumtaz Hussain and *Tara Shankar Sharma*—for Respondents.

Judgment.—These three appeals have been argued together, as the principal issue in each is the same and depends on the construction of an agreement, dated 12th July 1909, entered into between Ahmad Mirza Beg, Hamid Mirza Beg and

Amir Mirza Beg. The following pedigree given in the plaint in Suit No. 45 of 1916, out of which First Appeal No. 137 of 1916 arises, is necessary to explain the position:



The dispute relates to Taluqa Aurangabad, which belonged to Agha Jan Beg. His name was entered in List I at No. 77 and List 2 at No. 26 appended to Act 1 of 1869. His eldest son, Nawab Ali Beg, died during his lifetime. Agha Jan Beg died on 18th June 1875, and was succeeded by his second son, Muhammad Ali Beg, by virtue of a bequest, the effect of which was to vest the estate in his eldest surviving son. Muhammad Ali Beg died childless on 18th October 1908. On his death disputes arose between his sole surviving brother Ahmad Mirza Beg, and his two nephews Hamid Mirza Beg, and Amir Mirza Beg, as to their rights in the Taluqa and proceedings were taken against them under S. 145, Criminal P. C. to prevent a breach of the peace. These disputes were subsequently settled by mutual agreement on 12th July 1909.

The effect of this agreement was that mutation was to be effected in respect of the taluqa in favour of all the three claimants, that the Magistrate, before whom the proceedings under S. 145, Criminal P. C. were pending, was to release the property in their favour, treating all of them as in possession, and that subject to the conditions laid down in the agreement Ahmad Mirza Beg and after him Hamid Mirza Beg and after the latter Amir Mirza Beg were to hold the office of Taluqdar in succession without any power to transfer the property, except in certain contingencies therein specified. The agreement made a provision for the

personal expenses of each of the said persons and for the division of the remainder of the profits of the estate after the debts due by the late Taluqdar Muhammad Ali Beg were paid up, and further declared that after the expiry of the tenure of office of Amir Mirza Beg, who was to be the last Taluqdar, the son or sons of Hamid Mirza Beg, born of a biradari wife, would take a moiety and the son or sons of Amir Mirza Beg, born of a biradari wife, would take the remainder as absolute proprietors to the exclusion of the male descendants of Ahmad Mirza Beg, who in the presence of such sons were to get maintenance (Ex. 1). In pursuance of the said agreement, rotation of names was effected in favour of Ahmad Mirza Beg, Hamid Mirza Beg and Amir Mirza Beg (Ex. 10).

On 29th May 1912, Hamid Mirza Beg and Amir Mirza Beg borrowed Rupees 93,000 from the Allahabad Bank, Limited, by means of two promissory notes, for the repayment of which Lachhmi Narain, the defendant appellant in First Appeal No. 137 of 1916, stood surety. On the same date those persons executed an agreement in favour of Lachhmi Narain, promising to repay him what he might have to pay to the Allahabad Bank, Limited, on their account with interest at 1 per cent. per mensem. As these persons subsequently failed to pay the money due to the Allahabad Bank, Limited, the latter realised Rs. 93,120-6-0 from Lachhmi Narain on 8th October 1912.

On 16th November 1912 Hamid Mirza Beg and Amir Mirza Beg executed a deed of simple mortgage in favour of Lachhmi Narain for a lac of rupees in consideration of the amount paid by the latter to the Allahabad Bank, Limited, on their account with the interest due thereon and a sum of Rs. 5,824-4-0 due by them on another account. By the said deed they mortgaged a 6-annas share out of Taluka Aurangabad including the guzara villages assigned to them for their personal expenses, and agreed to pay the mortgage money within ten years with interest at 1 per cent. per mensem, compoundable half yearly (Ex. C-1). On 14th May 1913 they made another mortgage of a 4-annas 8-pies share of Taluka Aurangabad inclusive of the said guzara villages in favour of Lachhmi Narain for Rs. 40,000, agreeing similarly to repay

the same within ten years with interest at 1 per cent. per mensem, compoundable half-yearly (Ex. C-3). On 2nd January 1914 they made a mortgage of what they described as their entire 10-annas 8-pies share in favour of Lachhmi Narain for Rs. 79,450, agreeing similarly to repay the same within ten years with interest at the same rate (Ex. C-4). The contention of Ahmad Mirza Beg is that the said mortgages were invalid, inasmuch as the mortgagors had no right to transfer the mortgaged property. The relief claimed by him in Suit No. 45 of 1916, out of which First Appeal No. 137 of 1916 arises, is, however, confined to the mortgage of 16th November 1912 and that of 14th May 1913.

No relief is claimed in regard to the third mortgage. The learned Subordinate Judge found that the mortgagors had no right to mortgage the property in question. On 24th February 1914 Hamid Mirza Beg effected a simple mortgage of the entire village Rampur, which was assigned to him for his personal expenses by way of maintenance, in favour of Seth Bisheshwar Nath and Hafiz Muhammad Faruq in lieu of Rs. 16,000 and on the same date he executed a lease of the said village in favour of the mortgagees for 14 years beginning from 1321 Fasli on the rental of Rs. 2,700 per year, agreeing that the said rent might be credited by the mortgagees year after year towards the principal and interest due on their simple mortgage till the entire mortgage-money was liquidated. On the lessees' attempting to get mutation of names effected in their favour Ahmad Mirza Beg objected that the lessors had no right to mortgage the village or grant a lease thereof and he was successful. Seth Bisheshwar Nath accordingly sued for possession of the leasehold village with mesne profits for Rabi 1321 Fasli or in the alternative for the recovery of money due on his mortgage by sale of the mortgaged property. This suit, being No. 233 of 1915, is the subject of First Appeal No. 5 of 1916. The learned Subordinate Judge found that the mortgage and the lease were both invalid and he gave the plaintiff a simple decree for money subject to the right of Hafiz Muhammad Faruq to get such portion of the consideration as he might have advanced. There was a third Suit No. 96 of 1916, forming the subject of First Appeal No. 12 of 1917, arising out of an

attachment of a 5-annas 4-pies share in the villages Nimkhar and Pataunja, forming part of Taluka Aurangabad, obtained by Kedar Nath and Gauri Nath in execution of a decree for money held by them against Amir Mirza Beg. An objection filed by Ahmad Mirza Beg to the said attachment was unsuccessful, and the present suit was filed for a declaration that the judgment-debtor had no saleable interest in the property attached. The learned Subordinate Judge found in his favour. The first question to be decided is whether Hamid Mirza Beg and Amir Mirza Beg had acquired a transferable interest by virtue of the agreement, of 12th July 1909. The agreement so far as it is material for the determination of the above issue, runs as follows:

"We are Ahmad Mirza Beg, son of Agha Jan Beg, and Hamid Mirza Beg, son of Nawab Ali Beg, and Muhammad Amir Mirza Beg, son of Ali Mirza Beg caste Moghal, residents of Aurangabad, District Sitapur. A compromise has been arrived at amicably between all the three parties as given below:

"(1) The Taluka Aurangabad in Sitapur will not for the present be divided. (2) The office of Talukdar of the entire Taluka Aurangabad, left by Mirza Muhammad Ali Beg, will be held by Ahmad Mirza Beg, and after him by Hamid Mirza Beg, and after the latter by Amir Mirza Beg, and none will have the power to transfer the said property. During the time of one, the others will not have the power to interfere with the work of collections in the Taluka and other administrative works, contrary to the terms of the compromise, but they will have the right to inspect the accounts. But if the Talukdar for the time being neglects the payment of debts of commits any breach of trust, the man next after him may get him ousted and may himself assume that office. But the Talukdar, who is ousted, will get his fixed maintenance. But in case of urgent necessity, prior to the payment of the debts of Mirza Muhammad Ali Beg deceased, if the writing of a deed of alienation or hypothecation becomes necessary, then the deed will be valid only when it is signed and executed by all the three persons. (3) Every one of the three parties will take for his personal expenses villages yielding Rs. 10,000 a year. The rent of such villages will mostly be in cash. In order to determine the gross rental of a village, the village papers for 1908 to 1910 will be consulted. The Talukdar for the time being will pay with the entire Taluka the dues of the Government in respect of such villages."

After providing for the maintenance of Siddiq Mirza Beg, the son of Ahmad Mirza Beg by a non-biradari wife, and his male descendants, the agreement continues:

"(5) After the expiry of the tenure of office of Amir Mirza Beg as Talukdar, i. e., when this chain of Talukdars will be finished, the son or sons of Hamid Mirza Beg, born of a biradari

wife, to the extent of one moiety, and the son or sons of Muhammad Amir Mirza Beg, born of a biradari wife, to the extent of one moiety, will divide the estate and hold proprietary possession thereof, subject to the right of maintenance of Siddiq Mirza Beg and his heirs, as mentioned in Cl. 4 of this compromise. If Hamid Mirza Beg died before getting the office of Talukdar, the deceased's male issue, born of a biradari wife, will get, so long as the Talukdari system lasts, the same maintenance and profits which his or their ancestor would have received, if alive. (6) The moveables left by Mirza Muhammad Ali Beg will be divided in equal shares between the three parties, except the elephants, horses and conveyances given below the costs of whose maintenance has been fixed and which the members of the family will be entitled to use with the Talukdar's permission."

The agreement then proceeds to provide for the payment of the debts and the distribution of the profits in the following manner:

"(8). All the debts due from Mirza Muhammad Ali Beg will be a charge on the estate and the Talukdar for the time being will utilise the income of the villages of the estate, other than the maintenance villages, after deducting therefrom the Government revenue and defraying the costs of collection and the estate expenses described below, in payment of the aforesaid debts. No amount can possibly be fixed for the expenses of litigation, it is, therefore, left to the discretion of the Talukdar to spend a reasonable amount on cases between the landlord and the tenants, under-proprietors or other rights out of the income of the estate other than the maintenance villages. The costs of other litigation will be determined in consultation with all the three parties. After payment of the entire debt which is against the estate, the net profits of the estate will be divided equally between the three persons, i. e. each person will get a third during the lifetime of Ahmad Mirza Beg. If God forbid, Amir Mirza Beg or Hamid Mirza Beg do not live till then, their male children will receive the same. After Ahmad Mirza Beg's death, Siddiq Mirza Beg and his male issue and other heirs, mentioned in Cl. 4 of this compromise, will get only the aforesaid maintenance and Hamid Mirza Beg and Muhammad Amir Mirza Beg or their aforesaid issue will take the property in equal shares."

The agreement winds up by describing interest which each was to get as follows:

"(12). In conformity with the compromise mutation of names in respect of the ilaqa will be made in favour of Ahmad Mirza Beg, Hamid Mirza Beg and Muhammad Amir Mirza Beg subject to the conditions laid down in this deed Ahmad Mirza Beg will receive possession subject to the conditions of this document. In the case under S. 145, Criminal P. C., a separate application will be filed to the effect that a compromise has been effected between the parties and that now there is no danger of a breach of peace and that the evidence which has been produced may be regarded as proof of possession of all the three parties and the ilaqa be released in favour of all the three parties."

The Court below construes the deed a

giving to Hamid Mirza Beg and Amir Mirza Beg nothing more than a right to share in the usufruct but such a construction is inconsistent with the entire tenor of the deed. In the first place the agreement states that the ilaqa shall be released in favour of all the three parties and the evidence adduced in the proceedings under S. 145, Criminal P. C., shall be regarded as proof of the possession of all of them. In the second place it provides that in conformity with the compromise mutation of names in respect of the ilaqa shall be made in favour of Ahmad Mirza Beg, Hamid Mirza Beg and Amir Mirza Beg subject to the conditions laid down in this deed. It concedes to Ahmad Mirza Beg and after him to Hamid Mirza Beg and Amir Mirza Beg in succession the mansab or the office, dignity or position of the talukdar for such time as he may act in that capacity, maintaining "for the present" its indivisibility as recognised by List 2, Act 1 of 1869. But it describes each of them as acting talukdars or talukdars for the time being (talukdar waqt), and expressly states that if any of them neglects the payment of debts or commits any breach of trust the man next after him may get him ousted and may himself assume the office. If the intention was to recognise Ahmad Mirza Beg as the sole proprietor of the estate without any power of alienation and to allow Hamid Mirza Beg and Amir Mirza Beg only a share in the usufruct so long as they were alive the suggestion that Ahmad Mirza Beg could be ousted from his position of talukdar, if he neglected the payment of debts or committed any breach of trust would be out of place. A breach of trust can only be committed by a trustee and not by a proprietor. Ahmad Mirza Beg held by virtue of the agreement the management of the property on behalf of himself and his nephews Hamid Mirza Beg and Amir Mirza Beg, and the male children of these two born of biradari wives who were to succeed after the death of all the three.

By assigning the position or office of talukdar to one man and maintaining indivisibility "for the present", the object was that the dignity or status of the family should not ostensibly be reduced.

In the third place, in the case of urgent necessity prior to the payment of the debts due by Muhammad Ali Beg, the late talukdar, if the writing of a deed of alienation or hypothecation became neces-

sary, all the three persons were authorised to sign or execute such a deed jointly. If each of these persons was entitled only to a life interest they would not have transferred more than the interest they possessed. If on the other hand Hamid Mirza Beg and Amir Mirza Beg were entitled to a share in the usufruct, the authority given to them to join in a sale or mortgage in certain circumstances and to obtain a release of the property in proceedings under S. 145, Criminal P. C. and to get mutation of names effected in their favour jointly with Ahmad Mirza Beg would be without any significance. In the fourth place even the male children of Ahmad Mirza Beg were not absolutely deprived of all possible interest in the disputed property. If Hamid Mirza Beg and Amir Mirza Beg happened to have no more children by biradari wives the former were to have such heritable interest as might be permitted to them under the Mahomedan law.

The position of Ahmad Mirza Beg, Hamid Mirza Beg and Amir Mirza Beg was exactly similar in regard to the assignment of villages for their personal expenses and the distribution of the profits except in so far that each of them was to act in succession or in a particular order as the talukdar or, in other words as the custodian of the dignity of the family and the manager of the estate. Their rights in other respects were equal. Each was to be treated as holding possession and entitled to get mutation of names in his favour and if their rights were greater than those of a person holding a share in the usufruct or a mere life estate, they could not but be proprietary. In the latter instance the restriction on alienation imposed by the agreement would be void under S. 10, T. P. Act.

On the death of Muhammad Ali Beg it was disputed whether the property would devolve according to the Mahomedan law or according to the rule of primogeniture laid down in the sanad or family custom. The parties to the agreement were in any case uncertain as to their rights. Under S. 22, Act 1 of 1869, Hamid Mirza Beg was the person entitled to succeed, but by virtue of the bequest Muhammad Ali Beg was held entitled to the estate (Ex. 20). If the estate went out of the statutory rule of succession laid down under S. 15 of that Act, the property could

still remain indivisible if the family custom or sanad was to be applied, but would become divisible, if the Mahomedan law was to be held applicable uncontrolled by the sanad or the custom of the family. The claimants to the estate apparently agreed that all the three should hold the property together, that each of them shall in succession hold the office of talukdar and manage the estate on behalf of himself and the rest subject to the conditions laid down in the agreement and that on the death of all of them, the property shall devolve in a certain manner. The compromise was in the nature of a settlement of disputed claims, as held in *Faiyaz Husain Khan v. Nilkanth* (1), *Gaya Din Singh v. Syed Mumtaz Husain* (2), *Bhairo v. Parmeshri Dayal* (3) and *Ram Chandra v. Gopi Nath* (4), it may be regarded as a transfer to which the provisions of S. 10, T. P. Act are applicable. The corpus of the estate passed jointly to Ahmad Mirza Beg, Hamid Mirza Beg and Amir Mirza Beg by virtue of the agreement; and the restraint of alienation being void, each of them got an absolute estate, subject to the conditions as to the management and the like contained therein. In *Faiz Muhammad Khan v. Muhammad Said Khan* (5) their Lordships of the Privy Council pointed out that in order to show that an ultimate gift of the profits was less than a gift of the corpus, some evidence should be found in the context or in the circumstances affecting the property, tending to show a restriction of the interest given. The agreement in question contains only two restrictions, one against alienation or mortgage except in certain circumstances and the other deducible from the ulterior disposition mentioned therein. But if an absolute estate was given to Ahmad Mirza Beg, Hamid Mirza Beg and Amir Mirza Beg, the restraint on alienation being void, the ulterior disposition would necessarily fail.

There is nothing to show that any sons of Hamid Mirza Beg or Amir Mirza Beg born of biradari wives were alive or in existence on the date of the agreement. A gift in favour of persons unborn is not valid under the Mahomedan law and a

1. (1901) 4 O C 163.

2. (1907) 10 O C 186.

3. (1885) 7 All 516.

4. (1915) 29 I C 251.

5. (1898) 25 Cal 816=25 I A 77 (P C).

restriction of the gift to the life of the donee is not allowed by the Hanafi law by which the parties to the agreement are governed (Tyabji's Mahomedan law, pp. 274 and 341, and Ameer Ali's Mahomedan law, Vol. 1, Edn. 4, pp. 64 and 140). Even a life-interest can moreover be attached, sold or mortgaged for the lifetime of the holder of such interest, unless such interest is restricted in its enjoyment to the holder personally. Such is not the case here. The assignment of certain villages for personal expenses was only a method of enabling the persons concerned to recover money for those expenses directly without the intervention of the manager. The life-interest is as much saleable or transferable as any other interest, though such interest cannot last for more than a limited duration. The learned counsel for Ahmad Mirza Beg contends that if the interest of Hamid Mirza Beg and Amir Mirza Beg be sold, his client will not be able to carry out the trust reposed in him, namely, the discharge of the debts due by Mahomed Ali Beg and the preservation of the property for the benefit of his grand nephews. But the payment of the debts due by Muhammad Ali Beg has been declared by para. 8 of the agreement to be a charge on the estate and will follow the property in whatsoever hands it goes. The agreement creates no other charge and so far as it gives a vested remainder to persons not shown to have been in existence on the date of the agreement it is invalid. If the restriction on alienation is void, the gift over will moreover fail.

The appeals are therefore allowed and the claims of Ahmad Mirza Beg dismissed and that of Seth Bisheshwar Nath allowed, a decree being granted to the latter for possession of the leasehold property subject to the rights, if any of his co-lessee Hafiz Muhammad Faruq. The appellants will in the circumstances get their costs here and hitherto in each case from the contesting respondents who will bear their own costs throughout.

B.V./R.K.

Appeals allowed

A. I. R. 1918 Oudh 395

LINDSAY, J. C. AND KANHAIYA
LAL, A. J. C.*Muhammad Sher Khan*—Plaintiff—
Appellant.

v.

Swami Dayal—Defendant—Respondent.

First Appeal No. 78 of 1916. Decided on 19th June 1918, from decree of Sub-Judge, Kheri, D. 17th April 1916.

(a) *Transfer of Property Act (1882), S. 60—Time fixed for redemption—Suit for redemption before time expires is premature.*

A mortgage-deed provided that if the principal and interest due on the mortgage was not paid up to the date fixed for such payment, the mortgagee was to take possession of the mortgaged property, was to appropriate its profits in lieu of interest without any liability to account to the mortgagor for the profits, which exceeded the amount of interest at the contract rate by practically half as much, was to secure to himself certain further collateral advantages and was to remain in possession of the mortgaged property for a fixed period during which the mortgagor could not claim redemption. On the mortgagor failing to pay the principal and interest as stipulated in the deed, the mortgagee entered into possession of the mortgaged property. The mortgagor then sued for redemption, alleging that he was entitled to redeem during the period of the mortgagee's possession on the ground that the conditions in the mortgage-deed constituted a clog on the right to redeem.

Held: that the mortgage-deed did not contain a clog on the right of redemption and that therefore the suit was premature. [P 398 C 1]

(b) *Contract Act (1872), S. 16—Borrower in need of money—Lender does not dominate his will.*

Urgent need of money on the part of a borrower does not of itself place the lender in a position to dominate his will. [P 397 C 2]

Wazir Hasan and Ali Mohammad—for Appellant.*Gokaran Nath Misra and Ishwari Prasad*—for Respondent.

Judgment.—This is a mortgagor's appeal arising out of a suit for redemption, which has been dismissed by the Court below on the ground that the plaintiff under the mortgage-contract has no present right to redeem. Whether or not he has that right is the matter for determination in this appeal.

A short statement of the material facts may conveniently be given here by way of introduction. The plaintiff Muhammad Sher Khan is a talukdar holding an estate in the Kheri district and first entered into dealings with the mortgagee in this suit (or rather his father) in the year 1904. By that time the plaintiff had encumbered his property to a considerable

extent, he had executed five mortgages hypothecating portions of his estate in favour of two mortgagees, and the outstanding debt amounted to close on Rs. 72,000. The earliest mortgage executed in favour of a banker named Dwarka Das carried interest at 12 per cent. per annum compoundable with six-monthly rests; on this the mortgagee had brought a suit and obtained a decree. The other four mortgages were in favour of Gauesh Prasad; two of these carried interest at the rate mentioned above, the third at 15 per cent. per annum compoundable in the same way; the fourth loan was given at 12 per cent. per annum simple. To discharge these debts the plaintiff on 31st August 1904 borrowed a lakh of rupees from Seth Raghubar Dayal, the father of the present defendant: the sum owing to the prior mortgagees was left with Raghubar Dayal for payment and the balance was taken by the mortgagor.

To secure this loan the plaintiff executed a mortgage. It was agreed that interest should run at the rate of Rupees 7-1-8 per cent. per annum payable half-yearly, with a stipulation that the interest should be compounded in default of punctual payment, and the mortgagor undertook to pay off the debt at the end of four years in the month of Jeth. It was further agreed that if the mortgagor failed to pay four successive instalments of interest, or if he failed to redeem on expiry of the period mentioned, the mortgagee was to have the option of taking possession of the mortgaged property for a period of 12 years during which the mortgagor was not to be entitled to exercise his right to redeem; the profits during the term of 12 years during which the mortgagor was not to be entitled to exercise his right to redeem, i.e., the profits during the term of the mortgagee's possession, were to be appropriated in lieu of interest and there was to be no accounting between the parties for this period. The mortgagor undertook to deliver complete possession to the mortgagee, including possession of all *sir* and *khudkasht* lands and of all buildings. The mortgagee was to be allowed to appropriate fallen timber and to cut down four trees a year. Another condition was that when the mortgagor came to redeem on the expiration of 12 years he was to be liable to pay to the mortgagee, in addition to principal and

interest making up the mortgage debt, all sums recoverable from tenants on account of arrears of rent and *taqavi*. The only other condition of which we need take notice is one by which the mortgagee, while out of possession, agreed to receive payments of not less than Rupees 3,000 at a time in reduction of the principal sum.

On 9th June 1908 before the period of this mortgage expired, the mortgagor renewed the bond after an account had been taken between the parties showing that the mortgagor owed Rs. 82,154-15-6. He paid up Rs. 154-15-6 and the fresh bond was executed for Rs. 82,000. This is the bond now in suit. The terms of this bond are for the most part identical with those of the earlier document, but the period for redemption was fixed at five instead of four years. Further the mortgagee agreed that while he was out of possession he would receive payments of sums not less than Rs. 500 in reduction of principal. There was still a clause enabling the mortgagee to take possession for 12 years in case the mortgagor failed to redeem at the end of the five years' term, and under this clause the mortgagee is now in possession by virtue of a decree of this Court dated 9th February 1915. It is admitted that before this decree was passed, the Court gave the mortgagor an opportunity of paying off the debt by private arrangement so as to avoid delivery of possession to the mortgagee; the mortgagor however failed to take advantage of the indulgence.

He has now brought this suit for redemption and claims that he is entitled to recover possession, notwithstanding the covenant in the deed by which he is debarred from seeking redemption for a period of twelve years to count from the date of the mortgagee's taking possession. He says that he is entitled to relief against this contract on the ground that the bargain between himself and the mortgagee is harsh and unconscionable and was procured by undue influence, the mortgagee having taken advantage of his necessities for the purpose of obtaining unfair terms. He asks the Court to treat this covenant, read with the other terms of the contract, as amounting to a "clog" on the right of redemption which cannot in equity be enforced so as to prevent his now coming forward and asking to be re-

stored to possession on payment of principal and interest.

With regard to the plea of undue influence, the Subordinate Judge has ruled that it was not open to the plaintiff in accordance with the doctrine of *res judicata*; in his opinion this was a plea which the plaintiff could have and ought to have raised when he was resisting the mortgagee's suit for possession. We are not disposed to accept this finding of the Court below but we agree with the finding which it came to on the merits of the plea, namely, that there was no proof of undue influence which would entitle the plaintiff to avoid the contract under the provisions of S. 16, Contract Act. The plaintiff gave oral evidence for the purpose of showing that the mortgagee had taken undue advantage of him at the time the mortgage was renewed. A good deal of that evidence was irrelevant, and what was relevant has been found to be untrue. We agree entirely with the judgment of the Court below on this point; the evidence led by the defendant proves conclusively that the story told by the plaintiff and his witnesses regarding the events which happened at the time the deed was renewed is absolutely false. It is clearly established by the defendant's evidence that the transaction was entered into at the plaintiff's own request, that the mortgagee never pressed for renewal of the deed, and thus the plaintiff of his own free will and without compulsion of any kind executed the deed now in suit, which was written out by his own mukhtar, one Abdul Qayum. Apart from the oral evidence there is nothing either in the circumstances or in the terms of the document itself to justify the conclusion that the mortgagee was in a position to dominate the will of the plaintiff at the time the mortgage was executed. In this connection it is important to consider the admission made by the plaintiff in the witness-box that he had no complaint to make regarding the terms of the mortgage executed by him in the year 1904. His statement on this point may be quoted here:

"I executed the former deed in favour of the defendant's father with all its terms, not under any undue influence brought to bear upon me by the defendant's father, but because I was badly in need of money at that time to pay off certain decrees. I did not care much for that deed."

By this last expression we understand the plaintiff to mean that he was indiffer-

ent and had no reason to complain of the terms offered him by the mortgagee. If this be so, he appears to have no particular reason to impeach the present contract as being harsh and unconscionable, for the terms are more favourable to him than those of the deed of 1904. While interest is at the same rate, the mortgagee gives the plaintiff the right to make payments of not less than Rs. 400 at a time in reduction of principal. Under the earlier deed the minimum sum which the mortgagee was bound to accept on this account was one of Rs. 3,000. While it may be true that the plaintiff stood in urgent need of money when he executed the first deed, there is nothing to show that he wanted more money when he came to renew it. Indeed no money was advanced to him on the latter occasion. Clearly he wanted a renewal of the contract so as to secure a further opportunity of redeeming before the mortgagee exercised his option to take possession of the mortgaged property, and this the mortgagee agreed to give him. And in any case urgent need of money on the part of the borrower does not of itself place the lender in a position to dominate his will. We are satisfied, therefore, that no case is made out for interference with the bargain of the parties on the ground of undue influence. Next with regard to the argument that there is a clog upon the right to redeem from which the plaintiff is entitled in equity to be relieved, it is contended that the right to redeem which was settled by the contract is clogged by reason of the stipulation by which the mortgagee is entitled to retain possession of the mortgaged property for a period of twelve years without liability to account to the mortgagor for the profits. The plaintiff's allegation in para 9 of the plaint is that under this arrangement the mortgagee is now receiving profits which represent a sum of over Rs. 6,000 a year in excess of the interest agreed upon.

The Subordinate Judge has not expressed any definite opinion on this point, but he states that the defendant's pleader admitted in the course of argument that net profits exceed the interest by at least two or three thousand rupees a year; and before us it has been argued by the respondent's advocate that on the assumption that the excess amounts to Rs. 3,000 a year there is no question of penalty, because on this reckoning the rate of in-

terest has been enhanced from the date of default from Rs. 7-1-8 per cent. per annum to 10 3/4 per cent. per annum, which is still a moderate rate for transactions of this nature. Then again we are referred on behalf of the appellant to the clause by which the mortgagee while in possession is entitled to cut and remove timber as also to the clause which renders the mortgagor liable at the time of redemption to pay arrears of rent and taqavi advances to tenants which may be recoverable. And lastly we are asked to consider the stipulation by which the mortgagor is precluded from making payments on account of principal during the period of the mortgagee's possession. The case for the plaintiff, therefore, is that the mortgagee has secured to himself certain further or collateral advantages which constitute a fetter upon the right to redeem.

The agreement by which the exercise of the right of redemption is postponed for a period of twelve years cannot by itself be treated as a clog: the parties are allowed to settle the period of redemption by contract between themselves, and to arrange the date after which redemption may be had. Here we have a time for redemption fixed by the parties themselves, and unless the mortgage is, if it legally can be, satisfied from the usufruct meanwhile, there is no ground apparent upon which the plaintiff should be allowed to depart from his agreement and seek redemption at an earlier date. The clause by which the mortgagor is debarred from making payments towards principal during the period of the mortgagee's possession is part and parcel of the arrangement by which the exercise of the right of redemption is postponed: it is not a collateral or independent clause in restriction of the exercise of a right already agreed upon. As for the other terms to which our attention has been drawn, they are concerned with the terms upon which redemption may be had when the time for redemption arrives, and the question whether they are to be treated as penal within the meaning of S. 74, Contract Act, is not one to be dealt with at the present stage, when the only matter before us is the right of the plaintiff to bring this suit for redemption in contravention of the terms of the contract. We hold that the suit for redemption is premature and affirming the decision of the

Subordinate Judge direct that the appeal be dismissed with costs.

B.V./R.K.

Appeal dismissed.

A. I. R. 1918 Oudh 398

KANHAIYA LAL AND DANIELS, A. J. C.
Aditya Prasad—Defendant—Appellant.

v.

Muhammad Mubarak Ali Shah—Plaintiff—Respondent.

First Appeals Nos. 123 and 148 of 1916, Decided on 15th July 1918, against decree of Sub-Judge, Gonda, D/- 30th June 1916.

(a) Evidence Act (1872), S. 92, *Praviso* (6)—Oral evidence to prove relation of document to existing facts is admissible.

Where an instrument is ambiguous or contains a description which is imperfect or inaccurate as to existing facts, evidence is receivable of all the circumstances surrounding the instrument for the purpose of throwing light on its interpretation, for it is by these, as by a lamp, that the instrument has to be read. [P 400 C 2]

Where the language of a document is not clear and applies partly to one set of existing facts and partly to another, the rights possessed by the vendor may be helpful in determining to which set of facts the description in the sale-deed was intended to apply. [P 400 C 2]

(b) Oudh Rent Act (1886), S. 7-A—S. 7-A applies to sale of expropriatory rights or their relinquishment for consideration—Failure of consideration in respect of proprietary rights—Compensation can be claimed.

The prohibition contained in S. 7-A Oudh Rent Act applies only to the sale of expropriatory rights or the relinquishment thereof for consideration. Where a person sells what he does not own, agreeing at the same time not to claim expropriatory rights therein, the vendee can claim compensation for the failure of the vendor to make good his proprietary title. [P 402 C 1]

(c) Transfer of Property Act (4 of 1882), S. 55—Vendor is entitled to interest on unpaid purchase money.

Under S. 55, T. P. Act a vendor has a right to claim interest on the unpaid purchase-money, unless he has by his own conduct disentitled himself to it. [P 402 C 1]

A. P. Sen and J. K. Banerji—for Appellant.

Wazir Hasan, A. Sham and Mahamud Beg—for Respondent.

Judgment.—These appeals arise out of a claim brought by the plaintiff, Mubarak Ali Shah, for the recovery of the unpaid portion of the purchase money due to him with interest thereon under a sale effected by him in favour of Achambhit Lal, the father of the defendant, on the 3rd June 1905. The sale comprised a 5 annas 7 pies 4 kirants share in the village Lonawan Dargah, bearing Hadbast No. 668, with the hamlets and other lands ap-

pertaining thereto and included 20 bighas of *sir* and *khudkasht* lands, stated to have been held by the vendor. The sale was effected in lieu of Rs. 22,968, out of which Rs. 2,500 formed the consideration for the relinquishment by the vendor of his possession over the *sir* and *khudkasht* lands, or in other words, of such proprietary or occupancy rights as he might acquire therein by virtue of the sale. With the exception of Rs. 11,885 left in deposit with the vendee for payment to the vendor at any time he might require it by instalments or otherwise before the end of August 1905; the rest of the consideration was received by the vendor. Out of the said sum of Rs. 11,885, Rupees 5,465-15-6 have since been admittedly received by the vendor. The dispute in these appeals relates only to the balance of Rs. 6,419-0-6 and the interest payable thereon. It appears that after the execution of the said sale-deed two rival suits for pre-emption were filed, one by Mt. Rukaiya Bibi and the other by Mt. Latifunnisa, both of whom were sisters of the vendor and also co-sharers in the village. They alleged that a portion of the consideration entered in the sale-deed was fictitious. The suit of Mt. Rukaiya Bibi ultimately failed, because it was originally filed in a wrong Court and when filed again in the proper Court it had become barred by time. Mt. Latifunnisa succeeded in getting a decree for pre-emption subject to the payment of Rs. 6,419-0-6 to the vendor, Mubarak Ali Shah, and the balance of Rupees 16,548-15-6 to the vendee (Ex. 7).

This decree was passed on the 4th February 1910. On the 2nd March 1910 Mt. Latifunnisa paid Rs. 6,419-0-6 to the vendor out of Court. The balance was deposited in Court for payment to the vendee. These payments were not, however, considered to be an adequate compliance with the decree and her claim for pre-emption consequently failed. Mt. Latifunnisa then got a decree against Mubarak Ali for the refund of the money which she had paid to him with interest thereon at 6 per cent per annum. She realized the same from Mubarak Ali Shah on the 2nd March 1910. In the present suit Mubarak Ali Shah seeks to recover Rs. 6,419-0-6, being the balance of the purchase money payable to him, with interest thereon by the enforcement of his lien over the property sold. The

main defence was that the vendee did not get possession over a 5 annas 7 pies 4 kirants share of the land comprised in Chak Gudar Shah, which, according to the defendant, formed part of the property sold, and that the vendor also failed to deliver possession over of the *sir* area in their entirety, which he had agreed to sell. It is contended that in consequence of the failure of the plaintiff to place the vendee in possession of Chak Gudar Shah and the whole of the *sir* area, the vendee was entitled to compensation in respect of the same. It was further pleaded that Rs. 2,000 had been paid to the vendor, the receipt of which was acknowledged by him in the course of the suit for pre-emption filed by Mt. Latifunnisa; but that plea is not now pressed.

The Court below found that the plaintiff had not agreed to sell any portion of the land comprised in Chak Gudar Shah. It held that the plaintiff sold to the father of the defendant only a 5 annas 7 pies 4 kirants share in the village Lonawan Dargah proper, on the representation that it comprised 20 acres of *sir* and *khudkasht* lands, and the defendant was entitled to Rs. 1,625 on account of compensation for the failure of the plaintiff to secure him in possession of the entire *sir* and *khudkasht* area agreed to be sold. It decreed the claim accordingly for Rs. 4794-0-6 but allowed no interest on it. Both the parties appeal.

The first question for consideration is whether any portion of the land situated in Chak Gudar Shah was comprised in the sale. The sale-deed describes the property sold as a 5 annas 7 pies 4 kirants share in the village Lonawan Dargah, bearing *hadbast* No. 668, together with all hamlets, lands, etc., appertaining to the same. It gives the boundaries of the village and further states that the sale shall include a 5 annas 7 pies 4 kirants share

"without subtraction or reduction, in all pusses, *brambles* and lands, etc., tanks, *pukhta* and *kham* wells, Dargah and mosque, etc., etc., along with income from presents etc., together with village sites, *dih*, *dadar*, reeds, straw, fish, *jalkar*, *bankar*, *tinai*, *parahi*, etc., etc., fruit bearing and nonfruit bearing trees, and all *sayer* items, etc., *zamiindari* rights, *parjawat*, *chaukidar* and *patwari* rates, houses of tenants, etc., etc., whatever there exists or may come to exist hereafter, and appertaining to the village Lonawan aforesaid, without exception to any right or thing. (Ex. B-2)."

It is admitted that the village Lonawan Dargah is divided into several Mahals, one of which is the Mahal in which the vendor owned a 5 annas 7 pies 6 kirants share. His father owned the entire 16 annas of that Mahal and though on his death in 1895 the name of the plaintiff alone was entered in the revenue papers in succession to him, the widows and the daughters of the deceased subsequently succeeded in obtaining their shares, leaving the plaintiff owner of only a 5 annas 7 pies 4 kirants share on the date of the above sale. His father also owned a 4-annas share in another Mahal, called Chak Gudar Shah, in respect of which a deed of trust was executed by him, dedicating the property for certain specific purposes. The former was ancestral property, the latter was obtained by him by purchase from Beni Madho. The revenue assessed on the former was Rs. 1,000 and that on the latter Rs. 125. There was no necessary connexion between the main village of Lonawan Dargah and this Chak, except that they were surveyed together and given a single hadbast number in the settlement records. There were separate khewats prepared in respect of the main village and the Chak area (Exs. 23 and 24). The shareholders of the main village were not necessarily cosharers of the Chak and the sharers too, where the cosharers were common, were not the same.

In other words, the village proper and the Chak were separate entities both for the purposes of the settlement records and the payment of revenue, though they formed separate parts for survey purposes of the same hadbast number. The hamlets and land referred to in the sale deed were the hamlets and land appertaining to the village proper, that is, within the Mahal and not outside it. The sale deed makes no reference to the Mahal known as Chak Gudar Shah, in which the plaintiff holds no proprietary share.

The mention of the hadbast number is only a part of the general description and is by itself insufficient to establish that the vendee acquired any rights to the Chak by virtue of the sale. Being an independent Mahal the chak is in no way appurtenant to the village proper and there is nothing to show that the rest of the description of the share

sold or the boundaries given in the sale deed cover it.

Section 92, proviso 6, Evidence Act (1 of 1872), lays down that any fact may be proved which shows in what manner the language of a document is related to existing facts. In *Balkishen Das v. W. F. Legge* (1) their Lordships of the Privy Council pointed out that while the intention of the parties to a deed could be gathered only from a consideration of the documents themselves, such extrinsic evidence of circumstances could be admitted as might be required to show the relation of the written language to the existing facts. In *Maung Kyin v. Ma Shwe La* (2) the view taken was by no means different, for all that their Lordships of the Privy Council there say is that as against the parties to an instrument or their representatives, the reception of oral evidence should be confined to the ambit prescribed by S. 92, Evidence Act.

In other words, where an instrument is ambiguous or contains a description which is imperfect or inaccurate as to existing facts, evidence is receivable of all the circumstances surrounding the instrument for the purpose of throwing light on its interpretation, for it is by these, as by a lamp, that an instrument has to be read. The rights possessed by the vendor may not afford a test for determining the nature of the interest which he intended to convey; but where the language of a document is not clear and applies partly to one set of existing facts and partly to another, the rights possessed by the vendor may be helpful in determining to which set of facts the description in the sale deed was intended to apply. If the hadbast number be taken by itself, it might be wide enough to include the entire area which it represents; but the description of the share conveyed and the nature of the interest held, read with the fact that Chak Gudar Shah was a separate revenue entity not owned by the vendor and that the extent of the share held by the vendor therein as a trustee was not the same, leave no room for doubt that the Chak could not have been intended to be included in the sale. The subsequent conduct of the parties is not inconsistent with the above

1. (1908) 22 All 149=27 I A 58 (P C).

2. A I R 1917 P C 207=45 Cal 320=3 L B R 114=42 I C 61=44 I A 236 (P C).

construction. It is admitted that the vendee never got possession of even an inch of land in Chak Gudar Shah. Yet we find him admitting in the application for mutation of names, filed by him soon after his purchase, that he had received possession over the whole of the property sold.

In the suit filed by Mt. Latifunnissa for pre-emption, the vendee similarly admitted that he owed some money to Mubarak Ali Shah in respect of the sale in question and that Mubarak Ali Shah had not infringed any of the conditions of the sale-deed (Ex. 6). It is however significant that in the written statement filed by the vendee and his son, the present defendant, in the previous suit instituted by the present plaintiff for the recovery of the unpaid portion of the purchase-money, there was no allegation that the land in Chak Gudar Shah was included in the sale, and no compensation was claimed for the failure of the vendor to deliver possession over it. We agree with the learned Subordinate Judge in thinking that the plea that Chak Gudar Shah was included in the sale is an afterthought and that at the time of the execution of the sale-deed the parties did not contemplate that it was part of the same. The vendee, moreover, admitted in his previous deposition of 21st July 1908 that before purchasing the property he had ascertained its income by looking into the certified copies and private papers of Mubarak Ali Shah, that he had also inquired from the people of the village and learnt that the land was worth Rs. 25 per bigha kham, the total area being 1,300 or 1,400 kacha bighas (Ex. 6). The defendant similarly admits in his deposition in the present suit that he had an opportunity of seeing the khetwani and other papers relating to the property sold before agreeing to the purchase.

It is unlikely in the circumstances that the vendee or the defendant would have omitted to make an explicit mention of Chak Gudar Shah, otherwise known as Mahal Mazhar Husain, in the sale-deed or omitted to take possession of it, if it was included. In a suit filed by Mt. Ruqaiya Bibi against Mubarak Ali Shah in 1901 for the recovery of possession of her share of the property left by her father, one of the matters in dispute was whether Chak Gudar Shah was waqf property. The defendant appeared as a

pleader in that case for Mt. Ruqaiya Bibi and argued that it was not waqf (Exs. 21 and 22). He could not therefore have been unaware of the existence of the Chak or of the nature of the rights which Mubarak Ali Shah held therein. His failure to take possession of Chak Gudar Shah for more than 11 years subsequent to the sale is inexplicable except on the hypothesis that he treated the Chak as excluded from the sale.

The next question for consideration is whether the plaintiff sold the entire 20 bighas of *sir* and *khudkasht* lands specified in the sale-deed or only a proportionate share therein and whether the defendant is entitled to claim any compensation for the failure of the plaintiff to secure him in possession of more than a proportionate share. The terms of the sale-deed on this point are clear and specific. The sale purports to convey the entire 20 bighas, specifying the numbers borne by them; and the application for mutation filed by the plaintiff in pursuance thereof says the same (Exs. B-3 and B-5). The plaintiff apparently treated them as belonging exclusively to him and as he was not able to secure possession of more than a 5 annas 7 pies 16 kirants share of the same, the defendant is entitled to claim compensation for the portion of which he was deprived. In the sale-deed the vendor is stated to have received from the vendee Rs. 2,500 on account of *sir* and *khudkasht* lands, the right to cultivate which the vendor agreed to relinquish. There is a further covenant that if the vendor fails to put the vendee in possession thereof he shall be liable to pay damages at the rate of Rs. 3 per bigha kham or that if he claimed any *sir* or *khudkasht* land and any right of his, occupancy or exproprietary, in respect thereof was declared, he shall pay to the vendee the price of the same at the rate of Rs. 35 per bigha kham. That covenant cannot, however, be specifically enforced; and all that the vendee can claim is a reasonable compensation for that of which he has been deprived. The Court below has rightly allowed the defendant a proportionate amount out of Rs. 2,500 on account of the loss suffered by him.

It is contended on behalf of the vendor that the agreement to relinquish exproprietary rights for consideration was in contravention of S. 7-A, Oudh Rent Act (22 of 1886), which was added by U. P.

Act 12 of 1901, and was, therefore, void. So far as the 10 annas 14 pies 16 kirants share of the *sir* and *khudkasht* lands are concerned, the sale was, however, a transfer of the alleged proprietary rights which the vendor claimed therein in addition to an agreement to give up possession and relinquish any ex-proprietary rights, which might be acquired by reason of the transfer. S. 7-A, Oudh Rent Act, does not cover that portion of the contract which relates to the sale of the proprietary rights, and the decisions in *Murlidhar v. Pem Raj* (3) and *Bhikham v. Ghasi Ram* (4) do not apply to the sale of such rights. As pointed out in *Ikramullah v. Moti Chand* (5), which was confirmed by their Lordships of the Privy Council in *Moti Chand v. Ikram Ullah Khan* (6), the prohibition applies only to the sale of ex-proprietary rights or the relinquishment thereof for consideration. Where a person sells what he does not own, agreeing at the same time not to claim ex-proprietary rights therein the vendee can claim compensation for the failure of the vendor to make good his proprietary title.

The Court below has rightly allowed the defendant a set off for Rs. 1,525, but has erred in refusing to allow the plaintiff interest on the balance of the purchase-money due to him. Under S. 55, T. P. Act, a vendor has right to claim the unpaid purchase money with interest but he cannot claim any interest prior to 2nd March 1910, because, as the Court below has pointed out, he has by his own conduct disentitled himself to it. By virtue of the sale he was to have received the money by instalments or otherwise, as he might require it by the end of August 1905. According to the accounts filed by the defendant, various items, were paid to him from time to time up to 16th November 1905 (Ex. B.49). The two suits for pre-emption followed, in which the present plaintiff pleaded that the sale in favour of the father of the defendant was fictitious. It could not be reasonably expected from the present defendant, in the face of that statement of the vendor and the claims for pre-emption then pending, that he should

have made any further payments till the claims for pre-emption were finally decided. The claim of Mt. Latif-un-nisa failed on 7th February 1911 (Ex. B.22) and the claim of Mt. Ruqaiya Bibi had failed earlier. The plaintiff became entitled thereafter to claim the unpaid purchase-money with interest thereon from 7th February 1911 at 6 per cent. per annum. He received the balance of the purchase-money now claimed by him from Mt. Latif-un-nisa on 2nd March 1910 but he had to refund the same with interest at the above rate (Exs. 2 and 3). In other words, he did not receive the benefit of that payment and as from the date when the suits for pre-emption ended, he is entitled to be placed in the same position in which he would have been, had no payment been made.

The appeal of the defendant is, therefore, dismissed with costs and that of the plaintiff allowed with proportionate costs here and hitherto in so far that he will be entitled to interest at 6 per cent. per annum on the sum of Rs. 4,794.0.6 allowed to him by the Court below from 7th February 1911 till the date of payment. A fresh decree will be prepared in terms of O. 34, R. 4, Civil P. C., and six months' time will be allowed for payment. In other respects the decree passed by the Court below will be confirmed.

B.V./R.K.

Decree modified.

A. I. R. 1918 Oudh 402

LINDSAY, J. C.

Manna Lal and others — Plaintiffs—
Appellants.

v.

Bhagwandin and another—Defendants
—Respondents.

Second Appeal No. 195 of 1917, Decided on 20th August 1917, from decree of Dist. Judge, Lucknow, D/- 17th April 1917.

(a) Hindu Law — Debts — Father—Son's obligation to discharge debts during father's lifetime cannot be enforced.

So long as the father in a Hindu family is alive, the pious obligation to discharge his debts which is imposed by the Hindu law upon his sons cannot be enforced. [P 403 C 2]

(b) Hindu Law—Debts — Coparcener—Decree against coparcener's interest in joint property is liable to attachment and sale.

Under a decree against any individual coparcener for his separate debt, a creditor may during the life of the debtor seize and sell his undivided interest in the family property. [P 403 C 2]

3. (1900) 22 All 205.

4. (1907) 10 O C 243.

5. (1911) 33 All 645=11 I C 17.

6. A I R 1916 P C 59=39 All 178=39 I C 454 (P C).

St. C. Thompson—for Appellants.

Basudeo Lal—for Respondents.

Judgment.—The decision of both the lower Courts in this case is erroneous and must be set aside. The facts of the case may be very briefly stated: One Bhagwandin, who is defendant 1 in the suit out of which this appeal has arisen, made a mortgage in favour of defendant 2 Naraindin of a 4 pies share in certain zamindari property. This mortgage was made in the year 1907. Later on the mortgagee brought a suit for foreclosure, the defendant impleaded being the mortgagor Bhagwandin. When that suit was instituted, the sons of Bhagwandin, who are the plaintiffs in the present case, applied to be made parties on the ground that they were interested in the subject-matter of the dispute. The defence which they put forward was that the property was joint ancestral family property that their father had no right to mortgage the ancestral property and that there was no reason which in law would justify the passing of a decree which would bind the family property on the ground that the debt had been borrowed for legal necessity or in the interests of the joint family. The Court which was dealing with that case gave effect to this defence. It dismissed the suit for foreclosure but gave a personal decree for the mortgage debt against the father Bhagwandin. Thereafter the decree-holder proceeded to take out execution of this personal decree and in execution it seems that he attached the 4-pies share which had been mortgaged in the year 1907. The sons objected to this attachment. Their objection was dismissed and in consequence of the order of dismissal they filed the present declaratory suit. The relief which was claimed in the suit was that it should be declared that the entire family property was exempt from attachment and sale in execution of the personal decree obtained against Bhagwandin, the father. In the alternative it was prayed that if the whole of this relief be not granted, it should nevertheless be declared that the interest of these sons of Bhagwandin was not liable to be taken in execution of the decree. Both the Courts below have dismissed the suit in its entirety.

They have proceeded on the principle that the sons are liable to pay the father's debt and that therefore it was not possible in the present proceedings to hold

that this property which belonged to them was not liable to be taken in execution in order to satisfy the father's debt. However, we have it on the authority of a very recent decision of their Lordships the Privy Council, which is reported as *Sahu Ram Chandra v. Bhup Singh* (1), that so long as the father in a Hindu family is alive, the pious obligation to discharge his debts which is allowed by the Hindu law upon his sons cannot be enforced. To quote the words of Lord Shaw, which are to be found at p. 113 of (15 A. L. J.), of the report,

"While the father however remains in life, the attempt to affect the sons' and grandsons' share in the property in respect merely of their pious obligation to pay off the father's debts, and not in respect of the debt having been duly incurred for the interest of the estate itself, which they with their father jointly own, that attempt must fail and the dismissal of all reasons may be assigned for this, namely, that before the father's death he may pay off the debt, or after his death there may be ample personal estate belonging to the father himself out of which the debt may be discharged."

Consequently I must hold that the reason which has led the Courts below to their decision is not a good reason in law, and obviously the proper decree to be passed in the case was a decree declaring that the interest of these five plaintiffs in this share, which is joint family property, was not liable to be attached and sold in execution of the decree. The learned Counsel for the appellants has argued very strenuously that the plaintiffs are entitled to have a declaration made in respect of the entire joint family property including the interest of the father Bhagwandin, but that proposition does not appear to me to be maintainable. It has, I think, been settled definitely that under a decree against any individual coparcener for his separate debt a creditor may during the life of the debtor seize and sell his undivided interest in the family property. Consequently it appears to me that it was competent to the decree-holder in this case to apply for attachment and sale of the joint undivided interest of Bhagwandin in this ancestral family property and to have the share brought to sale. The purchaser of such an interest is after his purchase entitled to enforce his rights by partition. I am given to understand that while these proceedings have been going on in Court, the property has al-

ready been brought to sale and has been purchased by the decree-holder himself. In that case I may observe here that he has brought the property subject to the result of this litigation and the result will be that he will be deemed to have acquired only the interest of Bhagwandin in this joint family property. I allow the appeal to this extent therefore that I give the plaintiffs a decree declaring that their interest in this joint undivided family property, consisting of 4-pies zamindari share, was not liable to attachment and sale in execution of the decree obtained by respondent 2 against their father Bhagwandin. The plaintiffs are entitled to costs in all three Courts.

B.V./R.K.

Appeal allowed.

A. I. R. 1918 Oudh 404

KANHAIYA LAL AND DANIELS, A. J. CS.

Shamshad Ali Khan and another—
Plaintiffs—Appellants.

v.

Mohammad Ali Khan and another—
Defendants—Respondents.

Second Appeal No. 284 of 1917, Decided on 18th June 1918, against decree of Dist. Judge, Hardoi, D/- 30th April 1916.

Transfer of Property Act (1882), S. 60—Part of mortgaged property purchased by mortgagee subject to his mortgage—Mortgage is extinguished to the extent of property purchased.

Where a mortgagee purchases a part of the mortgaged property subject to his mortgage, the question of the sale price is immaterial and the effect of the purchase is to extinguish the mortgage to an amount proportional to the extent of the property purchased. (P 405 C 1)

M. Wadim—for Appellants.

A. S. Sen—for Respondents.

Daniels A. J. C.—Certain property was mortgaged with possession by Mohammad Ali Khan, defendant 1, to Asad Ali Khan deceased, father of the plaintiffs-appellants, and a deed of further charge was executed in respect of the same property. A portion of this property, amounting roughly to one half, was purchased by the plaintiffs in execution of a simple money decree. The purchase was made subject to the deed of further charge which was duly proclaimed at the sale. The plaintiffs in the present litigation seek to bring to sale the remaining half of the mortgaged property in lieu of half the interest due under the deed of further charge. They admit that by pur-

chasing the equity of redemption in half of the property the mortgage has been split up and has been extinguished to the extent of the property which they have purchased. The first Court, finding that the value of the property purchased was slightly more than half the total value of the mortgaged property, gave the plaintiffs a decree for Rs. 48-13-9, as against Rs. 54 which they originally claimed. The appellants admit the correctness of this decree. The lower appellate Court has dismissed the suit altogether, holding that because the deed of further charge was notified at the time of sale and the sale was made subject to it, the whole of the charge must be deemed to have been extinguished by the purchase.

The proposition of law enunciated by the Court below obviously cannot be supported and the respondents' counsel has made no attempt to support it. If one of several properties comprised in a mortgage is sold to satisfy the money claimed, it is the invariable practice to notify the entire mortgage and this certainly does not imply any intention on the part of the mortgagee to relinquish his claim against the remaining mortgaged properties. The contention of the respondents' counsel is that if it is found that the value of the property purchased is sufficient to cover the amount due under the charge in addition to the purchase money, it should be presumed that the charge was extinguished. He admits that there is no finding in his favour on this point and that the question has never been gone into, but he asks that we should now in second appeal remit an issue regarding it. He relies on the case of *Amir Hasan Khan v. Choudhri Hadi Hasan* (1), in which the view for which he contends was accepted as one of two grounds for upholding the lower Court's judgment. He relies still more strongly on the Privy Council case of *Dulichand v. Ramkishan Singh* (2), which was cited evidently with some doubt as to its applicability in *Amir Hasan Khan v. Choudhri Hadi Hasan* (1) (at p. 344), with the remark that "For this view there seems to be support in the case of *Dulichand v. Ramkishan Singh* (2)." On the other hand, a Full Bench of the Allahabad High Court has laid down in *Bisheshur Dial v. Ram*

1. (1901) 4 O C 341.

2. (1881) 7 Cal 648=8 I A 93 (F C).

Surup (3) that where a mortgagee purchases a part of the mortgaged property subject to his mortgage, the question of the sale price is immaterial and the effect of the purchase is to extinguish the mortgage to an amount proportional to the extent of the property purchased. If a mortgagee becomes possessed of the equity of redemption in one-third of the property then the mortgage is extinguished to the extent of one-third, if he becomes owner of half the mortgaged property the mortgage is extinguished to the extent of one-half and so on.

The appeal originally came before the learned Judicial Commissioner who referred it to a Bench on the ground that in his opinion the decision in *Amir Hasan Khan v. Chaudhri Haid Hasan* (1) was erroneous. With this view we are in entire agreement. Where property is sold subject to a mortgage, though the sale price will doubtless be affected by the existence of the encumbrance, the mortgage money forms no part of the price. On the contrary the whole meaning of selling subject to a mortgage is that the right of the mortgagee is preserved intact. The reason why there is a complete or partial extinction of the mortgage when the mortgagee is himself the purchaser is that in such a case there is a merger of the mortgagee's right and the proprietary interest to the extent of the property purchased. The integrity of the mortgage is broken up and the mortgagee can no longer claim to throw the whole burden of the mortgage on the remaining property. The law on the subject was fully considered by a Bench of six Judges in *Bisheshur Dial v. Ram Sarup* (3) and is thus summed up in the leading judgment of Banerji, J.

"Upon further consideration, I am of opinion that the rule laid down by the Bombay High Court is the true rule, and that when the mortgagee buys at auction the equity of redemption in a part of the mortgaged property, such purchase has, in the absence of fraud, the effect of discharging and extinguishing that portion of the mortgage debt which was chargeable on the property purchased by him, that is to say, portion of the debt which bears the same ratio to the whole amount of the debt that the value of the property purchased bears to the value of the whole of the property comprised in the mortgage."

That ruling has never, so far as we are aware or as has been pointed out to us, been dissented from by any High Court in India. It has been repeatedly followed

at Allahabad and the same rule has been followed, both before and since, by the Bombay High Court. It has also been followed by the Calcutta High Court: *vide Mutty Lal Pal v. Nandu Lal Neogi* (4). It has been treated as good authority in at least one case in this Court, e. g., *Suraj Kishan v. Ajudhya Prasad Singh* (5). It only remains to see whether there is anything in the Privy Council case relied on by the respondents to conflict with a view so reasonable in itself and supported by such a wide consensus of authority. There are some observations in that case, which were derived prior to the introduction of the Transfer of Property Act, which might appear to support the respondents' argument, but the actual point to be decided was whether a purchaser who had stepped into the shoes of a prior mortgagee could recover an amount paid into Court to prevent the property being sold over again in execution of a decree based on a subsequent mortgage, a sale against which he had vainly protested before it took place. The report shows that there was no dispute before their Lordships as to the equitable right of the plaintiff to recover his money. "The arguments at the Bar," say their Lordships,

"were not directed to show that there is any equity upon which the appellant could retain this money; but the objections taken to the action were that the payment was voluntary, and that the remedy, if any, was in the execution proceedings."

The case has been frequently cited as laying down the law as to what constitutes a voluntary payment. Neither in *Bisheshur Dial v. Ram Sarup* (3) nor in any of the various cases in which that ruling has been followed does it ever appear to have been suggested that the High Courts, in the view which they took, were contravening anything laid down by their Lordships of the Privy Council in that case. We accordingly allow the appeal, and setting aside the decree of the lower appellate Court, restore the Munsif's decree with costs in all Courts recoverable as part of the decretal amount.

Kanhaiya Lal, A. J. C.—I agree.

B.V./R.K.

Appeal allowed.

4. (1903) 12 C W N 745.

5. (1915) 27 I O 960.

A. I. R. 1918 Oudh 406

STUART AND KANHAIYA LAL, A. J. CS.
Mangal and another—Plaintiffs—Appellants.

v.

Indar Kuar — Defendant — Respondent.

First Appeals Nos. 29 and 30 of 1916, Decided on 8th January 1918, from decree of Sub-Judge, Sitapur, D/- 11th March 1916.

Civil P. C. (5 of 1908), S. 151 and O. 41, R. 27—Appellate Court is justified to permit production of additional evidence on substantial cause being shown.

In a suit the plaintiffs had some reason to suppose that the execution of the deeds on which the suit was based would not be seriously challenged. But it was seriously challenged. The plaintiffs then produced formal evidence of the execution of the deeds, by examining a witness to prove the signature of one of the attesting witnesses to the deeds. The trial Court however disbelieved this witness and dismissed the suit:

Held: that under these circumstances there was substantial cause to justify the Appellate Court under S. 151 and O. 41, R. 27, in permitting the plaintiffs to produce additional evidence as to the execution of the deeds. [P 406 C 2]

George Jackson, Ram Chandra and Chhail Behari Lal—for Appellants.

Gokaran Nath Misra and Harkaran Nath Misra—for Respondent.

Judgment.—Appeals Nos. 29 and 30 of 1916 relate to suits instituted on the basis of two mortgage-deeds which are alleged to have been executed on 13th February 1902 by Raja Karan Singh. The suits have been brought against Rani Indar Kuar, the mother of Raja Karan Singh, and Rani Khem Kuar, the widow of Raja Karan Singh. The alleged mortgages purport to transfer property which, as found by the learned Subordinate Judge, belonged to Rani Indar Kuar but which she permitted to be recorded first in the name of her husband, Raja Dip Singh, and then in the name of her son, Raja Karan Singh, both of whom managed it in their own right. The learned Subordinate Judge found that in these circumstances the mortgagees could claim the benefit of S. 41, Act 4, of 1882, and proceed against the property transferred. But as he found that the two deeds of mortgage in question had not been proved to have been executed by Raja Karan Singh, he dismissed the suits. The position with regard to the execution of these two deeds of mortgage is as follows:—The deeds were registered. The Sub-Registrar's endorsement shows that Raja

Karan Singh whom he knew personally admitted execution of these deeds in his presence. In a deed of agreement made between Rani Indar Kuar and Rani Khem Kuar it is stated that Rani Indar Kuar will be responsible for the payment of the amount due on these two deeds. In these circumstances the plaintiffs appellants had some reason to suppose that the execution of the deeds in question would not be seriously challenged. But it was seriously challenged. Sufficient evidence was produced in the lower Court to prove the signature of one of the attesting witnesses to both deeds.

The appellants considered it sufficient to prove the execution of the deeds by Raja Karan Singh through the production of a certain witness Sheo Ratan Lal. They were not in a position to know the view that the learned Subordinate Judge had taken as to the evidence of this witness. The learned Subordinate Judge found that this witness was an unreliable person and thus that there was not sufficient evidence of the execution of the deeds in question by Raja Karan Singh, and dismissed the suits. As this decision must necessarily have taken the appellants by surprise, for they had no reason to suppose that the evidence of the execution of these deeds need be anything but formal, we consider that they have had some grievance in not being given an opportunity to prove the execution of the deeds by other evidence. Under the provisions of O. 41, R. 27, we can give permission to the appellants to produce other evidence for substantial cause and we think that there is a substantial cause in this case which would justify us in permitting them to produce such additional evidence. We consider that apart from the provisions of O. 41, R. 27, we have authority to pass this order under the provisions of S. 151, Act 5 of 1908, as we consider our order necessary for the ends of justice. We therefore send back the case with the following additional issues:

1. Did Raja Karan Singh sign the mortgage-deeds in suit? 2. Did he admit having signed and executed the said deeds before the Sub-Registrar at the time of registration?

Both sides will be permitted to produce any evidence that they may wish to produce upon these remitted issues. The learned Subordinate Judge's successor will record such evidence as may be pro-

duced and decide these remitted issues and return the evidence certified with his findings on or before 8th March 1918. Ten days will then be allowed for objections.

B.V./R.K.

Issues remitted.

* A. I. R. 1918 Oudh 407

KANHAIYA LAL, A. J. C.

Ram Anuj and others—Accused—Applicants.

v.

Emperor—Opposite Party.

Civil Revn. No. 43 of 1918. Decided on 27th May 1918, against the order of Munsif, Hardoi, D/- 5th March 1918.

* Criminal P. C. (5 of 1898), S. 476—Court has power to enquire into commission of offence brought to notice in subsequent judicial proceedings.

The powers conferred by S. 476, Criminal P. C., can be exercised at any time when an offence is committed before a Court in a judicial proceeding, or when the commission of it is brought to its notice in the course of that judicial proceeding or in any other, 32 Mad 49 (F. B.) and 34 Cal 551; (F. B.), *Diss. from*. [P 407 C 2]

*A. P. Sen—*for Applicants.

*Government Pleader—*for the Crown.

Judgment.—This is an application for revision of an order passed by the Munsif of Hardoi, directing the prosecution of Ram Anuj, Tilak and Baldi, the first named, on charges under Ss. 193 and 209 and the latter on a charge under S. 193, I. P. C. In 1917 Ram Anuj filed a suit against Likha Singh for the recovery of the price of bullocks alleged to have been sold in 1321 Fasli. The defence was that the bullocks had been purchased 6 or 7 years prior to the suit and that the price had been paid up. Baldi and Tilak gave evidence in that case, supporting the claim of Ram Anuj. On behalf of Likha Singh, Lone Singh was examined. The Small Cause Court, which tried that suit, decreed the claim. Ram Anuj then filed a suit against Lone Singh, alleging that the latter had similarly purchased a bullock in 1321 Fasli. He was apparently confident that, Lone Singh having admitted in the suit against Likha Singh that both had purchased bullocks at the same time, and Likha Singh having failed to satisfy the Court, a decree against Lone Singh was certain to be passed. Lone Singh, however, succeeded in proving that at or about the time of the alleged purchase he was in jail. Fearing discomfiture, Ram Anuj applied for an amendment of the plaint but was unsuccessful. He

thereupon withdrew the suit. The Court then directed notices to issue to Ram Anuj to show cause why he should not be prosecuted for perjury and similar proceedings were subsequently taken against Tilak and Baldi also, with the result that their prosecution was ordered. If the facts found by the Court below be taken to be correct, Ram Anuj would be *prima facie* chargeable with the perpetration of systematic fraud and perjury, and his witnesses, Tilak and Baldi, with giving false evidence in support of his claim against Likha Singh. The learned counsel for the applicants contends that, so far as Tilak and Baldi were concerned, the commission of the alleged offence was not noticed by the Court till after the judicial proceeding in which it is said to have been committed was over. He relies on the decisions in *Ayakkannu Pillai v. Emperor* (1), and *Regu Singh v. Emperor* (2), wherein it was held that the power conferred by S. 476, Criminal P. C. could be exercised by the Court which tried the case only in the course of the judicial proceeding in which the alleged offence was committed or at its conclusion or as soon after it as to make it really a continuation of the same proceeding. Such a restricted interpretation does not seem, however, to be justified by the language of S. 476 of the Code, for there is nothing in it to limit the exercise of that power within any period or at any particular time. The power can be exercised at any time when an offence is committed before a Court in a judicial proceeding, or when the commission of it is brought to its notice in the course of that judicial proceeding or in any other. The discovery of the commission of such an offence may not be brought to the notice of the Court, before which it was committed, till an enquiry is made in some cognate matter in any other judicial proceeding, and it would be stultifying the scope and intention of S. 476, to hold that a Court would not be competent to deal with such a commission, unless a discovery is made in the judicial proceeding in which the offence was committed. In *Girwar Prasad v. Emperor* (3), it was accordingly held that the words "brought under its notice" were wide enough to cover an offence committed in another

1. (1909) 32 Mad 49=1 I O 597 (F. B.)

2. (1907) 34 Cal 551 (F. B.).

3. (1909) 1 I C 806.

forum and on some previous occasion, but it must be an offence brought to the notice of the Court holding the enquiry. In *Tilok Pandey v. Emperor* (4), it was similarly held that there was nothing in S. 476, to require a Court to take action, if at all, immediately after the conclusion of the case in which the offence was to have been committed or within any fixed time thereafter. In *Lakshmidas Lalji, In re* (5), a similar view was taken. The circumstances set forth by the Court below render an enquiry into the charges laid against the applicants eminently desirable. The application is rejected.

B.V./R.K. *Application rejected.*

1. (1915) 37 All 344=29 I C 97

5. (1908) 32 Bom 184.

A. I. R. 1918 Oudh 408

KANHAIYA LAL AND DANIELS, A. J. CS.
Ramman Lal and another—Plaintiffs
—Appellants.

v.

Ram Gopal and another—Defendants
—Respondents.

First Appeal No. 47 of 1916. Decided on 21st June 1918, against decree of Sub-Judge, Hardoi, D/- 6th April 1916.

Hindu Law—Debts—Son's liability—Simple mortgage—Personal liability can be separated—Son can be made liable if debt is not illegal or immoral.

The personal obligation comprised in every simple mortgage may be separated from the mortgage debt, and though the mortgage may in certain circumstances be invalid, the personal obligation to repay the money may amount to an antecedent debt which a Hindu son may be under an obligation to pay if it was incurred for purposes neither illegal nor immoral.

[P 411 C 2]

Gokaran Nath Misra and J. N. Chak
—for Appellants.

A. P. Sen—for Respondents.

Judgment.—This appeal arises out of a suit brought by the plaintiffs-appellants for the recovery of possession of the mortgaged property. The mortgage in question was effected by Ram Narain, the father of defendant 1 and father-in-law of defendant 2, who is the widow of another son of his, in favour of Narain Prasad, the predecessor-in-interest of the plaintiffs, on 11th October 1905. The amount secured by the mortgage was Rs. 12,500, out of which Rs. 7,000 were credited towards a prior mortgage of 12th March 1902 held by Narain Prasad, Rs. 1,091-8-3 were credited towards interest due thereon. Rs. 5,000 were left

for payment to Banwari Lal in satisfaction of his decree against the mortgagor dated 30th November 1904, Rs. 2,911 were credited towards a *bahi* debt due to the mortgagee and the balance was paid in cash before the Sub-Registrar. The properties mortgaged comprised the entire villages of Sikandarpur and Ratanpur situated in Tahsil Aligarh, District Farrukhabad, and the mortgagee right in a grove standing in Chak Bamiari, District Hardoi. The registration of the mortgage deed was effected in the latter district. The mortgage-deed provided for the payment of the mortgage money—with interest thereon at 6 per cent. per annum compoundable half-yearly—within five years, and one of the conditions in the mortgage-deed was that if the mortgagor failed to pay the said mortgage money within five years, he shall deliver possession of the mortgaged properties to the mortgagee. On 21st April 1913 the learned Subordinate Judge decreed the claim of the plaintiffs for possession of the grove but dismissed it in regard to the remaining properties mortgaged, holding that the registration of the mortgage deed, so far as it affected the latter properties, was invalid.

On appeal this Court set aside that decree and remanded the case to the Court below for its decision on the merits after determination of such of the issues as had remained undecided. The only issues on which this Court in common with the Court below expressed its findings, where those relating to the nature of the interest which the mortgagor held in the mortgaged properties, the validity of the registration of the deed of gift and the obtaining of the deed of mortgage by fraud and undue influence. The finding of this Court and of the Court below on the point last mentioned was that no fraud or undue influence was established. On the other matters the findings of this Court disagreed with those of the learned Subordinate Judge and were to the effect that the Farrukhabad property was acquired out of joint family funds possessed by the family of which Bhajan Lal and Ram Narain were members, and in which Banwari Lal and Ram Gopal obtained rights as co-parceners upon their birth, that Banwari Lal had relinquished his share under an amicable arrangement by which he was allowed a sum of Rs. 5,000 in lieu of his rights and that

the registration of the deed of mortgage was not invalid. The matters which remained for determination, were whether the mortgagor had received the consideration of the mortgage deed in suit, whether defendant 1 was benefited by the loan and was bound by it and whether the covenant to put the mortgages in possession of the mortgaged properties, if the mortgage money was not paid within five years, was enforceable against him. The learned Subordinate Judge came to the conclusion that the consideration paid by the mortgagee did not exceed Rs. 6,232-7-9, out of which Rs. 497-7-2 were shown not to have been taken for the benefit of the minor and the rest represented antecedent debts for which the minor was liable. He refused, however, to give a decree for possession of the mortgaged villages, but decreed the claim for the recovery of Rs. 5,735 with interest thereon at the stipulated rate by the sale of the mortgaged properties.

The findings of the learned Subordinate Judge on these points cannot be sustained. He considered that the sum of Rs. 3,000 principal and Rs. 1,091-8-3 interest credited in the mortgage-deed in suit towards an earlier mortgage of 12th March 1902 was not really due, because the alleged earlier mortgage was fictitious. The reason suggested for the execution of the fictitious mortgage by Hulas Singh (D. W. 8) is that there was a quarrel between Ram Narain and his son, Banwari Lal, and that the former said that he had executed the deed in favour of one of his relations to defeat the claim which the latter might bring for partition. On 15th August 1904 a suit for partition was brought by Banwari Lal (Ex. 42). It was compromised on 30th November 1904 (Ex. 44), whereby Banwari Lal agreed to accept Rs. 5,000 in lieu of his claim to a share in the family properties. That sum of Rs. 5,000 was paid to Banwari Lal out of the consideration of the mortgage in suit, and if the mortgage of 12th March 1902 was fictitious, there is no reason why after the claim of Banwari Lal had been amicably settled, the money due on that mortgage should have been acknowledged and credited in the mortgage in suit. Hulas Singh holds a lease of one of the villages in suit from Ram Narain and he is naturally interested in helping his lessor to defeat the claim of the mortgagee.

He alleges that he was present at the time of the registration of the aforesaid mortgage and learnt there from Ram Narain that it was fictitious, having gone there to pay the revenue due by him; but no instalment of revenue is generally payable in March. The statement of Hulas Singh cannot, therefore, be trusted. Another witness produced by the defendants to prove that the earlier mortgage was fictitious is Jagannath (D. W. 2). He is an attesting witness to the said mortgage. He states that Ram Narain executed it to bring pressure on Banwari Lal who was quarrelling with him. He further states that Ram Narain gave him Rs. 2,550 from his own house and that the said money was shown before the Sub-Registrar as having been paid by the mortgagee and was then returned to him. The falsity of the former statement is apparent from the fact that after the claim of Banwari Lal was settled by compromise, the mortgage of 12th March 1902 was credited in the mortgage-deed in suit and the falsity of the latter is equally apparent, because if the mortgage-deed was fictitious, there was more reason for Ram Narain to have concealed the fact from outsiders than to have published it by giving the money to be shown before the Sub-Registrar to such a person. He is not a resident of the village in which Ram Narain lived. He was at one time a chaukidar, but was dismissed from service for making a false report (Ex. 49). He admits that his brother was for sometime in the service of Ram Narain. No reliance can be placed on his statement.

On behalf of the plaintiffs Makhan (P. W. 3) has been examined. He states that the mortgage in question was executed in his presence and was attested by him, that Rs. 2,550 were paid before the Sub-Registrar and the receipt of the rest acknowledged by Ram Narain. He is related to one of the plaintiffs, but as his statement is corroborated by the mortgage-deed (Ex. 3) and the endorsement made thereon by the Sub-Registrar, there is no ground for discrediting his testimony. The learned Subordinate Judge observes that the plaintiff Ramman Lal did not come forward in the witness-box to give evidence and that the non-production of the original mortgage-deed is also suspicious. But Mangla-

din, one of the plaintiffs, has given evidence in the case and has produced account books, proving that Rs. 450 were advanced on different dates to Ram Narain prior to the execution of the said mortgage for the expenses of some litigation which was then going on in respect of his estate in Farrukhabad (O. P. 224) and that the balance was paid before the Sub-Registrar. It is suggested that another mortgage-deed executed by Ram Narain in favour of Ramman Lal on 12th February 1894 for Rs. 5,000 was held by the Subordinate Judge of Farrukhabad, in a suit filed for the recovery of the money due on the same to have been fictitious (Ex. A-18). But no inference can be drawn from the nature of the transaction, represented by that mortgage, in regard to the mortgage of 12th March 1902. Mangladin explains that the original mortgage-deed of 12th March 1902 was returned to Ram Narain when the money due on it was credited in the mortgage-deed in suit.

The defendants have not produced that mortgage deed and the failure of the plaintiffs to produce it cannot in the circumstances be construed as evidence to establish that it was fictitious and was in the custody of the plaintiffs. On the evidence adduced, there can be no doubt that the mortgage of 12th March 1902 represented a genuine debt due by Ram Narain and as it was an antecedent debt, there was a pious obligation on Ram Gopal, the minor son of Ram Narain, to pay it; and the mortgage effected in lieu of such a debt by Ram Narain is binding on him. The next item of consideration compromising the mortgage in suit is the sum of Rs. 5,000 paid by Banwari Lal on 10th January 1906 (Ex. 2) in pursuance of the compromise arrived at in the suit filed by Banwari Lal against Ram Narain. The effect of this compromise was to relieve the family property from the claim brought by Banwari Lal and to enlarge the share of Ram Narain and his son, Ram Gopal. By virtue of that compromise, Banwari Lal gave up all possible interest in the property which might accrue to him in favour of Ram Narain (Ex. 44), and as the defendant Ram Gopal was the only other son of Ram Narain, he was obviously benefited by the compromise and the loan taken

from the plaintiffs to comply with its terms. Item 3 of consideration is a bahi debt of Rs. 2,911, which is sufficiently proved by the evidence of Mangladin and the account-books produced. The learned Subordinate Judge found that there was corroborative evidence to prove items worth Rs. 735; but the letters on which he relies, show that there was a general course of dealings between the parties from a long time. On some occasions Ram Narain sent letters asking for specific sums of money. On other occasions, he might have gone to borrow the money or might have obtained it otherwise through some messenger. The mere fact that letters are not forthcoming in regard to the other items, is not necessarily evidence of the fact that no money was taken to Ram Narain. Ganesh Prasad (D. W. 5), who is a cousin of Ram Narain used to say to him that he had bahi khata accounts with Ramman Lal and that he took loans from him from time to time as necessity arose (O. P. 85). On 23rd August Ram Narain wrote a letter to Ramman Lal asking for an advance of Rs. 2,500 (Ex. 26).

On 26th August 1901 he acknowledged the receipt of Rs. 100 (Ex. 27). Between 29th June 1902 and 31st January 1903 he wrote various letters, asking for different sums of money (Exs. 17, 18, 19 and 28). On 26th February 1913 and again on 28th December 1908 he wrote letters acknowledging the receipt of different items (Exs. 16 and 20). On 25th January 1904 he asked for a loan of Rs. 100 (Ex. 21). On 27th March 1904 he acknowledged the receipt of another sum of Rs. 100 (Ex. 29). On 13th October 1904 he acknowledged the receipt of another similar sum (Ex. 22). On 3rd June 1906 sometime after the execution of the mortgage-deed in suit, Ram Narain wrote to Ramman Lal, saying that he was unable to pay the interest demanded (Ex. 30). By the terms of the mortgage the plaintiffs were entitled to claim possession of the mortgaged property, if the mortgage money was not paid within five years, Ram Narain wrote, suggesting that possession might be taken over one or both the villages mortgaged, provision being made for his maintenance, if both were taken (Ex. 30). On 1st July 1907 Ganesh Prasad similarly wrote that one or both the villages mortgaged might be taken in possession in lieu of interest (Ex. 24).

On 23rd July 1907 Ram Narain wrote again, asking Ramman Lal to take possession of one of the villages (Ex. 23) and sent other letters asking for a further loan of Rs. 50 for the marriage of his daughter (Exs. 25 and 31). On 24th January 1910 Ram Narain applied to the Collector asking that the Court of Wards might take a mortgage of his estate and pay his debts (Ex. 48) and stating that he owed Rs. 16,000 to Ramman Lal and others.

After the death of Ram Narain, Ganesh Prasad again wrote on behalf of his widow to Ramman Lal, asking him to give six months' time for the payment of the money due to him (Ex. 32). On 2nd March 1912 he asked Pandit Lakshmi Ram, a Deputy Collector, to intercede on behalf of the defendants in inducing Ramman Lal to wait for four months for the repayment of the mortgage money (Ex. 33). Ganesh Prasad admitted having sent the letters produced by the plaintiffs. The accounts filed show that Rs. 4,612-13-0 were due by Ram Narain on Phagun, Sudi 4, 1960. Ram Narain struck the balance and signed it with his own hand (Ex. 12). Thereafter other items were borrowed from time to time as shown by the day-book. The total amount due was thus Rs. 7,002-8-3 inclusive of Rs. 3,000 principal and Rupees 1,001-8-3 interest payable on the earlier mortgage. The whole of this amount was credited in the mortgage-deed in suit. The account-books filed by the plaintiffs were kept in the regular course of business and there is no sufficient reason for supposing that the debts entered in them were not genuine. Apart from the statement of Ram Narain in the mortgage-deed in suit wherein the existence of the said debts was admitted by him, the evidence produced in corroboration of the same is sufficient. Ramman Lal (sic) was admittedly the manager of the family comprising himself and his minor son, Ram Gopal, and as pointed out by their Lordships of the Privy Council in *Suraj Narain v. Ratan Lal* (1), the statements made by him are admissible in evidence against the other members of the family. A sum of Rs. 497-7-9, representing the balance of the consideration, was paid before the Sub-Registrar. There is evidence to show that that money was taken

by Ram Narain for the expenses of the investiture of his son, Ram Gopal, with the sacred thread. According to Shiam Lal, one of the witnesses for the defendants, the ceremony was attended by 500 or 600 persons. Mangla Prasad states that the amount aforesaid was taken by Ram Narain for the expenses of that ceremony. In the mutation proceeding, consequent on the death of Ram Narain, Ganesh Prasad (D. W. 5), who was present at that ceremony, admitted that the debts due by Ram Narain were incurred by him to meet the expenses of the maintenance of his family, the marriage of his daughters and the jama of his son. We have no doubt, therefore, that the entire consideration represented by the mortgage-deed in suit was taken either to pay antecedent debts or to meet a valid family necessity. The learned counsel for the defendants-respondents contends that an antecedent debt incurred on the security of the family property ought not to be taken into account in determining the family necessity, and reliance is placed in support of that contention on the observations of their Lordships of the Privy Council in *Saha Ram Chandra v. Bhup Singh* (2); but what their Lordships seem to lay down is that an antecedent debt secured by mortgage might be open to the same objection as a subsequent mortgage, effected to pay that debt. They nowhere say that the personal obligation comprised in every simple mortgage cannot be separated from the mortgage debt, and that though the mortgage may in certain circumstances be invalid, the personal obligation to repay the money may not amount to an antecedent debt, which a son may be under an obligation to pay if it was incurred for purposes neither illegal nor immoral. There is no allegation in this case that any of the debts comprised in the mortgage in suit was incurred for purposes illegal or immoral.

The plaintiffs ask for a decree for possession in enforcement of the terms comprised in the mortgage; but the learned Subordinate Judge gave them a decree for the money which, according to his finding, the defendants were liable to pay. The plaintiffs had, however, a right to insist on getting possession, to which they had become entitled in consequence

1. A I R 1917 P C 12=40 All 159=40 I C 988
=20 O C 211=44 I A 201 (P C).

2. A I R 1917 P C 61=39 All 437=39 I C 280
=44 I A 126 (P C).

of the failure of the mortgagors to pay the mortgage money within 5 years; and as held in *Jawahir Singh v. Chandika Baksh* (3) and *Muhammad Sher Khan v. Swami Dayal* (4), a decree for money ought not to have been forced upon them. The plaintiffs became entitled to possession on 11th October 1910. The present suit was filed on 1st March 1912 and by the frivolous pleas and defences raised by the defendants, some of which found favour with the Court below, they have been kept out of possession of the mortgaged property all this time. Ganesh Prasad, a relation of the defendants, said in one of his letters that if the plaintiffs were not amenable to his suggestion, they would suffer trouble as they had suffered before, and whoever may be responsible for the attitude which the defendants took up, firstly, in questioning the validity of the registration and, secondly, in questioning the necessity for the mortgage, there can be no justification in denying to the plaintiffs the relief they ask for. The appeal is, therefore, allowed and the claim of the plaintiffs decreed with costs here and hitherto. The defendants will, in the circumstances, bear their own costs throughout.

B.V./R.K. *Appeal allowed.*

3 (1899) 2 O C 145.

1. (1915) 18 O C 105=31 I C 377.

A. I. R. 1918 Oudh 412 (1)

LINDSAY, J. C.

Chandika Prasad—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Reference No. 5 of 1918, Decided on 28th February 1918, made by Second Addl. Sess. Judge, Lucknow, D/- 6th February 1918.

Penal Code (1860), S. 173—Subpoena—Mere refusal to accept subpoena under S. 160, Criminal P. C., is not offence.

A mere refusal to accept a subpoena issued under S. 160, Criminal P. C., does not constitute an offence under S. 173, I. P. C. [P 412 C 2]

M. A. Khan—for Applicant.

Govt. Pleader—for the Crown.

Referring Order.—This is an application in revision of an order of conviction and sentence under S. 173, I. P. C. The charge against the applicant was that he had refused to take a subpoena issued under S. 160, Criminal P. C. The trial was summary under S. 260 of that Code. There is nothing on the record to show any act

on the part of the applicant, beyond mere refusal to accept, to constitute prevention of service within the meaning of S. 173, I. P. C. This refusal constitutes no offence.

The point is concluded by the following authorities: *Queen v. Punamalai Nandan* (1), *Emperor v. Ahmed Husain Khan* (2) and *Empress v. Gangaram* (3). The latest Allahabad High Court ruling was reported in the Pioneer of 5th December 1917. I would therefore recommend that the conviction and sentence be set aside. A copy of this order will be sent to the Trying Magistrate through the District Magistrate for an explanation, he may think fit to offer, within a week. The bail will continue.

Judgment.—For the reasons given in the referring order of the Judge the conviction of Chandika Prasad is set aside. He will be acquitted and released, his bail bond being discharged.

B.V./R.K. *Reference accepted.*

1. (1882) 5 Mad 199.

2. (1909) 31 All 608=31 I C 265.

3. (1886) A W N 93.

A. I. R. 1918 Oudh 412 (2)

STUART AND KANHAIYA LAL, A. J. C.
Shankar Singh—Plaintiff—Appellant.
v.

Kalka Baksh Singh—Defendant—Respondent.

First Appeal No. 98 of 1915, Decided on 3rd April 1917, against the order of Sub. Judge, Hardoi, D/- 3rd September 1915.

(a) Registration Act (1908), S. 17 (6)—Compromise petition in mutation proceedings being step in judicial proceeding needs no registration.

A petition of compromise, the object of which is to intimate to the Court what is settled outside the Court with a view to get mutation effected in accordance with it and which is confined to the property which is the subject-matter of controversy in the mutation proceeding, constitutes a step in a judicial proceeding and does not require registration. [P 417 C 1]

(b) Registration Act (1908), S. 17—Petition admitting partition between co-owners needs no registration and is admissible in evidence.

A partition between co-owners does not require to be effectuated or evidenced by a written document, and a petition admitting or reciting such a partition is admissible in evidence without registration: 22 Mad 508 (P C); 20 All 171 (P C); 35 All 502; A I R 1915 All 114; 36 Cal 193; 30 Mad 478; 3 I C 247; 25 Cal 210; 18 O C 51; 33 All 356 (P C); 3 A H C R 82; A I R 1916 P C 41 and 19 O C 75, *Ref.*

[P 417 C 2]

(c) Civil P. C. (1908), O. 23, R. 3—Applies also to revenue proceedings.

Rule 3, O. 23, Civil P. C., applies equally to civil and revenue proceedings. [P 417 C 1]

Champat Rai, A. P. Sen and Sami-ullah Beg—for Appellant.

Gokaran Nath Misra—for Respondent.

Judgment.—This appeal arises out of a suit brought by Shankar Singh, the plaintiff appellant, for the recovery of Rs. 8,144-5-11 from his brother, Kalka Bakhsh Singh. The circumstances, which have given rise to the present claim, are as follows:—

Sauwal Singh was the uncle of Kalka Bakhsh Singh, Shankar Singh and Darshan Singh. On 27th June 1907 he executed a will by which he bequeathed his entire property to two of his nephews, Kalka Bakhsh Singh and Shankar Singh. Sauwal Singh died in 1908. He had two cousins, Narpat Singh and Beni Singh. At the time of his death a suit, filed by Narpat Singh, Beni Singh and their sons, was pending against Sauwal Singh, his nephews Kalka Bakhsh Singh, Shankar Singh and Darshan Singh, and others, wherein the former had claimed a share in what they described as their joint family property. The defence in that case was that the property then in dispute belonged to Sauwal Singh as the eldest member of the family and was impartible according to the family custom, and that the plaintiffs were living separately and had not been in joint possession of the said property from more than twelve years. That suit was eventually dismissed on 12th May 1910 except in regard to the village Bahadurpur, which was allowed to the plaintiffs as under proprietors subject to the payment by them and their heirs to the proprietors for the time being of the Government revenue, all rates, cesses and public charges and ten per cent. malikana (Exs. 161 and 162). Meanwhile in consequence with the defence set up in the above suit, mutation of names was effected in respect of the property left by Sauwal Singh in the name of Kalka Bakhsh Singh alone. On 23rd January 1911 Narpat Singh, Beni Singh and their sons obtained leave to appeal to the Privy Council but on 7th June 1911, they entered into a compromise by which they agreed to accept Rs. 4,000 from Kalka Bakhsh Singh and

Shankar Singh and withdrew their appeal to the Privy Council.

The dispute with Narpat Singh, Beni Singh and their sons having been thus settled, Shankar Singh applied on 25th July 1911 on the strength of the above-mentioned will for the entry of his name in respect of a half share of the property left by Sauwal Singh. Kalka Bakhsh Singh at first took time from the Court to make a settlement out of Court, and subsequently on 19th September 1911 the parties filed a petition of compromise, stating that by virtue of a mutual settlement arrived at between them, the village Lomanau with all its hamlets entered in list A appended to the compromise was allotted to Kalka Bakhsh Singh, that 16 other villages including Bahriyaman and Bhilawan, entered in list B, were allotted to Shankar Singh and that the remaining six villages entered in list C were to continue joint, and further stating that the name of Kalka Bakhsh Singh shall be removed from the property entered in list B and that of Shankar Singh substituted, and that the names of Kalka Bakhsh Singh and Shankar Singh should be entered in equal shares in respect of the property entered in list C.

At the time of the compromise there was a debt of Rs. 8,000 bearing interest at 6 per cent. per annum on the village Bahriyaman, which Sauwal Singh had mortgaged with possession with Raja Ram Pande on 30th May 1906 (Ex. 147). In regard to this debt the petition of compromise stated that a separate agreement had been executed, by which Kalka Bakhsh Singh had agreed to pay his half share of that debt within a month from that date, failing which Shankar Singh would be entitled to recover the same from him. There was also a debt of Rs. 3,000 bearing compound interest at 9 per cent. per annum on the village Bhilawan, which Kalka Bakhsh Singh had mortgaged with Gaxadin and Shankar Prasad on 13th April 1911 (Ex. 145). In regard to that debt the petition of compromise mentioned that Kalka Bakhsh Singh had similarly undertaken by a separate agreement to pay the entire amount within a month from that date, failing which Shankar Singh would be entitled to recover the same from him.

The allegation of Shankar Singh is that Kalka Bakhsh Singh failed to pay the

said money, and he sued accordingly for the recovery of the same with interest thereon at the rate stipulated in the instruments of mortgage. The defendant pleaded that the petition of compromise filed in the mutation case did not correctly embody the terms settled between the parties, that the contents thereof were not read over and explained to him, and that the plaintiff abused the confidence reposed in him by getting the defendant to affix his signature to something different from what was originally settled. He further pleaded that he came to know of the contents of the aforesaid compromise, when Gayadin and Shankar Prasad demanded the mortgage-money due under the mortgage of 13th April 1911, and that the said compromise was invalid on account of the fraud practised by the plaintiff and illegal and unenforceable for want of registration and the necessary stamp duty.

The learned Subordinate Judge found that the petition of compromise correctly represented what was actually settled between the parties, that a formal agreement was also drawn up, embodying the terms of the settlement but was being kept back by the defendant, and that the defendant failed to establish any fraud or undue influence. He however dismissed the claim of the plaintiff on the ground that the petition of compromise was invalid and unenforceable for want of registration. The learned counsel who appears for the defendant respondent impeaches the findings at which the learned Subordinate Judge has arrived on the points first mentioned. His contention is that the draft agreement filed by his client is a genuine document and represents correctly the settlement originally made between the parties and that the evidence adduced by him establishes that the plaintiff abused the confidence reposed in him by getting entered in the petition of compromise terms different from those originally settled. The evidence adduced in support of the alleged agreement consists of three witnesses, Munnu, Shankar Singh and Kalka Singh. Munnu is a petition-writer working at Sandila in partnership with Ghulam Husain. He states that the parties asked him to write an agreement and that he prepared a draft thereof according to the terms mentioned by the parties and copied the same in his book (Ex. A-7).

He further states that he faired out that draft on a stamp paper supplied by Shankar Singh and read it over to the parties, that the parties signed it and got it attested by two or three men and that it was eventually handed over by Kalka Bakhsh Singh to the plaintiff. An examination of the copy book however shows that it consists of 36 pages, 12 of which are completely blank. The first 12 pages contain 10 drafts comprising copies of plaints filed by different persons for arrears of rent, an application for inspection of registration records, another application for resumption of land and a sale deed and a mortgage deed all ranging between 2nd February 1911 and 15th June 1911. The next 12 pages contain copies of the agreement said to have been executed by the parties on 19th September 1911 and the petition of compromise filed by them in the Revenue Court on the same date. The former is stated to have been written by Munnu and the latter by Ghulam Husain. Between 15th June 1911 and 19th September 1911 no other document appears to have been written by either of the partners or was at all events copied in this book, and it is surprising that while the copy of the alleged agreement contains terms which are inconsistent with the petition of compromise filed in the Revenue Court, the petition of compromise, as copied in this book, tallies with the petition of compromise which was actually filed by the parties in the mutation proceedings.

The book contains evident marks of the preceding and succeeding pages having been removed and considering the normal quantity of work, which these two petition-writers must have done between 2nd February 1911, with which this book begins, and 19th September 1911, with which it ends, it is difficult to believe that this book is a genuine record of the documents and petitions which these two men wrote between that period in pursuance of their calling. It is suggested that the petition-writer copied only important documents in this book. But some of the copies in it relate to matters of a most trivial and ephemeral nature. Munnu admits that after 19th September 1911, the date of the alleged agreement, another copy book was started which was in the possession of Sakhat Husain but if there were 12 pages blank in this book, there was no necessity for another copy

book having been started. He further admits that he had no book similar to the one produced, for the year preceding 1911. He is a man of slender means, having been turned out by his father, who, as he admits, helps him with a rupee or two off and on. He holds no license to work as a petition-writer at Sandila. He came forward to give evidence and produced the copy book without any summons, and no reliance can be placed on his statement.

The next witness, Shankar Singh, poses to be a friend of the plaintiff and to have been called by him to settle his dispute with the defendant. He states that he settled that the debt of Rs. 4,000 payable in respect of Rahriyaman to Raja Man Pande and that of Rs. 3,000 payable in respect of Bhilawan to Gayadju and Shankar Sarup were to be paid exclusively by the plaintiff, because the property proposed to be allotted to his share was of greater value, and that an agreement was written to that effect and handed over by the defendant to the plaintiff; but he does not say why if such an agreement was written it was not registered. The witness is involved in debt and the learned Subordinate Judge observes that he showed so much interest in the case that even after his examination was over he remained in attendance at the defendant's bistara or sitting place on subsequent hearings. Like Shankar Singh, Kalka Singh professes to have joined in making a settlement between the parties and getting an agreement executed by Kalka Bakhsh Singh of the kind mentioned by the preceding witness. He is, however, a relation of Collector Singh, son of Narpat Singh, and was disbelieved by this Court in the previous case instituted by Narpat Singh against Sanwal Singh, in which he had given evidence for the former. He had an ill-feeling with Sanwal Singh who got him bound over to keep the peace.

He had also opposed an application for mutation presented by the present plaintiff in respect of the property of one Mt. Mamturan and was unsuccessful. He suggests that the agreement was written and signed on 18th September 1911, but the draft contained in the scribe's copy book purports to have been written on 19th September 1911. If the petition of compromise and the alleged agreement were written on the same date or one after the

other, it is hardly likely that the terms contained in the one would have been inconsistent with those contained in the other, unless some fraud was practised, about which there is no evidence. The petition on compromise distinctly stated that in regard to the debts charged on the estate the parties had agreed that those payable by Sanwal Singh, the testator, would be paid by the parties in equal shares, and that taken by the defendant after his death would be paid by him alone. The defendant is literate and knows Hindi and Urdu, and according to the evidence of Sheo Bhakt Das, he had read up to the upper primary standard. There is evidence to show that the petition of compromise was written in his presence and read over to him, and it is difficult to believe that he would have agreed in that petition to pay the debts which, according to the draft agreement produced by Munnu, were payable by the plaintiff.

The petition of compromise recites that a separate agreement had been executed that day by Kalka Bakhsh Singh in favour of the plaintiff in regard to the payment of the debts, but no such agreement is now forthcoming. The plaintiff denies that any such agreement was written or made over to him, and while it is probable that in pursuance of the intention of the parties a stamp of Rs. 1 was made over to the defendant for writing the agreement and that his intention to write it was taken for the deed when the petition of compromise was written, it is equally possible that it was written out by the defendant but was never actually made over to the plaintiff. If it was written out and made over to the plaintiff and contained terms corresponding to those contained in the petition of compromise, there was no reason for the plaintiff to have suppressed it, for its production would only have further refuted the case for the defendant and controverted the draft which the defendant sought to prove. If, on the other hand, it contained terms similar to those mentioned by the defendant, there was every reason for the defendant to have kept that agreement, for it would have given him a right which he would not have otherwise possessed. In either event we agree with the learned Subordinate Judge in holding that the plaintiff was not given the agreement and had no motive for with-

holding is from evidence. Reliance is also placed on behalf of the defendant on the testimony of certain witnesses, who profess to have been present at the time when the settlement between the parties was arrived at, in proof of the manner in which the debts due by the estate were to be paid. Most of these witnesses are either men of no position or related to Bodh Singh, a relation of his, who has been prosecuting the case on his behalf. The learned Subordinate Judge has discussed their evidence in detail and has given sufficient reasons for holding that their statements cannot be trusted. Bairam, for instance, had given evidence on behalf of Narpat Singh against Sanwal Singh in the previous case and is now trying to support the case of the defendant, because Collector Singh, son of Narpat Singh, is acting on his behalf. He is heavily involved in debt, and so is Dular Singh, who contradicts him as to the presence of Darshan Singh. Gajadhar Singh, Madar Singh and Tilak Singh are related to Bodh Singh, who, it has been found, used to attend the Court daily in the interest of the defendant. Kallu Singh admits that his father had executed a bond in favour of Kalka Baksh Singh and that his land might still be in his possession. The demeanour of Umra and Kallu Singh impressed the learned Subordinate Judge very unfavourably, inasmuch as they were not prepared to deliver their story except in the manner in which they professed to remember it. Lalta Singh is involved in debt and is a man of no position. The evidence of the above witnesses is, therefore, of little value and has been rightly rejected in view of the terms embodied in the petition of compromise, which the parties had filed.

The defendant does not explain how he allowed the petition of compromise to be filed, if it did not embody the terms to which he had agreed. The subsequent conduct of the defendant shows that he was aware of the terms of the compromise, for he verified its terms so far as they related to the mutation proceeding before the Tahsildar (Ex. 3). He subsequently took a copy of the petition of the compromise and filed it in a revenue case on 23rd August 1912 (Ex. 121). On 5th July 1912 a mortgage-deed executed by Kalka Baksh Singh in favour of Bisheshwar Nath, in which a reference

is made to the compromise (Ex. 131), and in another mortgage deed executed by him in favour of Sumera Prasad on 9th July 1912 (Ex. 132), there is a reference both to the compromise and to the arrangement made for the payment of the debts due by Sanwal Singh. Raja Ram Pande says that the defendant met him three years ago and told him that he would pay off half the debt due to him by Sanwal Singh and that he paid him some interest between 1912 and 1914. The allegation of the defendant that the money taken from Gayadin and Shankar Sarup was required to pay the expenses of opposing an appeal filed by Narpat Singh to the Privy Council and that he handed over the said money to the plaintiff, is not borne out by the recitals contained in the mortgage-deed which he had then executed (Ex. 14-A), or corroborated by any other evidence. The defendant has failed to establish that any fraud was practised by the plaintiff in the matter of the compromise, and we have no hesitation in agreeing with the learned Subordinate Judge in the conclusion at which he had arrived, namely, that the petition of compromise correctly represented the settlement made between the parties both as regards the property left by Sanwal Singh and the manner in which the debts were to be paid.

The next question is whether the petition of compromise was inadmissible in evidence for want of stamp or registration. The petition started with a recital of the manner in which the parties had settled their dispute out of Court and divided their property, prayed that the mutation of names should be carried out in accordance with it, and embodied directions as to the manner and the person by whom the debts chargeable on the property divided were agreed to be payable.

So far as the directions given as to the payment of the debts were concerned, the petition was obviously not one which required registration, but even as a whole, it was nothing more than an intimation to the Court of the terms which the parties had privately settled between themselves both as to the method of dividing the property and getting mutation of names effected in accordance therewith and as to the person who was to pay the debts for which some of the villages allotted to

the share of one of the parties were liable. O. 23, R. 3, Civil P. C., which applied equally to civil and revenue proceedings, lays down that where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, the Court shall order such agreement or compromise to be recorded and shall pass a decree in accordance therewith, so far as it relates to the suit. The proceeding in which the petition of compromise was filed arose out of an application made by Shankar Singh for the entry of his name in respect of a half share of the entire property left by Sanwal Singh. The object of the petition of compromise was to intimate to the Court what was settled outside it with a view to get mutation effected in accordance with it. The compromise was confined to the property which was the subject-matter of controversy in the mutation proceeding, and as pointed out by their Lordships of the Privy Council in *Pranab Anni v. Lakshmi Anni* (1), it constituted a step in a judicial proceeding and did not require registration. The provisions of S. 17, Registration Act, said Lord Watson in *Bundera Naik v. Gowa Sarna Saha* (2), did not apply to proper judicial proceedings, whether consisting of pleadings filed by the parties, or of orders made by the Court. In *Kabra v. Pearey Lal* (3) and *Daga Shantoor v. Hub Lal* (4) petitions of compromise filed in mutation proceedings, settling disputes between the parties either by distributing the property or by agreeing to its being entered jointly in the name of both, were held to partake of the nature of family settlements and not to require registration. In *Gurdeo Singh v. Chandrika Singh* (5) and *Joti Kuruvetappa v. Izari Sirusappa* (6) petitions of compromise filed in a Court were, in so far as they related to the properties in suit, similarly held not to require registration and to be enforceable, so long as the terms entered therein were lawful within the meaning of O. 23, R. 3, Civil P. C.

An instrument of partition is moreover, not required by law to be in writing, but the parties may, if they choose, reduce the partition into the form of a document

evidencing that partition, in which case, if the property affected is worth over Rs. 100 such an instrument would require registration under S. 17, Cl. (b), Registration Act (16 of 1908). A document the object of which is not to evidence a partition but to intimate to the Court the method in which a partition has been effected out of Court in order that the matter in controversy may be decided in accordance therewith is not, however, an instrument of partition, for, as pointed out in *Satya Kumar Bhargava v. Sotini Kripal Kanyas* (7) and *Gowanda v. Maharajapuram* (8), a partition between co-owners does not require to be evidenced or evidenced by a written document, and a petition admitting or reciting such a partition is admissible in evidence without registration. In *Itami Saray v. Bhudashur* (9) it was pointed out that a petition of compromise filed in a mutation case, which was relied on as a family arrangement, did not require to be registered under S. 17, Registration Act, as it did not create or confer any fresh title but was only in the nature of an agreement by which an antecedent title in the parties was acknowledged and defined. In *Khani Lal v. Kunwar Gobind Krishna Narain* (10) their Lordships of the Privy Council, referring to an earlier compromise made between the parties under which the property was divided, cited with approval the decision in *Lala Qudh Behoree v. Mewa Koonwer* (11), wherein it was laid down:

"The true character of the transaction appears to us to have been a settlement between the several members of the family of their disputes, each one relinquishing all claim in respect of all property in dispute other than that falling to his share, and recognizing the right of the others, as they had previously asserted it, to the portion allotted to them respectively. It was in this light, rather than as conferring a new distinct title on each other; that the parties themselves seem to have regarded the arrangement, and we think that it is the duty of the Courts to uphold and give full effect to such an arrangement."

In *Ahamad Raza v. Saiyid Abid Husain* (12), where the parties to a suit filed a petition of compromise reciting the terms on which the dispute was settled, among them being an agreement by one

7. (1909) 3 I C 217.

8. (1898) 25 Cal 210.

9. (1915) 18 O C 51=27 I C 938.

10. (1911) 33 All 256=10 I C 477=38 I A 57 (P C).

11. (1868) 3 A H C R 82.

12. A I R 1916 P C 41=38 All 494=39 I C 11=43 I A 264 (P C).

1. (1899) 22 Mad 508=25 I A 101 (P C).

2. (1898) 20 All 171=25 I A 9 (P C).

3. (1913) 35 All 502=21 I C 29.

4. A I R 1915 All 114=27 I C 497=37 All 105.

5. (1909) 26 Cal 193=1 I C 913.

6. (1907) 30 Mad 478.

party who was recognized as owner to grant a usufructuary mortgage to the other, and the order of the Court was that the compromise should be placed on the record, their Lordships of the Privy Council held in a subsequent suit to redeem that mortgage that the petition of Compromise merely evidenced an antecedent verbal mortgage, which was valid according to the law in force before the Transfer of property Act was passed, and that so long as it was properly stamped as a petition it could be admitted in evidence. There is nothing to preclude the parties from settling their disputes on such terms as they might think proper. In *Satrohan Lal v. Nageshar Prasad* (13) it was held that the intention of the parties was to be deduced in each case from the document and the circumstances in which it was executed, and that in view of the fact that no order of a Revenue Court in a mutation proceeding could per se operate to confer title, the question in each case would be whether the transaction was one amounting to a transfer of property, required by law to be reduced to writing and registered, or only to an acknowledgment of an antecedent title.

In the present case there is nothing to show that the petition of compromise in itself purported to create a new title, for it recited a partition which had been effected out of Court. It recited the will of Sanwal Singh under which the parties held an equal share in the property left by him and also referred to the mutual settlement which had been made to obviate future disputes and by which the property was divided between them, and merely asked the Revenue Court to direct mutation of names to be effected in accordance with it. It was not, therefore, an instrument by itself purporting to create or declare any right, title or interest in any property which did not exist before, and being a mere recital of the manner in which the partition had been effected, did not make it an instrument of partition so as to render its registration compulsory. It was sufficiently stamped as a petition to the Court, in which the mutation proceeding was pending. It is contended on behalf of the defendant that the agreement contained in the petition of compromise was not one in regard to which specific performance could be enforced. But the petition it-

self indicates the remedy to which the plaintiff was entitled in case of a breach, and the present suit does not ask for anything more than the remedy which the parties had contemplated in case the breach happened. So far as the question of registration is concerned, the present suit is confined only to the enforcement of the remedy provided in case the debts specified in the petition of compromise were not paid. That portion of the compromise was not in any event one covered by S. 17, Registration Act, and there is nothing in law to prevent its enforcement. The appeal is, therefore, allowed and the plaintiff's claim decreed with costs throughout, and future interest at 6 per cent. per year from the date of the suit till realization. The defendant-respondent will bear his own costs here and below.

B.V./R.K.

*Appeal allowed.***A. I. R. 1918 Oudh 418**

DANIELS, A. J. C.

Iqbal Narain—Decree-Holder — Appellant.

v.

Jaskaran and another — Judgment-debtors—Respondents.

Execution of Decree Appeal No. 40 of 1916, Decided on 28th November 1916, against the order of Dist. Judge, Lucknow, D/- 8th September 1916.

Civil P. C. (1908). O. 21, R. 14.—Decree for sale on mortgage—Attachment is not necessary—R. 14 does not apply.

A preliminary attachment is not necessary in cases where an application is made for sale in execution of a decree passed for sale of mortgaged property, and therefore O. 21, R. 14, does not apply to such an application.

Judgment.—These are two connected appeals in an execution case coming under S. 47, Civil P. C. The execution applications were dismissed by the Munsif under O. 21, R. 14, for failure to produce a certified extract from the khewat as ordered. The appeals have been dismissed by the District Judge and the decree-holder appeals. It appears to me that the appellant is right in his contentions that O. 21, R. 14, does not apply. In neither case was the application one for the attachment of land. The decree passed was one for sale on a mortgage where a preliminary attachment is not necessary, and the execution applications, which I have perused, merely ask for sale of the property, not for its attach-

ment. In Appeal No. 40 there is an additional reason why the rule does not apply as the application does not relate to land at all. The property the sale of which is asked for consists exclusively of trees. I accordingly allow both appeals and direct that the execution application be restored to the file. The appellant will have costs of the appeals.

B.V./R.K. *Appeal allowed.*

* A. I. R. 1918 Oudh 419

KANHAIYA LAL, A. J. C.

Nau Nehal Singh—Plaintiff—Appellant.

v.

Deputy Commr. Unao and others—Defendants—Respondents.

First Appeal No. 101 of 1917, Decided on 27th May 1918, from Decree of Sub. Judge, Unao, D^t 28th May 1917.

(a) U. P. Court of Wards Act (4 of 1912), S. 54—S. 54 applies to claim even though subject to pre-emption right of another.

The provisions of S. 54 cover all suits relating to the property of any ward, that is, any property belonging to him, though his title thereto may be defeasible by reason of claim for pre-emption which may be maintainable in respect to the same. [P 419 C 2 P 420 C 1]

(b) Pre-emption—Rule that all property must be included is subject to certain restriction.

The rule that a suit for pre-emption must embrace the entire property sold, unless the plaintiff is not entitled to claim pre-emption in regard to any portion thereof, is inapplicable where the interests of the vendees, inter se, are distinct or where they have since been separated or divided. [P 420 C 2]

(c) Civil P. C. (5 of 1908), O. I. R. 3—Suit against dead person does not extend period as against his heirs—Heirs subsequently substituted must be taken to be newly impleaded—Limitation Act (9 of 1908), S. 22.

A plaintiff cannot claim the benefit of the institution of a suit against a dead person for the purpose of extending the period of limitation against his heirs. [P 423 C 2]

Order 1, R. 3, Civil P. C. does not apply to a case where a suit is filed against a deceased person and his heirs are subsequently sought to be brought on the record. For the purposes of S. 22, Lim. Act such heirs, whether added or substituted, must be treated as newly impleaded and the suit as against them will be deemed to have been instituted when they were so made parties: 10 W. R. 317, *Dis.* [P 420 C 1]

Basudeo Lal, Hari Kishen Dhaon and Gulab Chand Srimal—for Appellant.

* *Nagendra Nath Ghoshal and Salig Ram*—for Respondents.

Judgment.—This appeal arises out of a suit for pre-emption. It appears that on 18th January 1898 Gajraj Singh mort-

gaged the entire village Mubarakpur and an eight annas of the village Shahpur, describing the mortgagee as Habibullah, son of Aminullah. Half of the said property was subsequently found to belong to other persons. Aminullah died on 27th September 1898. A dispute arose on his death in regard to his estate between Gharibullah, his so-called son, and his nephews, Ruhullah, Rahmatulla, Niamatullah and Mohammad Yakub. He also left a widow Mt. Rissunnisa. On 1st June 1901 an agreement was arrived at between the said claimants, whereby Gharibullah contented himself with a seven annas share in the property left by Aminullah, a four annas share went to Mt. Rissunnisa, while the remaining five annas went to Ruhullah, Rahmatullah and Mohammad Yakub. A decree appears to have been passed in accordance with this compromise. Gharibullah subsequently died and his property was taken charge of by the Court of Wards. On 25th January 1909 the Deputy Commissioner of Unao, acting as the Manager of the estate of Gharibullah, and the other persons, to whom the property of Aminullah had been allotted, filed a suit for the recovery of money due on the mortgage aforesaid treating it as forming part of the property held by Aminullah. The plaint recited the agreement made between the heirs of Aminullah, whereby the shares of the different claimants to the estate were defined and asked that in case the heirs and representatives of the mortgagor failed to pay the mortgage money, the mortgage might be foreclosed.

On 21st January 1911 the then plaintiffs obtained a final decree for foreclosure in regard to the half share belonging to the mortgagor (Ex. 1), which has given rise to the present claim for pre-emption. The suit was filed on 20th January 1917 within six years from the date of the said decree. The Court below dismissed the claim, holding that no notice had been sent to the Court of wards as required by S. 51, U. P. Act 4 of 1912, that the claim against the heirs of Mohammad Yakub was barred by limitation, and that a suit for pre-emption in regard to the property held by the remaining defendants, was not maintainable. The provisions of S. 54, U. P. Act 4 of 1912, cover all suits relating to the property of any ward, that is, any property belonging

to him, though his title thereto may be defeasible by reason of a claim for pre-emption which may be maintainable in regard to the same. The contention urged on behalf of the plaintiff-appellant is that the position of a mortgagee who obtains a final decree for foreclosure without sending the notice required by S. 10, Oudh Laws Act (18 of 1876) continues in spite of that decree to be that of a mortgagee qua a person entitled to claim the property by pre-emption. But such a contention is obviously untenable, because the effect of a decree for pre-emption is only to displace the title of the purchaser or of the person who obtains the final decree for foreclosure from the date when the payment is made in pursuance of that decree. Till such a decree is obtained and payment is made in accordance with it, the title of the purchaser or of the person obtaining foreclosure holds good, and if he is a ward within the meaning of S. 54, U. P. Act 4 of 1912, no suit for pre-emption can lie in respect of any property held by him, till the notice required by that section is given. The share of Gheribullah, which is held by the Court of Wards, being seven annas, that portion of the claim which relates to it cannot, therefore, be entertained.

The claim in regard to the 1 1/4 annas share held by Mohammad Yakub is similarly not maintainable, because Mohammad Yakub had died before the institution of the suit and his heirs were not impleaded till the period of limitation for a suit for pre-emption against them had expired. O. 1, R. 3, Civil P. C., does not apply to a case where a suit is filed against a deceased person and his heirs are subsequently sought to be brought on the record. For the purposes of S. 22, Lim. Act (9 of 1908), such heirs, whether added or substituted, must be treated as newly impleaded and the suit as against them will be deemed to have been instituted when they were so made parties. The plaintiff-appellant cannot claim the benefit of the institution of a suit against a dead person for the purpose of extending the period of limitation against his heirs. In *Fatmabai v. Pirbhai Virji* (1), where a suit was instituted by a person who claimed to be the heir of a deceased creditor, for the recovery of money due on a promissory note, and disputes subsequently cropped up between that per-

son and the other heirs of the deceased, who were subsequently added as co-plaintiffs, resulting in the latter being declared to be entitled to Letters of Administration, it was held that the institution of the suit by the former did not avail for the benefit of the latter who were subsequently added as co-plaintiffs, because the former was eventually found to have had no right at all, and when the latter were impleaded, the suit had become barred by time. As pointed out in *Veerappa Chetty v. Tindal Pennen* (2), there is nothing in the Code of Civil Procedure to authorise the institution of a suit against a deceased person, and the claim against the heirs of Mohammad Yakub, who were added after the period of limitation for a suit for pre-emption had expired, will be deemed to have been barred by time. The learned counsel for the plaintiff-appellant relies on a decision in *Sreekishen Chowdhry v. Ram Kristo Bhattacharjee* (3), but the rules of limitation now in force were not then the same.

The claim as against the other defendants, who represent a 7 3/4 annas share, is, however, maintainable. The general rule, as laid down in *Mujib-Ullah v. Umed Bibi* (4) and *Mahabir Prasad v. Ram Jiwan Lal* (5), is that a suit for pre-emption must embrace the entire property sold, unless the plaintiff is not entitled to claim pre-emption in regard to any portion thereof. But as explained in *Sheobharos Rai v. Jiach Rai* (6), *Ram Nath v. Radri Narain* (7) and *Lachhman v. Tulsi Ram* (8), that rule is inapplicable where the interests of the vendees, inter se, are distinct or where they have since been separated or divided. The principle of denying a right of pre-emption, except as to the whole of the property sold, is that by breaking up the bargain, the pre-emptor may seek to take the best portion of the property and leave the worst part of it with the vendee. But where the share of each purchaser is separate and distinct, there is really no breaking up of the bargain. The preferential right of the plaintiff-appellant not being disputed, he should have been

2. (1908) 21 Mad 86.

3. (1868) 10 W R 317.

4. (1899) 21 All 119.

5. (1910) 13 O C 260=8 I C 272.

6. (1886) 6 All 462.

7. (1897) 19 All 148.

8. (1905) 2 A L J 199.

1. (1897) 21 Bom 580.

allowed a decree for pre-emption in regard to the said $7\frac{3}{4}$ annas share out of the Mahals, which now constitute the mortgaged property. The appeal is, therefore, allowed, and the claim of the plaintiff-appellant decreed for pre-emption in respect of a $7\frac{3}{4}$ annas share out of the Mahals, which now constitute the mortgaged property, and in respect of which the decree for foreclosure was obtained, subject to the payment of Rs. 2,689.2.6 within one month from this date. In case of payment, the plaintiffs and defendants, other than defendant 1 and the heirs of Mohammad Yakub, will bear their own costs throughout. In case of non-payment the defendants shall get their costs here and hitherto from the plaintiffs. Defendant 1 and the heirs of Mohammad Yakub will in any event get their costs here and hitherto from the plaintiffs.

B.V./R.K. *Appeal allowed.*

A. I. R. 1918 Oudh 421

STUART AND KANHAIYA LAL, A. J. C.
Jainarain—Defendant—Appellant.

v.

Bajrang Bahadursingh and another—
Plaintiffs and Defendants — Respondents.

First Appeal No. 90 of 1917, Decided on 13th September 1918, from decree of Sub-Judge, Rae Bareilly, D/- 27th April 1917.

(a) **Hindu Law—Debts—Father — Burden of proof is on creditor having knowledge of limited powers of alienor.**

Where a mortgagee sets up a charge in his own favour made by one whose title to alienate he necessarily knew to be limited and qualified, he may reasonably be expected to allege and prove facts presumably better known to him than to an infant member of the family, namely, those facts which embodied the representation made to him of the alleged needs of the estate and the motives influencing his immediate loan: 6 M. I. A 293, *Foll.* [F 422 C 2]

(b) **Hindu Law — Alienation — Father — Pious obligation of sons to pay father's debts does not arise during father's lifetime.**

Where an alienation of family property made by a Hindu father is questioned by his sons during his life, no question of the pious obligation of the sons to pay off their father's debts can arise: A. I. R. 1917 P. C. 61 and 20 O. C. 311, *Foll.* [F 422 C 2]

Ali Mohammad—for Appellant.

Gokaran Nath Misra and Harkaran Nath Misra—for Respondents.

Judgment—The defendant appellant is the son of Suraj Din and seeks to impeach a mortgage of joint family property effected by the latter in favour of the

plaintiffs on 9th January 1913 and two deeds of further charge similarly executed by him in favour of the same persons. The defendant-appellant denied that there was any legal necessity to justify the above transactions, but the Court below found against him and decreed the claim. It appears from the documentary evidence adduced that the dealings between the plaintiffs and Suraj Din, which have culminated in the deeds of mortgage and further charge above referred to, commenced on 26th January 1901, when a deed of simple mortgage was executed by Suraj Din in lieu of Rs. 8,000 in favour of the plaintiffs and their deceased brother, Chanderpai Singh, the whole of the consideration having been paid in cash before the Sub-Registrar (Ex. 10). No necessity was recited in it for the loan. On 27th February 1905 Suraj Din executed another deed of simple mortgage in favour of the same persons in lieu of Rs. 3,000, tacking the same to the amount previously borrowed. Out of the sum of Rs. 3,000, Rs. 2,860.2-0 were credited towards certain prior debts and liabilities including a decree and some arrears of under-proprietary rent said to have been due in respect of Mauza Miran Bisaiya for 1310 to Kharif 1312 Fasli, and the balance was paid before the Sub-Registrar (Ex. 11).

On 10th January 1908 Suraj Din discharged the two deeds above mentioned by executing a fresh deed of simple mortgage in favour of the same persons for Rs. 15,000, out of which Rs. 1,484-13-0 were paid in cash before the Sub-Registrar and the balance was credited towards the money due on the above deeds and a promissory note of 1st January 1908 and some arrears of revenue or under-proprietary rent, said to have been due in respect of the village Miran Bisaiya for Kharif 1315 Fasli (Ex. 4). On 16th March 1908 he borrowed Rs. 2,600 and executed a deed of further charge in favour of the said persons, receiving Rs. 96.2-0 before the execution of the document and Rs. 6,911 in cash before the Sub-Registrar and crediting the balance in satisfaction of a decree which was then under execution against him (Ex. 5). On 19th June 1909 he again borrowed Rs. 4,000 from the same persons, receiving Rs. 86-13-9 before the execution of the deed and Rupees 1,938.3-6 in cash before the Sub-Registrar and crediting the balance towards the

interest due on the mortgage-deed for Rs. 15,000, and the deed of further charge for Rs. 2,600 above mentioned and some arrears of rent said to have been due in respect of the village Miran Bisaiya for 1315 to the end of 1316 Fasli (Ex. 6).

On 29th March 1912 he took a further loan of Rs. 3,500, out of which Rs. 3,000 were received by him in cash before the Sub-Registrar and the balance was credited towards the money due on mortgages and some arrears of under-proprietary rent in respect of the village Miran Bisaiya for 1317 to 1319 Fasli (Ex. 7). On 9th January 1913 he consolidated the above loans and executed a fresh deed of simple mortgage for Rs. 36,000 out of which Rs. 31,478-10-6 were credited by him towards the prior debts aforesaid and Rs. 200 were taken for the purchase of stamp and the balance was received in cash before the Sub-Registrar. In this deed it was stated that the mortgagor required Rs. 4,000 to meet the revenue demand and for domestic expenses (Ex. 1). This is one of the documents now in suit. It was followed by a deed of further charge of 11th December 1913 for Rupees 3,000 said to have been taken for domestic and private necessities (Ex. 8), another of 16th January 1914 for Rs. 1,000 stated to have been similarly taken for domestic and private needs, and a third of 4th July 1914 for Rs. 2,000 said to have been taken for the payment of arrears of revenue and other necessary expenses (Ex. 9).

The dealings did not end here. On 4th December 1914 he executed a deed of further charge for Rs. 15,000, out of which Rs. 4,014 were received by him in cash before the Sub-Registrar and the balance was credited in satisfaction of the deeds of further charge of 11th December 1913, 16th January 1914 and 4th July 1914, two promissory notes of 16th July 1914 and 27th November 1914 and some interest due on the mortgage of 9th January 1913. This is the second document now in suit. On 23rd April 1915 another deed of further charge was executed for Rs. 2,450, out of which Rs. 2,173 were paid in cash before the Sub-Registrar and the balance was credited towards a promissory note of 28th January 1915 and some arrears of revenue, said to have been due in respect of the village Miran Bisaiya for 1322 Fasli. This is a third document now in suit. There is no evidence to show whe-

ther the antecedent debts, amounting to Rs. 42,914-3-3, credited in the deeds of mortgage and further charge now in suit, were taken for family purposes or for family necessity. The plaintiffs were themselves the creditors in the case of each of these antecedent debts, and as pointed out by their Lordships of the Privy Council in *Hunoomanpersaud Panday v. Mt. Babooee Munraj Koonweree* (1), "where the mortgagee himself with whom the transaction took place, is setting up a charge in his favour made by one whose title to alienate he necessarily knew to be limited and qualified he may be reasonably expected to allege and prove facts presumably better known to him than to an infant member of the family, namely, those facts which embodied the representation made to him of the alleged needs of the estate and the motives influencing his immediate loan."

The learned counsel for the plaintiffs respondents does not contest that in accordance with the decision of their Lordships of the Privy Council in *Sahu Ram Chandra v. Bhup Singh* (2) read with the decision of this Court in *Bharath Singh v. Prag Singh* (3), no question of pious obligation can arise because Suraj Din is still alive. He asks for an opportunity to prove that the antecedent debts in question were taken for family purposes or family necessity, contending that the issues as framed by the Court below did not require him to go behind the antecedent debts and establish the purpose for which they were taken. The decision of their Lordships of the Privy Council in *Sahu Ram Chandra v. Bhup Singh* (2) was in fact delivered after the issues were framed in this case and did not become known in this country till after the case, which is the subject of appeal, was decided by the Court below. The question of the liability of the defendant-appellant for the sum of Rs. 10,335-12-9, said to have been taken in cash, cannot also be properly determined till the account books of Suraj Din, if any, showing his grain and cloth dealings and the expenses incurred in connection with the marriage of his daughters and the payment of arrears of revenue or under-proprietary rent in connection with his estate, from the time when the dealings first commenced, are forthcoming.

It was for the defendant-appellant to have produced evidence to rebut that ad-

1. (1872) 18 W R 81=6 M I A 393 (P C).

2. A I R 1917 P C 61=39 All 437=39 I C 280=44 I A 126 (P C).

3. (1917) 20 O C 311=43 I C 291.

duced on behalf of the plaintiffs. The representations made to the creditor may also be material under S. 38, T. P. Act. The Court below is, therefore, directed to determine the following issues, after taking such relevant evidence as the parties may adduce: (1) Whether the antecedent debts credited in the deeds of mortgage and further charge now in suit were taken for family necessity or family purposes or for the discharge of a common obligation and if so, to what extent? (2) Whether the money said to have been taken in cash was similarly taken for family purposes or family necessity or for the discharge of a common obligation or lent in good faith on the strength of the representations, if any, made as to the alleged needs of the estate and family, and if so, to what extent can the defendant-appellant be made liable for its payment? Three months' time will be allowed for the return of the findings and ten days from the date of the findings will be allowed to the parties for filing objections.

B.V./R.K.

Issues remitted.

A. I. R. 1918 Oudh 423

STUART AND KANHAIYA JAL, A. J. C.

Suraj Narain and another—Plaintiffs
—Appellants.

v.

Iqbal Narain and others—Defendants
—Respondents.

First Appeals Nos. 82 and 83 of 1916,
Decided on 12th September 1918, from
decree of Sub-Judge, Hardoi, D/- 10th
April 1916.

Hindu Law—Partition—Division of title is distinguishable from division of property—Separation does not necessarily put end to joint management—Suit for partition—Inquiry is directed to ascertain divisible assets—Manager is not liable to account for past dealings with family income—But after separation liability to account for income cannot be avoided.

In cases of joint Hindu families, a division of title is distinguishable from a division of property, the former being a matter of individual decision, the desire on the part of one member to sever himself from the joint family and to enjoy his hitherto undefined or unspecified share separately from the others, without being subject to obligations which arise from the joint status of the latter, being the natural resultant from his decision, namely, the division and separation of his share by metes and bounds. But a separation of one branch of the family from another does not necessarily put an end to the joint management of the estate by the manager on behalf of all, for a partition by metes and bounds may not take place till several years later. In an ordinary suit for a partition of the joint

family property, where there has been no previous separation, the inquiry is, in the absence of fraud or other improper conduct, directed to ascertain the divisible assets, the manager not being liable to account for his past dealings with the family income. He cannot, however, escape liability to account for the income once a separation has taken place. [P 421 C 2; P 422 C 1]

Gokaran Nath Misra, Ishwari Prasad and Lachman Prasad—for Appellants.

A. P. Sen—for Respondents.

Judgment.—These are cross-appeals arising out of a final decree for partition. On 20th June 1905 Suraj Narain and his son Railash Narain filed a suit for partition of their half share in the joint family property and for their share of the income profits from October 1901, alleging that they had separated from the remaining members of the family at that time. The Court of first instance decreed the claim, but on appeal this Court held that there was no evidence of any separation prior to the institution of the suit and that the plaintiffs were not consequently entitled to claim accounts or income profits for the period during which they were joint. The decree granted by this Court was in the following terms:

"The Court (below) should endeavour to divide the said property in two equal lots and to assign one lot to each party by mutual consent or otherwise. Compensation in cash can of course be ordered to be paid in the event of a precisely equal division of property being found impossible. In this connexion, and as part of the inquiry into the divisible assets of the joint family under the head of moveable property, the Court should take an account of the income, enjoyed by the defendants (and by Pandit Bakht Narain before his death), from the date of the institution of the plaintiffs' suit on 20th June 1905, to the date on which possession was given to the plaintiffs under the decree now appealed against, from the immovable property of the joint family, in respect of which the plaintiffs have been found to be entitled to a half share. The defendants will be entitled to set off against such income, not only the expenses of management, but all expenditure which the Court may find to have been properly incurred on objects to which the income of the joint family may properly be applied by the manager of the same. The balance, if any, will be treated as part of the divisible assets of the joint family, under the head of moveable property, in the hands of the defendants, and the plaintiffs will be awarded one-half of the same."

This decree was subsequently confirmed on appeal by their Lordships of the Privy Council: *Suraj Narain v. Iqbal Narain* (1). It is admitted that the plaintiffs got possession on 9th March 1909. The Court below has taken an account of the

1. (1913) 35 All 80=18 I C 30=16 O C 129=
40 I A 40 (PC).

income derived from the immovable property belonging to the family from 20th June 1905 to 9th March 1909 and of the expenditure incurred during the said period, and allowed the plaintiffs a sum of Rs. 12,409-1-4½ exclusive of a share in the grain recovered by the defendants and in the debts due to the joint family. Both the parties have taken exception to different items entered in the accounts. The main objection of the plaintiffs is directed against the method adopted by the Court below in debiting the plaintiffs with liability for a share of the expenses incurred solely for the benefit of the defendants after the institution of the suit.

It is unquestionable that if the plaintiffs be deemed to have continued joint till the 9th March 1909, when they got possession in pursuance of their decree for partition, they would be liable for the expenditure incurred for family purposes or in discharge of a common obligation; but if the branch of the family, represented by the plaintiffs, be deemed to have separated from the date of the institution of the suit for partition, the plaintiffs' share of the income from the joint property will be liable for all legitimate expenses or obligations connected with their branch of the family and the defendants' share of the income will be liable for all legitimate expenses and obligations connected with their branch. The judgment of this Court is far from clear on that point but reading it in the light of the judgment of their Lordships of the Privy Council, by which it was affirmed, there can be little room for doubt that the propriety of the expenditure was to be judged with due regard to the position each party occupied after the institution of the suit, that is, from a standpoint different from that which they occupied prior to the suit, for no accounting was allowed for the period preceding it.

In other words, the manager was not required to justify what he had spent prior to the suit, but to justify what he had spent after its institution. That justification can only be shown by establishing that what he had spent was spent for the benefit of the entire family, and not of any particular branch or in discharge of a common burden; for if that were not so, it would be within his power to reduce the divisible assets, existing on the date of the suit, materially by spend-

ing recklessly for his personal ends or for the benefit of his own issue to prejudice the other side. In their judgment in the suit, out of which these proceedings have arisen, their Lordships say that the question for determination before them was whether the plaintiffs had separated, as they alleged, in October 1901 or whether they continued joint in property, if not in food and worship, up to the institution of the suit in 1905. Their Lordships, agreeing with this Court, held that the plaintiffs had failed to establish their separation in October 1901 or their exclusion from that date, and on that ground they upheld the decrees passed by this Court, dismissing the claim for mesne profits prior to the date of the institution of the suit and allowing it after that date. The separation of the plaintiffs from the date of the institution of the suit was thus in effect affirmed. In fact in their later decision in *Girja Bai v. Sadashiv Dhundiraj* (2), their Lordships, referring to their decision in *Suraj Narain v. Iqbal Narain* (1), pointed out that a division of title was distinguishable from a division of property, the former being a matter of individual decision; the desire on the part of one member to sever himself from the joint family and to enjoy his hitherto undefined or unspecified share separately from the others without being subject to obligations which arise from the joint status of the latter, being the natural resultant from his decision, namely, the division and separation of his share by metes and bounds. A similar view of the said decision was taken in *Soundararajam v. Arunachalam Chetty* (3).

It is obvious that a separation of one branch of the family from another does not necessarily put an end to the joint management of the estate by the manager on behalf of all, for a partition by metes and bounds may not take place till several years later. In an ordinary suit for a partition of the joint family property, where there has been no previous separation, the enquiry as explained in *Balakrishna Aiyar v. Muthusawmy Aiyar* (4) and *Porneswar Dubey v. Gobind Dubey* (5), is, in the absence of fraud or other

2. A I R 1916 P C 104=43 Cal 1031=37 I C 321=49 I A 151 (P C).

3. (1916) 39 Mad 136=33 I C 858.

4. (1909) 32 Mad 271=3 I C 878.

5. (1916) 43 Cal 459=33 I C 190.

Improper conduct, directed to ascertain the divisible assets, the manager not being liable to account for his past dealings with the family income. He cannot, however, escape liability to account for the income once a separation has taken place. The result of the procedure, adopted by the Court below, is that while the defendants have been allowed all the expenses incurred by them on objects personal to them or in which the plaintiffs had no concern, no such allowance has been made in favour of the plaintiffs. The defendants have kept their personal or separate income to themselves and have charged the family funds in their possession with all expenses personal to them or their branch of the family during the progress of the suit. We cannot however ignore the altered position created by the suit for partition, and have therefore to examine in the case of each disputed item, whether the expenditure was incurred by the defendants for the benefit of their branch or for the common benefit of the entire family.

Item 1 in dispute is that shown under head 15, being a sum of Rs. 275.0 said to have been paid to Pandit Bihari Lal Raina on account of a deposit made by him prior to the institution of the suit for partition. The contention of the learned counsel for the plaintiffs is that the total amount deposited by Bihari Lal Raina was Rs. 13,737.06, while the amount advanced on his account or repaid to him from time to time was Rupees 11,787.06, the balance due to him being only Rs. 1,950. The defendants, on the other hand, have filed an extract from their account books, stating that Rupees 13,737.06 were deposited by Bihari Lal Raina and Rs. 5,450 were advanced on his account or repaid to him. In his deposition of 2nd November 1907, Bihari Lal Raina stated that out of the money deposited by him Ram Narain advanced some loans and sent him the deeds obtained in lieu thereof. In the absence of the original account books, which are not on the record, it is difficult to say how much was actually left uninvested and how much remained due to Bihari Lal Raina. The only objection taken by the plaintiffs in the Court below under this head was that the alleged deposit or amanat by Bihari Lal Raina was fictitious. They admitted that if the deposit was shown, they would have no objection to the

amount paid to Bihari Lal Raina being debited in the account. The amount of deposit being no longer in dispute, it was for the plaintiffs to show that Bihari Lal Raina has been overpaid. They have given no evidence on that point. The receipts filed prove that Rs. 2,750 have been paid to Bihari Lal Raina between 27th June 1905 and 3rd May 1908 and the Court below has rightly included the said payment in the debit side of the account. Item 2 in dispute is that entered in head 17, being payments made on account of hundis drawn by Pandit Bakht Narain after the institution of the suit. Some of these hundis were drawn before the date of the suit and the money borrowed by means of them was credited in the joint family funds. The validity of the transactions represented by those hundis cannot be questioned in the case. Out of the five hundis drawn by Pandit Bakht Narain after the institution of the suit, one for Rs. 2,000 in favour of Mahadeo Prasad is shown to have been drawn for the payment of revenue, another for Rs. 2,500 in favour of Govind Prasad for the payment of the decree for profits obtained by the co-sharers of Jaliamau. The remaining three hundis, that is, one for Rs. 2,500 and another for Rs. 1,000 both in favour of Govind Prasad, dated 23rd July 1905, and another for Rs. 5,000 in favour of Mahadeo Prasad, dated 29th July 1905, are not shown to have been drawn for joint family purposes. These hundis were drawn within nine days of the institution of the suit for partition. The purposes for which these loans were taken not having been established, they cannot be charged against the plaintiffs. The plaintiffs are therefore entitled to have the said hundis excluded from the account, that is, from the debit and credit sides, or, in other words, to have Rupees 903.26 on account of interest paid on them deducted from the expenditure shown under this heading.

Item 3 in dispute relates to head 19, being the amount paid to Pandit Suraj Narain on account of costs awarded to him by the decree for partition. The decree directed that the costs of the suit were to be paid out of the estate and this payment has therefore been rightly included in the accounts. The contention of the plaintiffs is that their expenses in that suit, other than those which were awarded to them, should also have been

paid out of the joint family funds. But no such claim was put forward before the Court below or in the memorandum of appeal and it cannot therefore be considered. Item 4 in dispute relates to head 20, which deals with the expenses of the suits filed by the manager in connexion with the estate. It appears that in 1907 a suit for defamation was brought by Mr. Manuel against Pandit Iqbal Narain in connexion with a statement made by the latter in a civil suit in which Mr. Manuel appeared for the present plaintiffs. The amount spent by Pandit Iqbal Narain in his defence was Rupees 118-1-0. But this amount cannot be charged against the joint family property, because the alleged act of defamation was one for which the joint family could in no way be held responsible.

A sum of Rs. 500 was paid to Pandit Bakht Narain on 31st October 1905 to obtain redemption of the village Tatera which was part of the joint family property. The plaintiffs have been allowed a share in that village and are liable with the other members of the family for the amount spent in redeeming it from the mortgagee. The plaintiffs have also taken objection to the amount spent by Pandit Bakht Narain in the suit filed by him against Ratan Lal for the recovery of the property belonging to the joint family which was in his possession. Pandit Bakht Narain originally claimed the entire property; but when Pandit Suraj Narain subsequently filed a suit for the recovery of his half share, Pandit Bakht Narain had to confine his claim to the half share which belonged to him. The trial of the two cases practically proceeded together, and the plaintiffs were indirectly benefited by the proceedings taken by Pandit Bakht Narain to establish the title of the joint family to that property. The expenses in that suit have, therefore, been rightly charged against the joint family fund. An objection is also taken to the expenses incurred in a suit for money filed by Bihari Lal against Gajraj Singh. That money was lent out of the deposit made by Bihari Lal with the joint family. The joint family had undertaken to invest the money for the benefit of Bihari Lal and whatever expenses were incurred in that suit should be debited in Bihari Lal's account. There is also an objection to the money spent in connexion with certain suits filed

against Ram Singh, the zamindar of Bharsara, who was an agent of the joint family. These suits were defended for the protection of the interest of the joint family in the village Bharsara, in which Ratan Lal wanted to make realizations after the death of Pandit Ram Narain to the prejudice of the joint family.

The defendants sought the assistance of Ram Singh, who was a cosharer in the village, and recovered rents through him. Ratan Lal then sued the tenants for rents and, on the tenants pleading payment to Ram Singh, expenses had to be incurred to support the right of Ram Singh to realise the same. It is immaterial whether Ram Singh was eventually successful or not in justifying what he had done, because what he had done was done at the instance of the joint family, whose agent he had become, and the joint family was in justice bound to bear the expenses connected with his defence. The next objection relates to head 22 and is connected with the suit brought against Ratan Lal, in which Rupees 6,361-9-3 were awarded as costs to him. The amount has been rightly paid out of the joint family funds, as the suit was filed for the protection of the joint family interest. In connexion with that suit various other expenses were incurred which are entered in the account books and they have rightly been included in the account. An objection is also taken to an item of Rs. 200-2-6 entered under head 24 as having been incurred in connexion with the suit for defamation filed by Mr. Manuel against Pandit Iqbal Narain. For the reasons given under head 20 this item must be excluded from the account. The next objection relates to head 30, which represents the salaries paid to the servants of the estate. The plaintiffs contend that some of these servants were the personal servants of Pandit Bakht Narain and his sons. There is nothing, however, to show that any of these servants were personal and that their services were not available to the plaintiffs. Their salaries have, therefore, been properly charged against the joint family funds.

An objection is also taken to certain expenses under head 32 incurred in journeys by rail or ekka to Fyzabad, Lucknow, Jaunpur and other places. It is suggested that these expenses were incurred by Pandit Iqbal Narain and his

brothers in connexion with the prosecution of their defence in the suit for partition. It is difficult at this distance of time to say for which purpose each journey was undertaken, but assuming that it was undertaken in connexion with the litigation then pending, the joint family would still be liable for the same, as the decree passed in the suit for partition directed that the costs of the partition suit were to be paid out of the estate. The same principle might well be applied to expenses incurred out of Court.

The next objection relates to head 44, comprising, among other things, the expenses in connexion with the death anniversary of Bari Bahuji, that is, the widow of Pandit Raj Narain, and the purchase of books and other articles. It is difficult to say that the expenses were incurred for the personal benefit of any of the defendants and they have been rightly included in the accounts. The law books purchased on 6th July 1905 may have been as much for the benefit of one member of the family as of the other and the objection of the plaintiffs in regard to this item is not entitled to any weight. There remain certain objections taken by the plaintiffs with reference to the items entered under heads 49 to 53. Head 49 relates to the expenses in connexion with the marriage of the daughter of Pandit Iqbal Narain in 1905 and the marriage of Dharam Narain in 1906. Head 50 relates to the expenses incurred in connexion with the illness and death of Pandit Bakht Narain in 1906. Head 51 deals with the expenses incurred in connexion with the illness of the wife of Pandit Iqbal Narain. Head 52 deals with the expenses incurred in connexion with the maintenance of the defendants after the death of Pandit Bakht Narain. Head 53 deals with the advances made to Pandit Bakht Narain between 20th June 1905 and 6th April 1906; the total amount being Rs. 6,830-4-6. So far as the expenses entered under heads 49 to 52 are concerned, they are purely personal to the branch of the family represented by Pandit Bakht Narain and his sons and they will be charged accordingly against their share of the income. It is not fair to the plaintiffs that the expenses of the maintenance of Pandit Bakht Narain and his sons and grandsons should be paid out of the family funds while the pay and income enjoyed by Pandit Bakht

Narain and his sons should be kept by them intact and similar expenditure incurred by the plaintiffs for their support excluded. The plaintiffs cannot properly be made liable for the same. In regard to the sum of Rs. 1,509-7-6 entered under head 53, the Fyzabad account books show that all that money was spent for estate purposes. The objection of the plaintiffs in regard to the same cannot, therefore, be sustained.

With reference to the amount shown under head 58 as having been invested in loans and mortgages, it has been pointed out that the bond executed by Chibutku Singh for Rs. 944-8-0 on 30th October 1903 and the bond executed by Mannu Singh of Makanpur for Rs. 20 on 16th November 1903 have not been filed or treated as forming part of the joint family property. The money advanced by means of those bonds has been included in the expenditure shown in the accounts. The defendants do not contest the right of the plaintiffs to claim a half share in the said bonds but they have not filed them in Court along with the rest. The cross-objections filed by the defendants relate to head 21, dealing with the expenses incurred by them in the suit filed by Pandit Suraj Narain, head 23, dealing with the expenses incurred by them in connexion with the mutation proceedings instituted on the death of Pandit Bakht Narain, and head 65, sub-heads 1 and 12, touching the deductions made on account of the profits of Jaliamau from 1315 Fasli and the costs of the civil appeal filed by the defendants in this Court from the decree passed in the suit for partition. As regards the expenses incurred in the suit for partition the details of which are entered in the account books and the correctness of which is not questioned, the defendants are entitled to charge them against the joint family funds because the decree passed in the suit for partition so directs it. The expenses incurred in the appeal are similar to be paid out of the joint family funds because the appeal is only a proceeding in the suit. The expenses incurred in the mutation proceedings consequent on the death of Pandit Bakht Narain cannot, however, be so charged because the plaintiffs have no concern therewith. In regard to the share of the profits due to Bishashar Nath a co-sharer of Jaliamau, which were paid

by the defendants after 9th March 1909, it is sufficient to say that the liability which the defendants have satisfied was one chargeable against the entire joint family, and the plaintiffs cannot be prejudiced if the amount due to Bisheshar Nath is treated as a debt due by the joint family which the family has since discharged.

There is also an objection as regards an item of Rs. 1,738-14-3 under head 64, relating to the money advanced to Ram Singh. It is admitted that a mortgage-bond was taken from Ram Singh on 6th September 1909 in lieu of that money. The plaintiffs cannot claim both a share in that money and a share in that mortgage-bond. The Court below says that the defendants are willing to give the plaintiffs a half share in that mortgage-bond but as the bond was taken after 9th March 1909, up to which the accounts have to be adjusted, the bond subsequently taken by the defendants cannot be taken into account. The defendants will be deemed to be the sole owners of that bond. The other objections taken by either party in their grounds of appeal are not pressed. The amount due to the plaintiffs according to the above account is Rs. 20,573. Both the appeals are, therefore, allowed in part, the result being that instead of Rs. 1-2,409/41/2 the plaintiffs will get a decree for the above amount with proportionate costs here and below against the defendants, who will get their costs in proportion from the plaintiffs in this appeal. The bond of Chhutku Singh and Mannu Singh above referred to will be added to the list of the joint property in which the plaintiffs have a half share. The rest of the decree of the Court below will be confirmed.

B.V./R.K. *Appeals partly allowed.*

A. I. R. 1918 Oudh 428

KANHAIYA LAL, A. J. C.

Raunaq Ali and others—Plaintiffs—Appellants.

v.

Gul Muhammad and others—Defendants—Respondents.

Second Appeal No. 431 of 1916, Decided on 20th June 1917, from the order of Dist. Judge, Gonda, D/- 12th September 1916.

Oudh Rent Act (22 of 1886), S. 108, Cls. (2) and (4)—Mortgagor allowed to remain in possession of mortgaged property as

tenant of mortgagee—Suit to recover arrears of rent and ejectment held not maintainable in civil Court under S. 108.

A zar-i-peshgi lease created the relationship of mortgagor and mortgagee between the parties. On the mortgagor's failure to deliver possession of the mortgaged property to the mortgagee the latter filed a suit for possession against the former. The suit ended in a compromise, whereunder it was provided that the mortgagor would remain in possession on behalf of the mortgagee on condition of his paying to the latter a certain amount of annual rent and that in default of such payment of rent the former would be liable to ejectment. On the mortgagor's failure to pay rent the mortgagee brought a suit in the civil Court against the mortgagor for possession of the mortgaged property and for arrears of rent.

Held: that the compromise in the previous suit created the relationship of landlord and tenant between the parties and that, therefore, the present suit was not maintainable in the civil Court in view of the provisions of S. 108, Cls. (2) and (4), Oudh Rent Act: 19 All 496, Dist. [P 429 C 1]

Abdur Rauf—for Appellants.

Ali Muhammad—for Respondents.

Judgment.—On 26th October 1896, Gul Muhammad, Pir Muhammad and Wali Muhammad executed a zar-i-peshgi lease in favour of plaintiffs 1, 2 and 3 and the ancestors of plaintiffs 4 to 11, whereby they borrowed Rs. 200 and agreed to give possession over the mortgaged property to the mortgagees, subject to the condition that the latter shall pay a rental of Rs. 6-13-0 per year to the former till the mortgage was redeemed. The time fixed for redemption was Baisakh 1313 Fasli. The mortgagors did not, however, deliver possession. A suit was then filed by the mortgagees for possession and a decree was obtained on 22nd August 1902. The mortgagees got possession in pursuance of that decree but were ejected thereafter. They, therefore, brought another suit for possession in 1904 in which there was a compromise, the effect of which was that the mortgagors were allowed to remain in possession on behalf of the mortgagees on condition of their paying Rs. 14-5-0 yearly to the latter. The compromise provided that if the mortgagors failed to give the rent they would be liable to ejectment. The mortgagees alleged that in spite of the said compromise the defendants had not paid the rent, which they had agreed to pay. They, therefore, sued for possession of the mortgaged property and for arrears of rent for the three years preceding the suit. In the plaint, they described arrears of rent as profits, but

that description does not make any difference in the nature of the suit.

The Courts below found that the mortgagors became the tenants of the mortgagees by virtue of the compromise and that the suit for possession and arrears of rent was not maintainable against them in the civil Court. The learned Counsel for the plaintiffs-appellants relies on the decision in *Altof Ali Khan v. Lalji Prasad* (1). But the facts of that case were clearly distinguishable from the present. In that case the suit was based on the *zar-i-peshgi* lease or the mortgage itself, and was for the recovery of the money due on the mortgage. There was also a lease accompanying the mortgage but the lease and the mortgage were taken to form part of the same transaction and the mortgagees were directed (initial) to seek their remedy for non-payment of the rent, reserved by the lease, in the civil Court by means of a suit upon the mortgage. The relationship of landlord and tenant was constitutive of the present case by a compromise effected on 10th September 1901. The compromise was an entirely separate transaction and as held in *Chitambar Lal v. Bhalur Singh* (2) and *Mohammad-nisa v. Subhedar Singh* (3), a suit for the recovery of arrears of rent on the basis of the lease, created by the said compromise, in regard to agricultural land would not lie in the civil Court, much less a suit for the ejectment of the tenants from the land leased. S. 105, Cls. (2) and (1), Oudh Rent Act (22 of 1886) gives exclusive jurisdiction to the Revenue Court to entertain suits for arrears of rent or for the ejectment of a tenant. A *zar-i-peshgi* lease, accompanied by a covenant for redemption, may amount to a mortgage, but the relation, which the compromise created and which the plaintiffs seek in this suit to terminate, is not that of a mortgagor and mortgagee but that of a person in possession of the mortgaged property as a tenant on behalf of the mortgagees. The plaintiffs have also impleaded some of the transferees of the mortgagors, but that fact makes no difference, because the transfer was made after the date of the compromise and whatever rights they might have need not be determined in

this case. The suit is principally for the ejectment of the mortgagors, who occupy the mortgaged property as tenants of the mortgagees, and for arrears of rent due by them, and the Courts below were justified in treating it as excluded from the cognizance of the civil Court. The appeal is, therefore, dismissed with costs.
D.V. K.R. *Judges dismissed.*

A. I. R. 1918 Oudh 429

STUART AND KASHAP v. LAT. V. P. K. Sadeishwar Narain — Defendant — Appellant.

v.

Lat. V. P. K. S. and others — Plaintiffs — Respondents.

Altof Ali Khan v. Lalji Prasad No. 22 of 1918, and S. O. R. No. 115 of 1918, Decided on 23rd August 1918, and on order of Sub. Judge, Lucknow, D. 1, and May 1918.

Civil P. C. (5 of 1909), O. 10, R. 4—Personal attendance of parties can be ordered only when pleader is unable or refuses to answer questions put forth by Court.

Before a legal order can be passed against a party refusing to appear in Court under the provisions of O. 10, R. 4, it is necessary that the Court should find, in the first place, that there are material questions relating to the suit which need to be answered by such party or by his pleader, and when such party has a pleader, it is only when the pleader is unable or refuses to answer those questions that the Court may direct the party to appear in person. [P 423 C2]

Sadeishwar Beg, Aditya Prasad and Raja Prasad—for Appellant.

Mohammad Fasih—for Respondents.

Judgment.—On an application filed by the plaintiffs-respondents to have an award filed and a decree passed in accordance therewith, the learned Subordinate Judge directed the defendant-appellant under provisions of O. 10, R. 4, Civil P. C., to appear to in person and answer certain questions. On his failure to appear in person and answer those questions, he pronounced judgment against him and directed the award to be filed and a decree passed in accordance therewith. Before a legal order can be passed against a party directing him to appear in Court under the provisions of O. 10, R. 4, it is necessary that the Court should find, in the first place, that there are material questions relating to the suit which must be answered either by such party or by his pleader and when such party has a pleader it is only when the pleader is unable or refuses to answer those questions that the Court, under the provisions of O. 10,

1. (1897) 19 All 496.

2. (1901) 23 All 338.

3. (1903) 6 O C 26.

R. 4, may direct the party to appear in person. It does not appear what in the opinion of the learned Subordinate Judge were the material questions in this matter. But, even assuming there were material questions, it is clear that the learned Subordinate Judge did not call upon the appellant's pleader to answer them. Such being the case, there could be no failure on the part of the pleader to answer the questions as he was never asked to answer them; and the order of the Subordinate Judge directing the appellant to attend the Court was, therefore, erroneous.

We accept the appeal and the application for revision and send back the case to the learned Subordinate Judge to be restored to its original number and decided according to law. The cross-objections filed by the plaintiffs-respondents as to their costs are disallowed. The parties will pay their own costs in these proceedings in this Court.

B.V./R.K.

Appeal accepted.

A. I. R. 1918 Oudh 430

STUART AND KANHAIYA LAL, A. J. CS.

Brij Indra Bahadur Singh—Plaintiff
—Applicant.

v.

Deputy Commissioner of Kheri and another—Defendants—Opposite Parties.

Civil Revn. No. 81 of 1917, Decided on 11th June 1917, against order of Second Addl. Dist. Judge, Lucknow, D/- 15th May 1917.

Civil P. C. (5 of 1908), S. 115—*Interlocutory orders are not open to revision.*

Section 115, authorizes the Court to call for the record of any case which has been decided, but where there has been no decision and the case is still pending, interlocutory order passed during the course of the hearing cannot be made the subject of revision, unless those orders have the effect of determining the case so far as the party applying for revision is concerned or concluding the claim otherwise in a manner not open to appeal. [P 431 C 1]

Moti Lal Nehru, H. C. Dutt and H. K. Ghose—for Applicant.

John Jackson, Ram Bharose Lal, Sita Ram and Salig Ram—for Opposite Parties.

Judgment.—This is an application for revision of an order passed in a suit, pending in the Court of the Second Additional Judge of Lucknow, refusing to permit an amendment of the plaint in certain particulars. The plaintiff is a minor and has instituted a suit, claiming possession of the Mahewa Estate, as the

heir-at-law of the late Taluqdar, Rajendra Bahadur Singh. The defendant, Jai Indra Bahadur Singh, claims the estate as the legatee of Rajendra Bahadur Singh. The plaintiff is represented in the suit by his mother, who is his next friend. The allegation of the plaintiff in regard to the will set up by Jai Indra Bahadur Singh is that Rajendra Bahadur Singh was a man of weak intellect and mind, and was for various reasons in fear of Sheo Indra Bahadur Singh, with whom he lived and who was the manager of his estate, and that the latter took advantage of his position and of Rajendra Bahadur Singh's weakness and got him to execute a will in favour of his own son, Jai Indra Bahadur Singh, by the exercise of coercion and undue influence. These allegations were denied by the defendants. In his replication the plaintiff reiterated what he had stated in the plaint and affirmed that Sheo Indra Bahadur Singh had got his brother Rajendra Bahadur Singh to execute the will by fear and undue influence. The plaint was verified by the next friend of the plaintiff, and the replication was verified by her general agent. It is now sought to amend the plaint so as to add that the execution of the said will by Rajendra Bahadur Singh was also denied.

The ground on which the amendment was pressed in the Court below, was that the mother and next friend of the plaintiff had on previous occasions contested the genuineness of the will in other cases to which the plaintiff was a party and that her agent and counsel had wrongly presented her as admitting the execution of the said will by Rajendra Bahadur Singh without her knowledge or permission. The Court below disallowed the application. The learned counsel who now appears for the plaintiff urges in revision that the next friend of the minor was in any event entitled to apply for the amendment of the plaint in the interest of the minor, if on a reconsideration she thought that she had wrongly made admissions prejudicial to his interest. We cannot, however, allow that question to be considered in revision because, as pointed out in *Hevanchal Kunwar v. Kanhai Lal* (1) and in *Nand Ram v. Bhopal Singh* (2), no application

1. (1909) 12 O C 405=4 I C 878.

2. (1912) 34 All 592=16 I C 1.

for revision lies from an interlocutory order which does not determine the case. An appeal would lie from the final decree which might be passed in the suit. S. 115, Civil P. C., authorizes the Court to call for the record of any case, which has been decided, but where there has been no decision, and the case is still pending, interlocutory orders, passed during the course of the hearing, cannot be made the subject of revision, unless those orders have the effect of determining the case so far as the party applying for revision is concerned, or concluding the claim otherwise in a manner not open to appeal.

In *Bhavji Ali v. Rao Rajenhar Baji* (3) and in *Allahabad Bank v. Muhammad Raza Khan* (4) an application in revision was entertained from an order adding or refusing to add a person as a party to a suit, because so far as the right to add that person as a party was concerned, the order had the effect of concluding it. In *Mt. Farid-un-nisa v. Mukhtar Ahmad* (5) an application for revision was similarly entertained from an order directing the plaintiff to elect and remove one of the two inconsistent allegations, because the effect of the forced removal would have been to determine that part of the case. In the present case, it is open to the plaintiff to contest the propriety of the order refusing him leave to amend the plaint under S. 105, Civil P. C., when an appeal is filed from the final decree. The consequences of the application for amendment being allowed in appeal may sometimes be embarrassing, as evidence by the decision in *Seragan Chetty v. Krishna Aiyangar* (6), but the ground on which the application for amendment is pressed in this Court is different from that urged in the Court below, and it may be still open to the plaintiff to move the Court below for a reconsideration of its order. We do not desire at this stage to express any opinion on the merits of the application for amendment. We disallow the application for revision accordingly. The opposite party will get one set of costs from the applicant.

B.V./R.K.

Revision rejected.

3. (1910) 13 O C 109=6 I C 977.

4. (1912) 15 O C 301=16 I C 592.

5. (1917) 4 O L J 230=40 I C 488.

6. (1912) 36 Mad 378=13 I C 268.

A. I. R. 1918 Oudh 431

LINDSAY, J. C. AND STUART, A. J. C.

Mt. Badshah Khanum—Plaintiff—Appellant.

v.

Bishunath Singh and another—Debtors—Respondents.

First Appeal No. 52 of 1917, Decided on 23rd July 1918, against order of Sub-Judge, Bahraich, 10th January 1917.

Deed—Construction—Bond providing payment by particular date—Parties held intended last day of Fasli to be same as last day of June.

A registered bond provided that the amount thereunder would be repaid at the end of Jeth 1317 Fasli corresponding to the end of June 1910. The bond was sued upon on 29th of June 1910.

Held: that for the purpose of this bond the parties must be taken to have retitled between them—i.e. that the last day of Jeth 1317 Fasli was to be the same as the last day of June 1910, and that therefore, the suit was within time.

[P 482 C 1]

Mohammed Beg and M. A. Khan—for Appellant.

Rudra Dutt Sinha and Laddo Prasad—for Respondents.

Judgment.—The only question for decision in this case is one of limitation. The suit was brought on a bond which was executed on 26th May 1909. The bond was registered. The executant of the bond was one Saiyed Haidar Mehdi who is impleaded as defendant 2, and the bond was executed in favour of defendant 1 Bishunath Singh alias Sheo Nath Singh. The present plaintiff claims to be an assignee of the debt from Bishunath Singh. The suit was instituted on 29th of June 1916. The Subordinate Judge has held that it was put in seven days beyond limitation. In our opinion the decision of the Subordinate Judge is wrong. The question has to be determined with reference to the language of the bond. In his judgment on issue 1 the Subordinate Judge has reproduced verbatim the language of the deed which is relevant to the matter under consideration:

"Iqar karte hain ki mublighan machur mai sud akhir mah Jeth 1317 Fasli mutabiq akhir mah June san 1910 ada wa bebaq kar denge."

It is admitted that the last day of Jeth 1317 Fasli fell upon 22nd of June 1910, and it was in view of this fact that the learned Subordinate Judge arrived at the conclusion that this suit had been filed a week beyond time. On the other hand, the contention is that for the purpose of

this agreement the parties settled between themselves that the last day of Jeth 1317 Fasli was to be taken to be the same as the last day of June 1910. We think this contention must prevail. There were cases cited before the Subordinate Judge which support the contention. The Subordinate Judge, for reasons which we are not able to appreciate, held that these rulings were not applicable and he applied to the case the ruling of their Lordships of the Privy Council which is reported as *Jagatpal Singh v. Jagdishar Baksh Singh* (1). That was a case in which a report had been made by a patwari regarding the death of a certain person. The patwari gave the date according to the Hindi calendar and by way of explanation added that the Hindi date corresponded to a certain date in the English calendar. Their Lordships held that for the purpose of deciding the question of the date of the death which was reported, the Hindi date was the proper date to be taken into consideration. Obviously there is a great difference between that case and the case now before us. Here for the purpose of payment the parties agreed between themselves that one date should correspond to another, and, in our opinion, the suit was within time if brought within six years from 30th of June 1910. The case has been disposed of on this preliminary issue. We allow the appeal, set aside the decision of the first Court and send the case back for disposal on the merits. Costs here and hitherto will abide the result.

B.V./R.K. *Appeal allowed.*

1. (1908) 25 All 143=30 I A 27 (P C).

A. I. R. 1918 Oudh 432

STUART AND KANHAIYA LAL, A. J. Cs.
Prag—Defendant—Appellant.

v.

Mohan Lal and others—Defendants—Respondents.

First Appeal No. 19 of 1916, Decided on 11th September 1917, from decree of Sub-Judge, Hardoi, D/- 7th January 1916.

(a) Deed—Construction—Consistent intention possible from document—Repugnancy should not be imputed.

It is not desirable to impute repugnancy to the terms of a document where a consistent intention can be found from the study of the document as a whole. [P 433 C 2]

(b) Deed—Construction—Year—Meaning explained.

A year usually means a period of 12 months,

but the context of a document may show that a particular year, ending with a specified month or season, was intended. [P 433 C 2]

(c) Mortgage—Usufructuary mortgagee is not entitled to continue in possession after satisfaction of mortgage money from usufruct.

A mortgagee has no right to remain in possession of the mortgaged property after the mortgage money is satisfied from the usufruct, even though the parties may have miscalculated that the liquidation of the mortgage money from the usufruct shall take a longer period and may have said so in the deed. [P 434 C 1]

(d) Mortgage—Usufructuary mortgagee failing to pay off prior encumbrance—Mortgagor is entitled to claim accounts and is entitled to set-off for amount paid in satisfaction of prior encumbrance—Suit for reimbursement is governed by Limitation Act (9 of 1908), Art. 62, and not by Art. 116.

Wherein consequence of an usufructuary mortgagee's failure to pay the money left with him for payment to a prior encumbrance, the mortgagor has to satisfy the prior encumbrance, the mortgagor is entitled to claim at the time of redemption accounts of the realizations made by the mortgagee in spite of a stipulation to the contrary contained in the mortgage-deed. Such accounts should not be adjusted on the footing of the consideration actually advanced by the mortgagee, but the mortgagor is entitled to a set-off for the amount paid by him in satisfaction of the prior encumbrance. [P 434 C 2]

Where a mortgagee who is bound to pay off a prior encumbrance fails to do so and the mortgagor is compelled to pay it off and then sues the mortgagee for reimbursement the suit is governed by Art. 62 and not by Art. 116, Lim. Act, and limitation would begin to run from the date on which the plaintiff paid off the prior encumbrance. [P 434 C 2]

J. Jackson and Ram Chandra—for Appellant.

Basudeo Lal, Gokaran Nath Misra, Sami Ullah Beg and Harkaran Nath Misra—for Respondents.

Judgment.—The appeal arises out of a suit brought by the plaintiff respondent for the redemption of a mortgage, effected by Gaya Singh and his wife Mt. Sundar, acting as the guardian of her sons Kaptan Singh, Dirgaj Singh and Sheobaran Singh, in favour of Prag on 8th September 1905 and a deed of further charge executed by Gaya Singh and Mt. Sundar, acting as the guardian of Dirgaj Singh, in favour of the same person on 7th December 1907. Kaptan Singh and Sheobaran Singh died during their minority without leaving any issue. The mortgage was effected in lieu of Rs. 4,000, out of which Rs. 300 were left with the mortgagee for payment to Baiju about his prior mortgage, dated 18th August 1903. The deed of further charge was

executed in lieu of Rs. 2,404, out of which Rs. 225 were left with the mortgagee for payment to Jutta Sah about his mortgage of 14th June 1907. By virtue of the mortgage, the mortgagee was given possession over the mortgaged property. The mortgage money carried interest at Rs. 1 per cent. per mensem, and the covenant between the parties was that the mortgagee shall take the entire profits of the mortgaged property and after paying the Government revenue and village expenses chargeable on the same, deduct the amount of annual interest due to him and credit the balance year after year in reduction of the principal money secured by the mortgage.

In regard to the time fixed for redemption, the terms were not so clear. At one place it was stated that the mortgage shall be redeemable after ten years (bad muddat das sal); and at another place it was said that within the fixed period of ten years, the entire sum, comprising the principal and interest due to the mortgagee, would be fully paid up out of the annual net profits of the mortgaged property, and that the property mortgaged would be redeemed in the month of Jeth in the fallow season without the payment of any mortgage money or interest thereof. There was also an agreement that at the time of redemption the parties to the mortgage shall have no claim against each other for interest or for surplus profits. The money secured by the deed of further charge was re-payable with interest at Rs. 1.8-0 per cent. per mensem after six months (bad muddat ohhe mah), and if not so paid, at the time of the redemption of the mortgage, previously mentioned.

The property mortgaged in both deeds has since been purchased by Mohan Lal. On 4th June 1914 he deposited rupees 3,217-2-0 on account of the said deeds of mortgage and further charge; but the mortgage refused to accept the same. The present suit was, thereupon, filed by him for redemption, resulting in a decree in his favour subject to the payment of rupees 1,873-5-10 to the mortgagee. In the memorandum of appeal, filed by the mortgagee several pleas were taken, but the learned counsel who appears for him, has confined his arguments to only two matters. In the first place he contended that the possessory mortgage was not redeemable before the expiry of 10 years.

and that the suit, filed by the plaintiff, was consequently premature. In the second place, he argued that the sum of Rs. 1,291 paid by the plaintiff to the heirs of Baiju in satisfaction of their prior mortgage on 18th June 1913 was improperly debited against him in these accounts inasmuch as the claim of the mortgagees for damages, caused by the failure of the mortgagee to pay the money left with him for payment to Baiju, was barred by Art. 113, Lim. Act. The mortgage deed is very inartistically worded, and there is a certain amount of apparent inconsistency between the earlier and later clauses. If the mortgage was not redeemable till after the expiry of ten years from the date of the mortgage, the suit would be premature by about three months. If, on the other hand, effect be given to the covenant in the mortgage-deed that redemption should take place in the month of Jeth in the fallow season, the computation of full ten years from the date of the mortgage would give possession to the mortgagee for a period of nearly ten years and eight months or 11 agricultural years of two harvests each.

It is not desirable, however, to impute repugnancy, where a consistent intention can be found from the study of the document as a whole. An agricultural year ordinarily ends with 30th June, after which the land is brought under fresh cultivation. On the date on which the possessory mortgage in suit was executed, the collection of rents for the Kharif harvest had not commenced, so that the mortgagee must have in the ordinary course realized the entire rent for the agricultural year 1905-1906. By the end of Jeth 1916, ten full agricultural years were completed, and from the fact that redemption was to take place in that month in the fallow season after the expiry of ten years, it is reasonable to presume that agricultural years were intended. A year usually means a period of 12 months, but the context may show that a particular year, ending with a specified month or season, was intended. It could hardly have been the intention of the parties that the mortgagee should remain in possession of the mortgaged property and collect rents for the same for full 11 agricultural years or 22 harvest seasons, and the tenier, which was mada in Jeth 1915, and the suit, which follow

ed it, cannot, therefore, be regarded as premature. A mortgagee has, moreover, no right to remain in possession of the mortgaged property after the mortgage money is satisfied from the usufruct, even though the parties may have miscalculated that the liquidation of the mortgage money from the usufruct shall take a longer period and may have said so in the deed.

"Any stipulation in a mortgage," says Ashburner, "is invalid, if it prevents the mortgagor from redeeming, or allows the mortgagee to retain for his own benefit any part of or any interest in the mortgaged property after the mortgage has been discharged." (Ashburner on Mortgages, Indian Edn. p. 341).

The important thing in such cases is to ascertain whether it was the intention of the parties, as expressed in the deed, to postpone redemption till the mortgagee had enjoyed the usufruct for the full period mentioned. As pointed out in *Gopal Singh v. Karan Singh* (1), such term may not form an essence of the contract, where the mortgagee is only to take interest at a specified rate from the profits of the mortgaged property and to credit the rest towards the principal money. In *Bakhtawar Begam v. Husaini Khanam* (2) where a mortgage-deed provided for redemption in nine years and the mortgage debt was satisfied earlier, it was held by their Lordships of the Privy Council that limitation for a suit for the redemption of such a mortgage should be computed from the date of its satisfaction and not from the date when the period of nine years, fixed for redemption, had expired. S. 62, T. P. Act lays down that in the case of usufructuary mortgage the mortgagor has a right to recover possession of the mortgaged property, where the mortgagee is authorized to pay himself the mortgage money from the rents and profits of the property, when such money is paid. It makes no reservation in favour of any contract to the contrary and, as the mortgage money was paid up from the usufruct long before the suit, the mortgagee has no right to withhold possession of the mortgaged property or to resist a suit brought for redemption of the same.

It is contended on behalf of the mortgagee that the plaintiff was not entitled under the terms of mortgage to claim ac-

counts of the realizations made by the mortgagee. But the conduct of the mortgagee in this case in not paying the mortgage money left for payment to Baiju, the prior encumbrancer, renders accounting essential. He did not pay the entire consideration money secured by the mortgage, and failed to carry out his part of the contract in so far as it related to the payment of the prior encumbrance due to Baiju. Baiju, accordingly, sued for the recovery of his money, making the mortgagee a party to his suit, and got a decree for sale, which was satisfied by the present plaintiff for the protection of the rights which he had purchased from the mortgagors. Whatever the terms of the original contract may have been, the mortgagee had no right in the circumstances to appropriate the entire profits of the mortgaged property for a period of ten years, in whichever manner that period may be calculated, when he failed to pay a portion of the consideration secured by the mortgage. He who seeks equity must do equity, and a person cannot expect another to abide by a contract which he has himself broken. In either view of the case, the plaintiff was justified in claiming accounts and seeking redemption as soon as the mortgage money advanced by the mortgagee, with the interest due thereon, was satisfied.

The next point for consideration is whether the accounts ought to be adjusted on the footing of the consideration actually advanced by the mortgagee, or whether the plaintiff is entitled to a set-off for the amount paid by him to the heirs of Baiju in satisfaction of their prior mortgage, which the mortgagee had undertaken to pay out of the consideration money left with him for the purpose. A suit for compensation for breach of a contract in writing registered ordinarily lies under Art. 116, Lim. Act, (9 of 1908) within six years from the date of the breach. But the plaintiff does not claim damages for the breach of that contract. He only claims recoupment for the amount actually paid by him to the prior encumbrancer on the defendant's account. Art. 62, Lim. Act applies to such a case, and the plaintiff is entitled to a set-off for the amount paid by him on the defendant's account on paying the requisite court-fee. The suit was filed within three years from the date of the payment. The allegation of the mort-

1. A I R 1914 Oudh 160=17 O C 218=25 I C 302.

2. A I R 1914 P C 36=36 All 195=23 I C 355=41 I A 84 (P C).

gagagee that he had offered the money to Baiju and that Baiju had refused to take it was disbelieved by the Court below, and no argument has been addressed to us to contest the correctness of that finding. In *Hakim Ali Khan v. Dalip Singh* (3) it was held in somewhat similar circumstances that the limitation for a suit for re-imbursement would run from the date on which the plaintiff paid the decretal money due on the first mortgage.

In *Rani Raghubans Kuar v. Rana Ali* (4), where a mortgagee brought a suit for the recovery of money due on his mortgage, and had not paid a portion of the mortgage money left with him for payment to a prior mortgagee, it was held that the mortgagee was entitled to recover such portion of the principal amount, as was actually paid by him, with interest thereon, and that the mortgagor could in a separate suit sue the plaintiff for the recovery of such damages as might have accrued to him owing to the failure of the mortgagee to carry out his part of the contract. But in that case no payment had actually been made by the mortgagor to save the mortgaged property from sale in satisfaction of the prior mortgage, and the damages did not form an ascertained sum, in regard to which a set-off could have been claimed under S. 111 of the Union Civil P. C. It is true, as pointed out in *Raghubar Rai v. Baij Rai* (5), that a mortgagor may file such a suit before he has suffered any loss by reason of the failure of the mortgagee to carry out his part of the contract. But a suit for reimbursement is different in its nature from a suit for damages, and Art. 116, Lim. Act can only apply to the latter. The plaintiff has now been directed to pay the requisite court-fee on the claim for reimbursement. The other points taken in the memorandum of appeal have not been pressed. The plaintiff has filed a cross objection, urging that no interest ought to have been allowed to the mortgagee after 4th June 1914, when Rs. 3,247-2-0 were tendered under S. 83, T. P. Act. If the tender was sufficient no interest should have been allowed to the mortgagee after the date of that tender. It is not possible, however, to determine whether that tender was sufficient or to settle the account finally, till

it is ascertained whether the mortgagee had paid Rs. 225 to Gaya Singh, on Jutta Sah refusing to receive the same as he now alleges. The learned Subordinate Judge has since his decision under appeal allowed an application for a review of his judgment with a view to inquire into that matter; but it does not appear whether he has come to any finding on that point. The Court below is, therefore, directed to determine, after taking such additional evidence as the parties may adduce: (1) Whether the mortgagee tendered Rs. 225 to Jutta Sah as alleged by him, and on his refusal to receive the same, paid that sum to Gaya Singh? (2) What is the amount remaining due to the mortgagee on the deed of further charge, calculated on the footing of the consideration actually paid by him after crediting the surplus profits received by him from the mortgaged property up to the date of the suit, and excluding from the account Rs. 1,342 or any portion thereof which has been found to have been paid to the heirs of Baiju?

Two months' time will be allowed for a return of the findings and ten days from the date of the findings will be allowed to the parties for filing objections.

D.V. R.R.

Issues remitted.

A. I. R. 1918 Oudh 435

STUART AND KANHAIYA LAL, A. J. CS.
Bhagwati Prasad Singh—Plaintiff—
Appellant.

v.

Muhammad Abul Hasan Khan—Defendant—Respondent.

Second Appeal No. 291 of 1916, Decided on 14th September 1917, from decree of Dist. Judge, Gonda, D/- 8th May 1916.

Provincial Small Cause Court Act (1887), Sch. 2—Suit for contribution is not exempted.

A suit for contribution is not exempted from the cognizance of a Court of Small Causes.

[P 437 O 2]

Shahid Hussain—for Appellant.

Ali Muhammad—for Respondent.

Order of Reference. ¶

"I have decided after consideration to refer this case for disposal to a Bench. The suit was one for contribution and the facts are as follows: The plaintiff, the Maharaja of Balrampur, being the mortgagee of an 8-anna share in the Taluqa of Birwa Mahnon, brought a suit for arrears of rent against four persons

3. (1913) 19 I C 676.

4. (1907) 10 O C 69.

5. (1912) 34 All 420=14 I C 244.

who were the thekadars of a village called Kapurpur and obtained a decree. Subsequently the Maharaja and the defendant-respondent the Raja of Bilahra (who owned the other 8-anna share of the taluqa) joined in issuing a notice of ejectment against these thekadars under the provisions of the Oudh Rent Act. A suit to contest the notice was filed by thekadars, who lost their case in the Court of first instance but won it in appeal with the result that the Maharaja and the Raja were cast in costs of considerable amount. Subsequent to the passing of the appellate decree the Maharaja of Balrampur applied for execution of his decree for rent against the thekadars: the latter applied for set off of the sum awarded to them as costs in the ejectment suit and this was allowed, the consequence being that entire costs were paid by the Maharaja. He now sues to recover from the Raja of Bilahra his proportionate share of those costs, and his suit has been dismissed by both the Courts on the ground that such a suit for contribution does not lie. They have relied upon two authorities of this Court, one a ruling of Mr. Chamier reported as *Mt. Kaniz Fizza Bibi v. Sheo Narain Misr* (1), the other a recent ruling of Mr. Stuart reported as *Jamshed Ali Khan v. Zahur-ul-Hasan Khan* (2).

The facts of the case decided by Mr. Chamier were not the same as those of the case before me, for the plaintiff was seeking to recover from the defendant a share of certain costs which had been made payable under a decree to which the defendant was no party. Mr. Chamier, on the authority of the ruling in *Punjab v. Pelam Singh* (3), decided that the plaintiff could not recover. According to him the reasoning in the judgment just mentioned was unanswerable. The facts in the case were similar to those of the case which Mr. Chamier was considering and the reasoning which Mr. Chamier accepted is set out at p. 196 of the report in the following language:

"We see no sufficient reason for departing from the ordinary rule with regard to costs. When a joint debt is incurred, it is in contemplation of the parties that it will be paid without suit. Although every one of the persons who may be under the joint liability must be presumed to engage to contribute his fair share to

its satisfaction, they are not to be presumed to engage to pay their shares of the costs of litigation to which they may not be parties and over which, whether it be more or less protracted they may have no control.

"If persons who are under a joint liability are jointly sued and a decree passes for the debt and costs against both of them, each being under a joint liability in virtue of a decree is bound to contribute in respect both of debt and costs his share of the decree." Where only one of several co-contractors is sued, he cannot call upon his co-contractors to contribute to the costs of the suit."

Without committing myself to whole-hearted acceptance of this doctrine which appealed so strongly to the learned Judge responsible for the ruling in *Mt. Kaniz Fizza Bibi v. Sheo Narain Misr* (1), I may be permitted to observe that it does not appear to be applicable to the case where the joint liability of the parties to the suit for contribution has arisen out of a decree as distinguished from a contract. This indeed seems clear from the passage which I have (italicised) above. Whatever state of mind may be imputed to parties who enter into an agreement which imposed upon them a joint liability for the payment of a sum of money, it is obvious that the contemplations of the parties can have nothing to do with the matter when the Court passes a decree imposing upon them a joint and several liability for payment of damages or costs on both. The liability is imposed regardless of the state of mind of the parties and they must accept the consequent legal relation, whether they like it or not. Is that legal relation to be altered by the mere accident of the choice of a decree-holder, who under the law has the option of realising the judgment-debt from one or other of the judgment-debtors? When one of the debtors has been compelled to pay the whole debt, can the others turn round and claim that they have been released from their obligations by reason of the action of the decree-holder over which none of the judgment-debtors has any control? Surely not. If the case does not come under S. 69, Contract Act (a matter regarding which there has been a conflict of judicial authority), it certainly seems to come under S. 70 and I altogether fail to see why the judgment-debtor who has satisfied the whole debt should be debarred from suing his joint judgment-debtors to enforce the obligation arising out of the joint decree.

1. (1907) 10 O C 108.

2. (1195) 18 O C 340=33 I C 357.

3. (1874) 6 N W P H C R 192.

With regard to Mr. Stuart's decision in *Jamshed Ali Khan v. Zahur-ul-Hasan Khan* (2) the facts are not stated in the judgment. I have referred to the record and find that the case was one of a decree against two defendants. One of them was obliged in execution to discharge the whole amount awarded for costs and he sued his joint judgment-debtor for his share of the costs. According to the ruling the suit was not maintainable. Mr. Stuart followed the opinion of Mr. Chamier in the earlier case and I think I have succeeded in showing that the facts were different and that the ratio decidendi of the High Court which Mr. Chamier adopted is altogether inapplicable to the case where the joint liability of the parties to the contribution suit has its origin in a decree of Court. I cannot assent to the proposition laid down in the head note to the ruling in *Jamshed Ali Khan v. Zahur-ul-Hasan Khan* (2) that a suit for contribution in respect of costs is not maintainable. I have only to add a few words with respect to an observation of the learned Judge of the Court below in his judgment in the present case. Apart from the authorities just referred to, he thought the suit was not competent on the ground that a Court of Equity is not bound to decide a pecuniary dispute between two wrongdoers. No doubt the learned Judge had in mind what was laid down in the well-known case of *Merryweather v. Nixon* (4), namely, that there is no right of contribution between joint tortfeasors: but he has given far too wide an interpretation of this rule of law. It is well settled that there are limits to the application of this doctrine. Lord Denman in *Wells v. Gibbins* (5) observed:

"The general rule is that between wrongdoers there is neither indemnity nor contribution: the exception is where the act is not clearly illegal in itself."

and the principle does not extend to cases where the plaintiff is a tortfeasor by inference of law only. And lastly it is to be observed that the issuing of a notice of ejectment under the Oudh Rent Act, even if the notice is set aside after contract, is not a tort, i. e., an actionable wrong. The parties to this present appeal are not joint tortfeasors. For the above reasons I refer this appeal to a Bench for decision."

4. (1799) Sm L C (Ed. 9) Vol 2, 569.

5. (1834) 2 Ad & E 57.

Judgment.—The hearing of this appeal has been referred to a Bench by the order of the Judicial Commissioner with special reference to a point of law. We regret that we are unable to express any opinion on the point referred. It escaped the notice of the counsel of the parties and the learned Judicial Commissioner that the suit was a suit of which a Court of Small Causes could take cognizance. It was not a suit of the nature specified in Sec. 2, Act 9 of 1877. This is the conclusion at which the learned Judicial Commissioner arrived in *Suraj Bakh Singh v. Raghular Singh* (6). The valuation of the suit was Rs. 406-2-0. It is thus clear that no second appeal can lie under the provisions of S. 102, Act 5 of 1908. Such being the case, we feel ourselves precluded from expressing any opinion on the merits. The appeal is, therefore, dismissed. Costs on parties.

S. S. (N. R.), Appeal dismissed.

G. M. R. 1914 Oudh 22=241 C 28.

A. I. R. 1918 Oudh 437

STUART AND KANHAIYA LAL, A. J. Cs.
Maharaj Lal Bihari and others—Plaintiffs—Appellants.

v.

Anjuman-un-Nisa and others—Defendants—Respondents.

First Appeal No. 3 of 1918, Decided on 12th September 1918, from decree of Sub-Judge, Sirapur, Dt. 29th November 1917.

Evidence Act. (1872), 3. 68—Proof of attestation of document—Evidence conflicting—Court has discretion to accept any evidence—Attestation repudiated—Document is not invalidated, if it can be proved that false testimony is given.

Where there is one class of evidence showing that a document was properly attested and another class of evidence suggesting that it was not so, it is open to the Court on a consideration of the probabilities of the case to reject the one and accept the other. The fate of a document is not necessarily at the mercy of attesting witnesses. The mere fact that they repudiate their signatures or make statements suggesting that they attested at the instance of persons other than the executant or in his absence, does not invalidate the document, if it can be proved by evidence of a reliable character that they have given false testimony. [P 438 C 1, 2]

Gokaran Nath Misra and Chhail Bihari Lal—for Appellants.

Haider Husain—for Respondents.

Judgment.—This appeal arises out of a suit for foreclosure brought by the plaintiffs-appellants in respect of a mortgage effected by Fida Husain, the ancestor of defendants 1 to 4, and Raza Husain,

who is defendant 5. The appeal is illustrative of the difficulties which mortgagees experience in proving the due attestation of registered documents, the execution of which is incapable of being seriously disputed. As is usual in such cases, defendants 1 to 3 pleaded that they were not aware whether Fida Husain had executed the mortgage bond in suit. Defendants 4 and 5 absented themselves. The Court below held that the mortgage bond in suit was not proved to have been duly attested in the manner required by law and passed a decree for money against defendants 1 to 5, regardless of the fact that defendants 1 to 4 were only impleaded as heirs. The mortgage bond purports to have been attested by four witnesses, two of whom Sher Andaz Khan and Ganesh Prasad, as is also the scribe, are stated to be dead: the other two Syed Zakir Husain and Syed Zahid Ali are alive and have been examined. Syed Zakir Husain is related to Raza Husain. Raza Husain and Fida Husain were brothers. Syed Zakir Husain states that Fida Husain and Raza Husain did not sign the deed in his presence, that he attested the deed outside the Registration Office and that he did not remember whether the other attesting witnesses attested the deed in his presence or not. Syed Zahid Ali is similarly related to the wife of Raza Husain. He admits that the mortgage bond in suit was executed by Fida Husain and Raza Husain, and that he attested it. But he asserts that Fida Husain and Raza Husain did not sign the deed in his presence and that he must have signed the deed at their request, but was not sure of it. None of those witnesses was asked whether any personal acknowledgment was made to them by the executants. Raghubar Dayal, one of the plaintiffs in the suit, went into the witness-box and stated that the attesting witnesses, Syed Zakir Husain, Syed Zahid Husain and Ganesh Prasad, attested the deed in his presence and that Fida Husain and Raza Husain signed it in his presence and the presence of these and other witnesses.

As pointed out in *Brahmadat Tewari v. Chaudan Bibi* (1), the mere fact that the attesting witnesses to a document repudiate their signatures or make statements suggesting that they attested at the instance of persons other than the exe-

cutant does not invalidate the document, if it can be proved by evidence of a reliable character that they have given false testimony. In discussing the evidence adduced in support of a will, which was attested by four witnesses, two of whom had died and the other two deposed practically in favour of the objector, Moorjee and Beachcroft, JJ., observed:

"This, however, does not compel the Court to pronounce against the will. It was ruled... in the case of *Nubo Kishore Doss v. Joy Doorga Dossee* (2) that the mere fact that attesting witnesses to a will have repudiated their signatures, does not invalidate the will, if it can be proved by evidence of a reliable character that they have given false testimony. To the same effect is the decision of the Judicial Committee in *Cooper v. Bockett* (3). The principle is well settled that when the evidence of the attesting witnesses is vague, doubtful or even conflicting upon some material point, the Court may take into consideration the circumstances of the case and judge from them collectively whether the requirements of the Statute were complied with, in other words, the Court may, on consideration of the other evidence or of the whole circumstances of the case, come to the conclusion that their recollection is at fault, that their evidence is of a suspicious character or that they are willfully misleading the Court, and accordingly disregard their testimony and pronounce in favour of the will: "*Young v. Richards* (4) and *Burgoyne v. Showler* (5)."

Where there is one class of evidence showing that a document was properly attested and another class of evidence suggesting that it was not so, it is open to the Court on a consideration of the probabilities of the case to reject the one and accept the other. The fate of a document is not necessarily at the mercy of attesting witnesses.

This case was moreover decided before Act 26 of 1917 came into force. By that Act it has been provided that instruments of mortgage or gift, executed prior to the 1st January 1915, shall not be deemed to be invalid by reason only that any person, who purported to attest such instrument as a witness, did not see the executant sign it, provided that such person before signing his name on the instrument received from the executant a personal acknowledgment of his signature to the same. It is possible that the plaintiffs might be able to prove such a personal acknowledgment and we consider that an opportunity should be given to them to do so. The proof of such a

2 (1874) 21 W R 189.

3 (1846) 13 E R 365=4 Moo PC 419 (P C).

4 (1839) 2 Curt 371.

5 (1844) 1 Rob 5.

personal acknowledgment might render an examination of the other evidence unnecessary. We direct the Court below accordingly to determine, after taking such relevant evidence as the parties may adduce, whether the document in question was properly attested or valid within the meaning of S. 2 of Act 26 of 1917. Three months' time will be allowed for return of the finding and 10 days from the date of the finding will be allowed to the parties for filing objections.

B.V./R.K.

Issue remitted.

A. I. R. 1918 Oudh 439 (1)

KANHAIYA LAL, A. J. C.

Balbhaddar Singh—Defendant—Appellant.

v.

Sripal Singh and others—Plaintiffs—Respondents.

Second Appeal No. 79 of 1918, Decided on 19th August 1918, against Decree of Dist. Judge, Hardoi, D-1st December 1917.

(a) Evidence Act (1 of 1872), S. 32 (5)—Statements by agent and relatives of deceased member of family are admissible.

The statements of the deceased relatives, servants and dependents of family are as much admissible under S. 32, Cl. (5), Evidence Act, as the statements of the members of the family, provided they had special means of knowledge requisite to render their statements admissible.

[P 439 C 2]

(b) Evidence Act (1 of 1872), S. 32 (5)—Principal and Agent—Pedigree filed by agent in suit to which principal was party—Presumption is that pedigree was filed under instructions of master—Pedigree is admissible in inheritance suit.

In a suit for inheritance the plaintiffs relied upon a pedigree which purported to have been filed in a previous suit by the general agent of one of the parties to that suit. The latter was a member of the family to which the parties in the inheritance suit belonged and he and his general agent were both dead:

Held: (1) that the presumption was that the general agent must have filed the pedigree under the instructions of his master; [P 439 C 2]

(2) that the pedigree was admissible in the inheritance suit under S. 32, Cl. (5). [P 439 C 2]

Gopal Sahai—for Appellant.

Judgment.—This is a suit by certain persons who claimed to be the reversionary heirs of Ganga Bakhsh Singh deceased. They sued for a declaration of their title to the property left by him as their nearest reversioners or in the alternative for the recovery of possession of the said property. The defence was that the defendants were the nearest heirs of the deceased. Both the Courts below

found in favour of the plaintiffs and decreed the claim. In appeal it is contended that the pedigree relied on by the Courts below was inadmissible in evidence inasmuch as it purported to have been signed and filed on behalf of Balwant Singh by his general agent Rudradat. Balwant Singh was a member of the family to which the parties belong. In 1866 he filed a suit for redemption of a mortgage against Kalyan Singh. The pedigree was then filed which supports the claim of the present plaintiffs. It is difficult to say under what circumstances Rudradat signed the pedigree on behalf of his master. It is possible that Balwant Singh might have been illiterate or unable to sign, and it is equally possible that he might have sent his general agent to file it. In any event Balwant Singh being dead, the presumption is that the general agent must have filed it under the instructions of his master. As pointed out in *Gururadhwanji Prasad v. Suparadhwanji Prasad* (1), the statements of the deceased relatives, servants and dependents of the family are as much admissible under S. 32, Cl. (5), Evidence Act, as the statements of the members of the family, provided they had special means of knowledge requisite to render their statements admissible. The evidence adduced by the defendants was disbelieved by both the Courts below. The appeal is therefore rejected.

B.V./R.K.

Appeal rejected.

1: (1901) 23 All 37=27 1 A 283 (P C).

* A. I. R. 1918 Oudh 439 (2)

STUART, A. J. C.

Mt. Shahzadi and others—Judgment-debtors—Appellants.

v.

Ahmad Ali Shah and others—Auction-purchasers—Decree-holders and Respondents.

Execution of decree Appeal No. 26 of 1918, Decided on 2nd July 1918.

* Civil P. C. (5 of 1908), O. 21, R. 84—Stranger cannot become purchaser by deposit or even by consent of real bidder.

A person cannot avail himself of the bid made by another at a Court-auction and constitute himself the purchaser by depositing the purchase money; nor can the consent of the bidder improve his position in this matter. [P 440 C 1]

H. K. Ghosh for *Daya Kishen Seth*—for Appellants.

K. Dorabji—for Respondents.

Judgment.—The facts of this case are as follows. S. T. Williams held a decree against the seven appellants. In execution of this decree he attached and brought to sale a certain house belonging to the appellants. The house was put up to auction. The last bid was in the name of a certain Bahadur Khan. Bahadur Khan did not however deposit the 25 per cent. of the purchase-money as required by O. 21, R. 84. A certain Ahmad Ali Shah made that deposit. Ahmad Ali Shah did not deposit this on behalf of Bahadur Khan but on behalf of himself. He subsequently deposited the remaining 75 per cent. He asserted that Bahadur Khan had purchased the house on his behalf. Bahadur Khan subsequently ratified this statement. In the meanwhile the appellants paid up the total decretal amount. They omitted however to deposit 5 per cent. of the purchase-money as required by O. 21, R. 89. When Ahmad Ali Shah applied for confirmation of the sale, the learned Munsif confirmed the sale and his order has been upheld by the learned District Judge. I do not consider that there was any regular purchase. The sale should have been to Bahadur Khan if Bahadur Khan deposited the money. He did not do so. The sale to Ahmad Ali Shah in my opinion was an irregular sale which cannot be upheld. Irrespective of the fact that the appellants did not deposit 5 per cent. of the purchase-money, the sale is a bad sale. Therefore this appeal must succeed. I direct that the sale be set aside and that the amount deposited by Ahmad Ali Shah be returned to him. Costs on parties.

B.V./R.K.

Appeal allowed.

A. I. R. 1918 Oudh 440

KANHAIYA LAI, A. J. C.

Chhatarpal and others—Plaintiffs—Appellants.

v.

Hardeo Bakhsh Singh and another—Defendants—Respondents.

Second Appeal No. 447 of 1917, Decided on 13th September 1918, against decree of Dist. Judge, Hardoi, D - 17th July 1917.

Pre-emption — Suit for— Pre-emptor prior mortgagee—Money left with vendee out of sale consideration to pay off incumbrances—Failure of vendee to discharge—Pre-emptor cannot claim right to set off in pre-emption suit.

A pre-emptor, who is also a prior mortgagee of

the property sold, cannot in his suit for pre-emption claim in reduction of the purchase-money such interest to which he may have become entitled by reason of the failure of the vendee to pay to him and to the other creditors of the vendor moneys which had been left with him out of the sale consideration for discharging incumbrances on the property sold. [P 441 C 1]

Bisheshwar Nath Srivastava—for Appellants.

Basudeo Lal and M. A. Ali—for Respondents.

Judgment.—This appeal arises out of a suit for pre-emption and the only question for determination is whether a pre-emptor is entitled to claim a set-off for the additional interest, which became payable to him and to the other creditors of the vendor on account of the failure of the vendee to pay the money left with him for payment to the above persons out of the consideration of the sale. As pointed out in *Ram Raian v. Jugrai* (1) and *Jogan Nath v. Sheoratan Singh* (2), the right of pre-emption is a right to the benefit of a contract or a right of substitution entitling the pre-emptor, by reason of a legal incident to which the sale itself was subject, to stand in the shoes of the vendee in respect of all the rights and obligations arising from the sale, under which he has derived his title. The question for consideration in this case, however, is whether the rights and obligations, arising between the date of the sale and the date of the suit or decree for pre-emption, are to be determined in the suit for pre-emption or in a separate proceeding, intended to enforce those rights or obligations. It is unquestionable that there are certain rights and obligations which must be determined in the suit for pre-emption itself, such as those which form a part of the contract of sale or are necessary legal incidents of the price thereof. In *Tajammul Husain v. Uda* (3), where a certain sum was fixed as the price of the property sold, and such sum was paid by the vendee, but it was subsequently agreed between him and the vendor as a part of the sale contract that the vendee should recover for his own benefit certain moneys due to the vendor at the time of the sale and the vendee recovered such moneys, it was held that the pre-emptor was entitled to the deduction of the amount of such moneys from the sum originally fixed as

1. (1905) 8 O C 186

2. (1910) 13 O C 219=7 I C 295.

3. (1881) 3 All 668.

the price of the property, the reason being that the sum subsequently received by the vendee operated as a reduction of the price nominally fixed in the sale-deed.

In *Hazari Lal v. Ram Narain* (4) the pre-emptor was declared liable to pay the arrears of underproprietary rent paid by the mortgagees for the period antecedent to his decree for foreclosure, which was the subject of pre-emption, because in the absence of any agreement in writing, with the original proprietor to the contrary, S. 154, Oudh Rent Act (22 of 1886) imposed a statutory liability on the transferee to pay any arrears of rent due at the time of the transfer and the payment was made by him for the protection and preservation of the disputed property from sale in lieu of the said arrears. No question of protection arises in this case. The interest here claimed by the pre-emptor is in the nature of damages, said to have been caused by the failure of the vendee to carry out his part of the contract with the vendor. The right to claim that interest flows out of the contract of sale, but it is not an integral part of it. It follows the contract of sale, not because the contract necessarily carries a right to it, but because something, which was then uncertain, has happened since the date of the sale, namely, the money left has not been paid or the contract has been broken which gives a right to it. S. 13, Oudh Laws Act (18 of 1876) and O. 20, R. 14, Civil P. C. only permit the determination of the price, and in certain cases of the market value. The amount of interest cannot moreover be satisfactorily originally determined, unless the mortgagees or the creditor for whom the money was left to be paid are before the Court in a suit properly framed for the purpose, for they may contest the adequacy of the money left for them, or it may appear that a tender was made to them and they had refused to accept it, or some of the creditors may have died and the right to receive on their behalf may be a subject of dispute.

The pre-emptor happens to be one of the creditors in this case, but he is mixing up his position as a pre-emptor with his position as a prior mortgagee. The Courts below have rightly refused to allow him in this suit to set off the additional interest, due to him and to the other credi-

tors, against the purchase money. The appeal is therefore dismissed with costs.
B.V.R.K. Appeal dismissed.

A. I. R. 1918 Oudh 441

LANDSAY, J. C.

Askaran Baid—Defendant—Applicant
v.

Bhola Nath and another—Plaintiffs—
Opposite Parties.

Misc. Appln. No. 4203 of 1918. Decided on 23rd July 1918.

(a) Civil P. C. (5 of 1908), S. 22—Application for transfer by party objecting to jurisdiction is not maintainable.

Defendant in a suit, who takes objection to the jurisdiction of the Court in which the suit has been instituted cannot maintain an application for its transfer to another Court under S. 22. [1918 C 2]

(b) Civil P. C. (5 of 1908), S. 22—Inconvenience of defendant's witnesses is not good ground for transfer—Plaintiff's choice of forum cannot be interfered with except for cogent reasons.

A plaintiff's right to choose his own forum cannot be taken away from him except for very cogent reasons.

The fact that a defendant's witnesses would be very much inconvenienced if the suit continues in the Court chosen by the plaintiff as his forum is not a sufficient ground for taking action under S. 22. [1918 C 2]

Munata Hussain—for Applicant.

Balakeshar Nath Srivastava—for Opposite Parties.

Judgment.—This is an application under Ss. 22 and 23, Civil P. C. The applicant Askaran Baid is the defendant in a suit which has been instituted by the Opposite Party Bhola Nath and Murli Dhar in the Court of the Subordinate Judge of Lucknow. After the institution of the latter suit the applicant filed a suit in the High Court at Calcutta, and now he desires to have the suit which is pending in the Lucknow Court transferred to Calcutta under the provisions of S. 22, of the Code. The grounds upon which the application is made are that in view of the relation between the parties and in view of the scope of the suit which has been brought by the applicant in Calcutta it is not desirable that the trial of the Lucknow suit should continue inasmuch as the matters involved in the Calcutta suit comprise the single matter which is in dispute in the suit pending at Lucknow.

The plaintiffs in the Lucknow suit are two persons Bhola Nath and Murli Dhar, who describe themselves as being the proprietors of a firm carrying on business

under the name of Balgobind-Bhola Nath and the transaction to which the suit relates, is a single transaction regarding a quantity of cloth which it is said the plaintiff firm entrusted to the present applicant for sale on commission in Calcutta. The suit in Calcutta has been filed by the applicant Askaran Baid against these same persons Murli Dhar and Bhola Nath who are described as carrying on business under two names, namely, Badri Das-Prag Das and Balgobind-Bhola Nath. It has been stated before me by the learned Counsel who opposes this application that these two firms are distinct and carry on different businesses, although it is the fact that Murli Dhar, one of the persons named, is a partner in both the firms. For the applicant it is stated that Murli Dhar has been carrying on business with Askaran Baid for a number of years and that there is an account between the parties for the settlement of which the suit in Calcutta has been filed, and as already mentioned the applicant's case is that the account between the parties relates to dealings extending over a number of years including the particular transaction which is the subject-matter of the dispute in the Lucknow suit.

It is clear from the pleadings of the parties in both the suits that they are at issue regarding a number of facts. One point to be noticed is that the applicant Askaran Baid has put in his written statement in reply to the plaint filed in the Court at Lucknow. One of the pleas which he has raised is that the Lucknow Court has no jurisdiction to entertain the suit. It has been urged before me by the learned Counsel for the opposite party that in view of this plea the applicant is not competent to maintain the present application for a transfer of the Lucknow suit to Calcutta; and as an authority for this argument I am referred to a judgment of a Judge of the Allahabad High Court reported as *Panna Chandra Mukerji v. Dhone Kristo Biswas* (1). The correctness of that judgment has been contested before me by the learned Advocate for the applicant, but I am not prepared to accept his argument. It appears to me that on a proper construction of S. 22, an order for transfer can only be made in respect of a suit which may be instituted in any one of two or more Courts. If the defendant's case is that the suit is not one

of this description because it has been brought in a Court which has no jurisdiction at all, it seems to me that he ought not to be allowed to maintain any application under S. 22. Apart from the law on the question, I am not satisfied that any sufficient ground has been made out which would justify the transfer of this case, even if a transfer were possible. The main argument before me is that most of the witnesses who can depose regarding the matters in issue between the parties are people who live and carry on their business in Calcutta and the inconvenience of bringing these people before the Court at Lucknow is appealed to. As pointed out, however by the other side, the personal attendance of witnesses from Calcutta cannot be enforced in the Lucknow Court and such evidence as may be required from Calcutta can be taken on commission.

In any case an application of this kind cannot be dealt with from the point of view of the convenience of the defendant's witnesses. The plaintiff admittedly has the choice of forum and his right to choose cannot be taken away from him except upon very cogent grounds. The law on the subject has been laid down in a ruling of the Bombay Court to be found in *Geffert v. Ruckchand Mohla* (2). In that case arguments in favour of a transfer were put forward similar to those which have been advanced before me and were repelled on the ground that no good cause was shown for depriving the plaintiff of his right to file his suit in Bombay. I am satisfied that there is no sufficient ground upon which any order for transfer can be made in this case and I dismiss the application with costs.

B.V./R.K. *Application dismissed.*

2. (1889) 13 Bom 178.

A. I. R. 1918 Oudh 442

KANHAIYA LAL AND DANIELS, A. J. CS.

Mt. Basti Begam — Decree-holder — Appellant.

v.

Sajjad Mirza — Judgment-debtor — Respondent.

Execution of Decree Appeal No. 13 of 1918, Decided on 20th June 1918, against decree of Sub.Judge, Lucknow, D/- 10th December 1917.

(a) Practice — Execution — Application for execution dismissed, directing institution of suit—Order in suit referring to seek re-

medy by execution has the effect of nullifying previous order passed in execution proceedings.

Where a suit to enforce a security bond filed in a Privy Council appeal was dismissed, on the grounds (1) that the necessary parties had not been impleaded and (2) that the claim was barred by S. 47, Civil P. C., and on an application for execution to enforce the said security being made, the decree-holder was met with the plea that an order passed before the institution of the above suit in a previous execution proceeding, referring him to seek his remedy by suit, operated as a bar to a fresh application for execution:

Held: that the order passed in the suit had the effect of nullifying the previous order passed in the execution proceeding. [1 P 444 C 2]

(b) Pleadings—Inconsistent pleas cannot be allowed to be taken.

A party who sets up a plea, to which effect has been given by a Court in a previous proceeding, should not be allowed to set up another plea inconsistent with it in a subsequent proceeding brought for the same relief. [1 P 415 C 2]

J. N. Chak—for Appellant.

Baba Gokul Prasad—for Respondent.

Kanhaiya Lal, A. J. C.—The question for consideration in this appeal is whether a security bond filed by an appellant for the costs of the respondent under the provisions of S. 600 of the old Civil P. C., in respect of an appeal to His Majesty in Council can be enforced against the surety by the sale of the property hypothecated in the said bond, in a proceeding taken to execute the decree passed on appeal by His Majesty in Council.

It appears that Sajjad Hussain and Umrao Mirza filed a suit against Nawab Abid Hussain Khan, Saifid, Fazal Hussain and Mt. Basti Begam for a declaration that the properties comprised in three deeds of endowment were wakf properties and for possession of the same as trustees. The suit was dismissed by the Court of first instance but decreed on appeal in regard to the properties in two of the deeds. The plaintiffs appealed and a security bond for Rs. 4,000 was filed on behalf of Umrao Mirza, one of the appellants, hypothecating certain property for the payment of the costs which might be allowed to the respondent if the appeal was unsuccessful. The Court charged with the execution of the decree disallowed her application, holding that the security bond could only be enforced by means of a separate suit. A suit was then filed by Mt. Basti Begam for the enforcement of the security bond, but it was dismissed on the grounds that a regular suit was not maintainable and that the neces-

sary parties had not been impleaded. The decree-holder applied again to the Court charged with the execution of her decree, praying that the money due to her might be realized by the sale of the property hypothecated in security. This application was disallowed on the ground that the order disallowing her previous application for execution operated as *res judicata*. The Court below did not give effect to the order passed in the suit. The former was passed on 26th June 1915 in the previous execution proceeding, directing the decree-holder to seek for remedy by a regular suit. The latter was passed on 20th December 1916 in the regular suit filed in pursuance of that order. In the execution proceeding the judgment-debtor had objected that the decree-holder could not proceed against the property hypothecated without first obtaining a decree for sale. When a suit for sale was filed, he turned round and said that the suit was barred by S. 47, Civil P. C.

When a fresh application for execution was made, he reiterated the objection that no order for the sale of the mortgaged property could be passed, until a decree for sale was obtained in the manner provided by law. He thus took up inconsistent positions, varying his defences according to the nature of the proceeding taken by the decree-holder against him. As pointed out in *Mahommed Mehdi Ali Khan v. Mt. Sharfunnisa* (1) and *Abdul Qayum v. Fida Hussain* (2), a party who sets up a plea, to which effect has been given by a Court in a previous proceeding should not be allowed to set up another plea inconsistent with it in a subsequent proceeding brought for the same relief. In *Bhindeewari Prosad Singh v. Lakpat Nath Singh* (3) it was held that where a jurisdiction was usurped by a Court in passing an order against which an appeal lay, an appeal against the order could not be defeated by showing that the order was without jurisdiction. In *Bhagirathi Dass v. Baleswar Bogarti* (4) and *Umeshananda Dut v. Mohendra Prosad* (5) it was similarly held that a litigant should not be allowed to occupy inconsistent positions in Court, or in other words, to approbate and reprobate, for if the par-

1. (1900) 3 O C 32.

2. (1915) 30 I C 551.

3. (1910) 8 I C 26.

4. A I R 1914 Cal 143=41 Cal 69=19 I C 686.

5. (1911) 11 I C 230.

ties were to be permitted to assume inconsistent positions in the trial of their causes the usefulness of Courts of Justice would in most cases be paralysed.

The later decision has had moreover the effect of superseding the earlier one. In *Dambar Singh v. Munawar Ali Khan* (6), where inconsistent orders were passed in different execution proceedings in connexion with the same decree, it was held that the later decision neutralized the earlier. The decision passed in the regular suit was therefore binding on the parties and the Court below was as much in error in permitting a plea to be raised inconsistent with the pleading in the suit as in refusing to allow the decree-holder to enforce her decree for costs by the sale of the property hypothecated as security. The surety, in this instance, was one of the appellants himself. The security was furnished under O. 45, R. 7, of the Civil P. C., and under S. 145 of the Code, the liability of the surety could in any event be enforced to the extent to which he had rendered himself personally liable in the manner provided for the execution of decrees.

In *Motilal v. Chandrasangji* (7), where a bond was given as security for restitution in the event of a decree being reversed on appeal, a suit based on such a bond was held to be maintainable. In *Shyam Sunder Lal v. Bajpai Jainarayan* (8) the decree-holder was permitted to realize his decree money by the sale of the properties given in security without instituting a suit under S. 67, T. P. Act. But in *Chandralati v. Babu Ram* (9) and *Tokhan Singh v. Girwar Singh* (10) a contrary view was taken, reliance being placed on old S. 99, T. P. Act, which has now been replaced in a considerably modified form by O. 34, R. 14, Civil P. C. Where a decree for the payment of money is obtained in satisfaction of claim arising under a mortgage, different considerations arise. Here the decree is one for costs, and it can be enforced, apart from what was held in the suit, as if it were a simple money-decree, though a suit for sale on the security bond may also be maintainable.

The learned Counsel for the judgment.

debtor contends that the order passed in the regular suit was based on two grounds, the first in serial order being that all the necessary parties had not been impleaded. He argues that that finding rendered the decision of any other matter in the suit unnecessary. But the question of the competency of a Court to entertain a suit is logically the first question that a Court has to decide before it can proceed to determine the other issues. In *Shib Charan Lal v. Raghu Nath* (11), which was followed in *Jiwa Ram v. Salyan* (12) and *Har Sahai v. Ali Muhammad Khan* (13), it was held that if there were two findings of fact, either of which would justify in law the making of a decree, that one of such two findings of fact, which should in the logical sequence of necessary issues be first found and the finding of which rendered the other of such two findings unnecessary for the making of the decree which was made, was the finding which would operate as *res judicata*. This difficulty arising out of the non-joinder of necessary parties was the first matter with which the judgment dealt, but it was not the first matter in the order of logical sequence, because the matter could only be taken up after the Court had decided that it had jurisdiction to hear the suit. If it came to the conclusion that the suit was barred by S. 47, Civil P. C., and that the remedy of the mortgagee was to apply for the execution of her decree by the enforcement of the security, any decision dealing with the other matters raised in the suit could only be ancillary or of secondary interest. That portion of the judgment which decided that a regular suit was not maintainable has become final and operates as *res judicata*; and it is not now open to the judgment-debtor, who was a party to it, to go behind it and contend that the application for execution to enforce the security is not maintainable. The previous order passed in execution is superseded by the order passed in the suit.

The appeal is, therefore, allowed and the case is remanded to the Court below, with a direction to reinstate the execution proceeding and to proceed with the application for execution in the manner provided by law. The appellant will get

6. (1915) 37 All 531=20 I C 775.

7. (1912) 36 Bom 42=12 C 549.

8. (1903) 30 Cal 1060.

9. (1915) 27 I C 365.

10. (1905) 32 Cal 494.

11. (1895) 17 All 174.

12. (1911) 9 I C 983.

13. (1913) 16 O C 178=20 I C 266.

her costs from the judgment-debtor throughout.

Daniels, A. J. C.—I concur. To allow a party to play fast and loose with the Courts, as the respondent has been permitted to do in this case, is nothing short of a denial of justice. It is, in my opinion, unnecessary form to decide whether both the findings on which the Subordinate Judge's judgment of 20th December 1916 was based constitute *res judicata* or only one of them—a point expressly left open in *Har Sahai v. Ali Muhammad Khan* (13), as the Court held that the situation referred to did not really arise—inasmuch as whether we adopt the view of the law taken by the Chief Court of the Punjab in *Haba Lal v. Hari Baksh* (14) or the view adopted by the Allahabad High Court in *Shah Charan Lal v. Raghu Nath* (11), in either case the finding that the plaintiff's remedy lay in the execution department certainly did so operate.

N.A.R.R. Appeal allowed.
14, (1916) 13 P R 1015=41 C 479.

A. I. R. 1918 Oudh 445

KANHAIYA LAL, Oppo. J. C. AND
DANIELS, Oppo. IST A. J. C.

Sadiq Husain Khan—Decree-holder—
Appellant.

v.

Al. Ummatulfatima Begum and others
—Judgment-debtors—Respondents.

Execution of Decree Appeal No. 18 of 1918, Decided on 26th June 1918 against order of Sub-Judge, Lucknow, D. 11th March 1918.

Mortgage—Costs— Costs in appeal form part of decretal amount and are realisable by sale of mortgaged property.

Costs awarded in mortgage suits, including costs of appeal, form part of the decretal amount and are realisable in the first instance by sale of the mortgaged property and not otherwise.

[P 415 C 2]

Wazir Hasan—for Appellant.

Zahur Ahmad and Bisheswar Nath Srivastava—for Respondents.

Judgment.—This appeal arises out of execution proceedings under a mortgage decree. There were two suits between the parties, a suit for sale on a mortgage brought by the appellant Sadiq Husain against the respondents Hashim Ali and Qasim Ali, and a declaratory suit brought by the latter against the former for a declaration that the property was not liable to sale under the mortgage. The

first Court decided both suits in Sadiq Husain's favour. The respondents were to a large extent successful in this Court but, on a further appeal being preferred to the Privy Council, their Lordships restored the decrees of the Subordinate Judge. Both appeals were heard together and the successful appellant Sadiq Husain was awarded his costs of both suits by a single order. The costs were afterwards apportioned by this Court between the two suits. The question in this appeal is whether the costs incurred in the appeal to the Privy Council in the mortgage suit can be recovered in the first instance otherwise than from the mortgaged property.

The proceedings in mortgage suits and the form of the decree in such suits are regulated by the provisions of O. 34, Civil P. C., and in particular by Rr. 4, 5 and 10 of that order. In accordance with that order it is the settled practice in this country to treat costs in such suits, including costs in appeal, as part of the decretal amount realisable in the first instance by sale of the mortgaged property and not otherwise. If any authority is necessary for so well settled a rule, we may refer to *Raj Kumar Singh v. Shree Narayan Saha* (1). The appellant's contention is that the Privy Council is not bound by the Civil Procedure Code and that they have not expressly said that the costs in the mortgage suit are to be recovered as part of the mortgage decree. No doubt the Privy Council can override the Civil Procedure Code if they wish, but the presumption is that unless they give special directions to the contrary, they intend the costs to be realized in the way in which they would be realized under the ordinary law. It is not to be expected that the Privy Council should enter into details as to the manner in which costs awarded by them are to be realized. That is left to the operation of the ordinary law. Even Courts of Appeal in India frequently omit to specify details of this kind. A case occurred quite recently in which the Allahabad High Court was required to interpret one of its own decrees passed in a suit for sale on a mortgage: *Dambar Singh v. Kalyan Singh* (2). The judgment was in much the same form as the Privy Council's order in the present case. It simply

1. (1903) 35 Cal 431.

2. A I R 1918 All 365=43 I C 557=40 All 103.

directed that the decree of the Court of first instance should be restored with costs in all Courts.

The question arose whether the costs in appeal were recoverable as part of the mortgage decree from the mortgaged property or as an ordinary money decree. Their Lordships held that in construing the decree it was open to them to consider the nature of the suit and the general practice of the Court in regard to mortgage decrees and that having regard to these matters, the intention was that there should be the ordinary mortgage decree awarding the costs incurred in the suit and up to the time of the final decree of the High Court to be realized by sale of the mortgaged property. This is the conclusion at which the learned Subordinate Judge has arrived in this case and, in our opinion, it is a correct conclusion. The appellant has attempted to base a further argument on the facts that the costs in the two suits are dealt with together in the Privy Council's order. This certainly cannot be construed to mean that the costs in each suit were not to be realized in the manner appropriate to that suit. In fact this argument is two-edged since the Privy Council deal in one sentence with costs before themselves and costs in the Court of the Judicial Commissioner and the appellant himself has treated the latter costs as recoverable under the mortgage decree. The decision of the learned Subordinate Judge is, in our opinion, correct and we dismiss this appeal with costs.

B.V./R.K.

Appeal dismissed.

A. I. R. 1918 Oudh 446

LINDSAY, J. C.

Ram Adhin—Decree-holder—Appellant.

v.

Ram Lot and another—Judgment-debtors—Respondents.

Execution of Decree Appeal No. 41 of 1917, Decided on 22nd April 1918, against order of Dist. Judge, Fyzabad, D/- 22nd November 1917.

(a) Civil P. C. (1882), S. 2—Order dismissing appeal for default is not decree.

An order dismissing an appeal for default is not a decree within the meaning of the definition of that word contained in the Civil Procedure Code of 1882 [P 448 C 2]

(b) Civil P. C. (1882), S. 2—Civil P. C., (1908), S. 48—Appeal dismissed for default—Limitation for execution commences from

date of original decree and not from order of dismissal of appeal.

Where an appeal was dismissed for default under the Civil Procedure Code of 1882.

Held: that the only decree which could be executed was the decree of the original Court and that limitation for execution of the decree must be taken to have begun to run from the date of the original decree, and not from the date of the order dismissing the appeal from that decree for default. [P 449 C 1]

Gokaran Nath Misra and *Basudeo Lal*—for Appellant.

Wazir Hasar and *A. P. Sen*—for Respondents.

Judgment.—This is an appeal against an appellate order of the District Judge of Fyzabad dismissing an application for execution of decree made by *Ram Adhin*, the appellant, on the ground that it was barred by limitation under the provisions of S. 48, Civil P. C. It appears that the decree-holder obtained this decree on 27th September 1904 against *Matadin*, who is now represented by the respondents to this appeal. *Matadin* went in appeal to the Court of the District Judge. A date was fixed for hearing of the appeal but the hearing was adjourned till 29th March 1905. On that date *Matadin* himself did not appear in Court. He was however, represented by a pleader. This gentleman informed the Court that he had received no instructions from his client and was not in a position to argue the case on his behalf. The result was that an order was passed by the learned District Judge dismissing the appeal for default. A formal order was prepared in the shape of a decree. No costs were however awarded to the respondent in consequence of the dismissal. After this applications for execution were made from time to time by the decree-holder and finally we have a fresh application which was made on 6th March 1917.

The Court of first instance held that this application was within time as the period of 12 year's limitation provided by S. 48, Civil P. C., ran from 29th March 1905, the date upon which the judgment-debtor's appeal had been dismissed for default by the District Judge. This order has been reversed in appeal by the present District Judge. He has held that limitation ran from the date of the original decree, namely, 27th September 1904. He has held that the order of the District Judge dated 29th March 1905 was not a decree; and that consequently it could not be contended that

limitation ran from that date on the principle that the decree of the appellate Court is the decree which has to be executed. The learned Judge has pointed out quite correctly that under the definition of the term "decree" contained in the present Code of Civil Procedure, an order of dismissal for default is not a decree. The question, therefore, which he had to consider was whether or not under the language of the former Code (Act 14 of 1882) the order of 29th March 1905 was or was not a decree. He held that it was not; and in coming to this conclusion he relied upon the ruling of their Lordships of the Privy Council reported in 12 A. L. J. Reports at p. 621: *Abdul Majid v. Jawahir Lal* (1). This case is also reported in I. L. R. 36 All. 350.

The case for the decree-holder appellant here is that the decision of the Court below is wrong and that the learned Judge was in error in relying upon the judgment to which I have just referred. It is pointed out that in that case their Lordships were dealing with an order passed in accordance with the Rules of Practice of the Privy Council, and it is contended, and I think rightly, that the judgment in question cannot be deemed to apply directly to cases which are decided in Courts in India under a totally different procedure. In connexion with this argument I may refer to another judgment of their Lordships to be found at p. 284 of the same volume of the Allahabad Series (*Batuk Nath v. Mt. Munni Dei* (2)). With regard to the later case to which the learned Judge refers, I adjourned the hearing of this appeal for the purpose of obtaining a certified copy of the order which was passed by their Lordships of the Privy Council. It seems clear the judgment in *Abdul Majid v. Jawahir Lal* (1) was delivered with reference to the special rules of procedure contained in an Order of Council dated 26th June 1873. Similarly in an earlier case reported at p. 284 of the same volume *Batuk Nath v. Mt. Munni Dei* (2), the order which their Lordships were interpreting had been passed under another Order in Council dated 15th June 1853. It seems therefore that these

judgments of their Lordships cannot be treated as direct authority for the proposition that an order dismissing an appeal for default under the provisions of the old Code of Civil Procedure (Act 14 of 1882) is not a decree, for, as I have already observed, their Lordships were not in either of these cases discussing the provisions of that Code.

It was admitted in the course of arguments that under the provisions of the old law there was a conflict of decisions as to whether an order of dismissal for default was a decree, and I have been referred by the learned counsel for the appellant to a number of decisions on the point. The learned counsel for the appellant was not able to refer me to any authority of this Court which is directly in point. He cited two cases, namely, *Mohammad Husain v. Mohammad Yusuf* (3) and *Raghunath v. Parkhund Ali* (4). In the former case the judgment deals with the effect of an order passed in a case where an appeal was withdrawn. It certainly was not decided in that case that such an order was a decree. On the contrary, the point under consideration was one of limitation and the Article of Schedule which was being considered was an Article dealing with a period of limitation running from the date of a "decree or order." It was observed in the judgment that if the order of the appellate Court was not a "decree," it was certainly an "order" finally disposing of the appeal. Similarly in *Raghunath v. Parkhund Ali* (4) the matter for decision was a question of limitation with reference to the provisions of Art. 179, Lim. Act.

There again it was not decided whether the order in question was a decree or merely an order, indeed it was not necessary for the Court to decide this point. I have examined the other cases to which the learned counsel for the appellant has referred me. It is obvious that a great many of them cannot be regarded as authority for the proposition that under the Code of 1882 an order dismissing an appeal for default was a decree. For example, in the case reported as *Beni Rai v. Ram Lakhan Rai* (5) it seems to have been assumed that an order of an appellate Court dismissing an appeal for want of prosecution was a de-

1. A I R 1914 P C 66=23 I C 649=36 All 350 (P C).

2. A I R 1914 P C 65=23 I C 644=36 All 284 =41 I A 104 (P C).

3. (1900) 3 O C 50.

4. (1902) 5 O C 143.

5. (1898) 20 All 267.

crec. But the question which was before the Court in that case was, whether or not the order which the appellate Court had passed amounted to an affirmation of the decree of the Court of first instance. The discussion arose in connexion with an application for leave to appeal to His Majesty; and having regard to the provisions of the Code of Civil Procedure relating to this right of appeal it is clear that an appeal may lie either from a decree or order. It was not necessary therefore for the Judges to decide whether or not the order they had before them in that case was a decree. It certainly was an order. Similarly in another case of the Allahabad Court reported as *Muhammad Razi v. Karbalai Bibi* (6) it was assumed that an order declaring an appeal to have abated was in effect an affirmation of the decree of the Court below.

There the question was one of limitation, and clearly the period of limitation ran from the date of the "order or decree." It seems to have been assumed that the order declaring the appeal to have abated was a decree. On the other hand the decision of the Allahabad Court in *Pokhar Singh v. Gopal Singh* (7) seems to have assumed that an order dismissing an appeal for default was not a decree. In the case reported as *Ramchandra Pandurang Naik v. Madhav Purushottam Naik* (8) it was held by one of the learned Judges that the order of an appellate Court dismissing an appeal for default was a decree under S. 2, Act 14 of 1882. The learned Judge who delivered this opinion held that such an order was an adjudication adverse to the appellant's right to have his appeal heard, and decided the appeal. The other learned Judge who was a party to the judgment declined to express any opinion on this point. This opinion seems to have been followed in a Full Bench decision of the Calcutta High Court reported as *Radha Nath Singh v. Chandi Charan Singh* (9). There being no authority of this Court to bind me in dealing with this question, I feel myself at liberty to decide the matter for myself with reference to the language in which the definition of the term "decree" was expressed

in the Code of 1882. That definition read as follows:

"Decree means the formal expression of an adjudication upon any right claimed or defence set up in a civil Court when such adjudication so far as regards the Court expressing it decides the suit or appeal."

After much consideration I have come to the conclusion that an order passed under the former Code by which an appeal was dismissed for default was not a decree within the meaning of the Code, and in coming to this conclusion I am fortified by the opinion of a Bench of the Calcutta High Court to be found in a recent judgment reported as *Syam Mandal v. Sati Nath Banerjee* (10). At pp. 959 of *I. L. R.* 44 Cal. and 960 of *I. L. R.* 44 Cal. of the report the learned Judges who delivered the judgment of the Bench observe as follows:

"It is indisputable that the original decree is merged in the appellate decree whether the latter confirms, amends, or reverses the original decree and it is the appellate decree alone which can be executed; see the authorities collected in *Abdul Rahiman v. Maidin Saiba* (11) and *Chandra Kanta Bhattacharjee v. Lakshman Chandra Chakravarty* (12). But this doctrine cannot be applied where the appeal is dismissed in default; in such a case, the appeal fails for non-prosecution and it cannot appropriately be said that the Court of Appeal adopts the decree of the primary Court. This was recognised by Sir Barnes Peacock, C. J., when in his judgment in the Full Bench case of *Bipro Das Gossain v. Chunder Seekur Bhattacharjee* (13) he observed that if in the case of an appeal, a new judgment of affirmance of the former decree should be given then a new judgment would have to be executed, but if the appeal were dismissed for default, there would be no new judgment, and the judgment of the lower Court would be the judgment to be enforced. This view was adopted by a Full Bench of the Madras High Court in *Virasamy Mudaly v. Manonmany Ammal* (14) and has now been accepted by the Legislature in the definition of the term 'decree' in S. 2 (2), Civil P. C. 1908, which expressly provides that any order of dismissal for default is not a decree..... In our opinion it is fairly clear that when an appeal against an original decree has been dismissed for default, the order of dismissal is not a decree, that there is consequently neither in form nor in substance an appellate decree where in the original decree may be deemed to become merged and that the original decree is thus the decree to be executed, notwithstanding the dismissal of the appeal for default."

The reasoning of the learned Judge appears to me to be unanswerable and it is supported by the observations of their Lordships of the Privy Council in the

6. (1910) 32 All 185=5 I C 473.

7. (1892) 14 All 36.

8. (1892) 16 Bom 23.

9. (1903) 30 Cal 660 (F B).

10. (1917) 44 Cal 954=38 I C 493.

11. (1838) 22 Bom 500.

12. (1916) 36 I C 460.

13. (1867) 7 W R 521.

14. (1868-69) 4 M H G R 32.

case to which the learned Judge of the Court below has referred. At p. 353 of the report (I. L. R. 36 All. 350) (1) we have the following observations which the lower appellate Court has reproduced in its judgment:

"The order dismissing the appeal for want of prosecution did not deal judicially with the matter of the suit and could in no sense be regarded as an order adopting or confirming the decision appealed from."

These observations are very pertinent to the case in hand, and although I have recorded my opinion that this judgment of their Lordships is no direct authority on the interpretation of the language of Act 14 of 1882, the remarks I have just referred to are of great importance, inasmuch as they lay down a definite principle upon the basis of which it is possible to determine whether a particular order amounts or does not amount to a decree. It seems to me, in view of this language, that the decision of one of the Judges of the Bombay Court referred to in *Ramchandra Pandurang Naik v. Madhoo Purushottam Naik* (8) and the opinion expressed by the Judges of the Calcutta Court in *Hindia Nala Singh v. Charan Charan Singh* (9) can no longer be regarded as setting forth a correct exposition of the law. I hold, therefore that in the present case the order of the Appellate Court dated 29th March 1905 did not amount to a decree, and that consequently the only decree which was amenable of execution was the decree of the Court of first instance passed on 27th September 1904. Consequently the fresh application for execution, which was made on 6th March 1917, was beyond the period of 12 years allowed by S. 48, Civil P. C.

The learned Advocate for the appellant invited me, in case I decide against his contention upon this question of law, to send the case back to the Court below for the decision of an issue as to whether the judgment-debtor had been guilty of force or fraud in the matter of resisting the previous proceedings taken in execution of decree. I am unable to yield to this invitation, the fact being that the decree-holder never set up any plea either of force or fraud for the purpose of having the period of limitation extended. He took his stand upon the view that limitation for his application began to run from the date of the order in appeal. Having failed in that contention I cannot now allow him to fall back upon a ground

which was never raised before. The result is that the appeal fails and is dismissed with costs.

R. V. B. K.

Appeal dismissed.

A. I. R. 1918 Oudh 449

STUART AND KANHAIYA LAL, A. J. CS.

Iktal Narain and others—Respondents—Appellants.

Rajendra Narain and others—Plaintiff—Respondents.

First Appeal Nov. 10, 11 and 13 of 1916, Decided on 29th March 1917, against decree of Sub Judge, Muzaffargarh, D. No. 8th November 1915.

(a) Hindu Law—Adoption—Custom—Kashmiri Brahmins—Daughter's son can be adopted.

The rule of the Mitakshara which lays down that a son, whose mother the adoptive father could not have married in her maiden state, cannot be lawfully adopted, is not recognized by Kashmiri Brahmins so that the adoption of a daughter's son is permissible according to the custom prevailing among them. [P 451 C 2]

(b) Custom—Proof of—Persons having special means of knowledge are permitted to testify to their existence under Ss. 32(5) and 49, Evidence Act (1 of 1872).

Where the custom of a community is in question and it is clear that direct evidence cannot be obtained of instances of such custom, which required before the memory of man, persons, having special means of knowledge, are, in view of the provisions of Ss. 32(5) and 49, Evidence Act, permitted to testify to their existence from such knowledge as they might possess of what has been practised in their community or from what they might have heard from persons, having special means of knowledge of what was practised before. [P 454 C 2]

(c) Co-sharers—Entire joint property in possession of one co-sharer—Other co-sharer's remedy is by way of partition and not by ejectment.

Where a co-sharer is in possession of the entire joint property, the remedy of the other co-sharers against the said co-sharer lies not by ejectment of the co-sharer but by partition of the joint property. [P 457 C 1]

(d) Hindu Law—Joint family—Property with one member cannot be presumed to form joint property—Proof that property is joint is necessary.

Property in the hands of and dealt with by one member of a joint Hindu family cannot be presumed to form part of the joint family property but it must be shown that it belonged to the joint family or was purchased out of joint family funds. [P 457 C 1]

B. E. O'Connor—for Appellants.

J. N. Chak, M. N. Chak, Gokaran Nath Misra, Janki Nath, Chand Narain Harkauli and Wazir Hasan—for Respondents.

Judgment.—The parties to the suits out of which these appeals have arisen

are Kashmiri Brahmans, settled in Oudh. The exact time when the family to which the parties belong migrated to these provinces is not ascertainable, but it is not disputed that during the period of Moghul rule, which extended to Kashmir, numerous families of Kashmiri Brahmans came and settled in the Punjab and in these provinces and elsewhere for the purpose of business or employment and that during the period of Pathan dominion, following the disruption of the Moghul Empire the atrocities committed by the Pathan rulers compelled a still larger number to leave their country and settle elsewhere to escape persecution and forcible conversion at their hands.

The number of Kashmiri Brahmans settled in British India does not, according to the evidence, exceed 5,000 souls, females and children all told. They comprise about 450 families. The use of the Kashmiri language is little known among them except to the elderly few, but they have preserved their religious and social practices and customs intact, and many of the ceremonies which they observe on the occasions of marriages, deaths and adoption are still recognized or known by their Kashmiri names. The parties admit that they are governed by the Mitakshara Law, except in so far as it is inconsistent with or has been modified by the customs prevailing among them. According to the evidence of Pandit Bishambhar Nath (P. W. 27), the Mitakshara is little known in Kashmir and Apararka is more generally followed there. Dr. Buhler says that he found the Apararka in common use there (Dr. Jolly's Tagore Law Lectures, 1883, p. 24). Apararka is a commentary on the Institutes of Yagnyavalkya by Aparaditya, the King of the Konkan, in Southern India. The Mitakshara was written by an ascetic who was at one time attached to the Court of King Vikram of Kalyan in Southern India and is similarly a commentary on the Institutes of Yagnyavalkya. On the question of adoption there is little or no difference between the Mitakshara and the Apararka.

The dispute between the parties arises out of the adoption of Rajendra Narain by his maternal grandfather Ram Narain. Bishun Narain, the head of the family to which the parties claim to belong, died in 1867, leaving four sons. Raj Narain, Ram Narain, Bakht Narain and Suraj

Narain. He left considerable property, to which additions were made after his death. Raj Narain and Ram Narain were practising pleaders. Bakht Narain was a member of the Provincial Judicial Service of Oudh. Suraj Narain was employed in the Amethi Estate. They lived jointly and carried on some joint family business at Lucknow. Raj Narain, the eldest of the four brothers, died in 1890, leaving a widow and a daughter. Ram Narain then became the head and manager of the family. He had a daughter Mt. Prano, who was married to Ratan Lal defendant 8. On or about 1st May 1895 Ram Narain adopted Rajendra Narain, one of the sons of Mt. Prano, as his son. He died on 19th October 1900 while living jointly with his brothers and their sons. On his death Bakht Narain got his name entered in the Revenue papers in the place of Ram Narain as the head of the joint family. Rajendra Narain was a minor at the time. At the end of 1903 Suraj Narain applied to the Revenue Authorities to have his and Rajendra Narain's names entered in respect of two-thirds of the family property but was unsuccessful.

Suraj Narain and his son then filed a suit against Bakht Narain and his sons for the partition of a half share of the joint family property, alleging that they had separated in October 1901. They ignored the right of Rajendra Narain as an adopted son of Ram Narain and did not make him a party to the suit. The suit was decreed by the Additional Judge of Hardoi on 27th August 1908 and Suraj Narain was awarded mesne profits with effect from October 1901. The latter portion of the decree was subsequently varied on appeal by this Court on the ground that the family had continued to be joint till the date of the suit, and a decree directing accounts to be taken from the date of the suit was substituted. That decision was confirmed by their Lordships of the Privy Council on 10th December 1912: *Suraj Narain v. Iqbal Narain* (1).

On 10th April 1911 Rajendra Narain filed the present suit, which has given rise to First Appeals Nos. 10 and 15 of 1916, claiming separate possession by partition of a one-third share of the family properties on the strength of his

adoption by Ram Narain and exclusive possession of certain other properties which, he alleged, had been acquired by Ram Narain out of his personal income, with mesne profits from the date of his death. He asserted that he attained majority on 30th August 1908, that is, within three years of the institution of the suit and that this adoption by Ram Narayan was valid according to the custom prevailing among the Kashmiri Brahmans. The defendants denied the existence of such a custom and pleaded, inter alia, that the claim of the plaintiff was barred by limitation. The learned Subordinate Judge found that the plaintiff was born on 30th August 1880 and that his claim was within time from the date of his attaining majority. He also found that the custom set up by the plaintiff was established and that his adoption was valid in law. He decreed the claim accordingly for partition of a one-third share out of such properties as were proved to have belonged to the joint family and for mesne profits from the date the plaintiff was excluded. He held that Bakht Narain, who succeeded Ram Narain as the manager of the family, and after his death his sons and grandsons, defendants, 3 to 7, who have been in possession of the family property, were liable to account for the profits of the plaintiff's share.

On 23rd October 1912 the sons and grandsons of Bakht Narain filed a cross-claim, which has given rise to First Appeal No. 11 of 1916 seeking to eject Rajendra Narain and his natural father, Ratan Lal, from a house situated in Hardoi, which was in the occupation of Ram Narain at the time of his death and has continued in the occupation of his son-in-law, Ratan Lal, and his adopted son, Rajendra Narain, since. Rajendra Narain pleaded that the house in question was built by Ram Narain and belonged to him as his adopted son and that his natural father, Ratan Lal, was living in it on his behalf. The defence of Ratan Lal was the same. The learned Subordinate Judge found that the house formed part of the joint family estate, and holding that Rajendra Narain was the lawfully adopted son of Ram Narain he allowed him and Ratan Lal to continue to live in the house till a partition was effected.

The first point for consideration in these

appeals is whether the adoption of the son of a daughter is permissible according to the custom prevailing among the Kashmiri Brahmans. The ordinary rule, as recognised by their Lordships of the Privy Council in *Ishagwan Singh v. Ishagwan Singh* (2), is that the adoption of a daughter's son by a Hindu of any of the three regenerate classes, Brahman, Kshatriya and Vaishya, is repugnant to the Hindu law and is illegal and void; but as pointed out by Sir Arthur Wilson in *Rup Narain v. Gopal Devi* (3), the above general rule may be varied by a family custom and often is so varied. In the Punjab adoptions of a daughter's son are not uncommon (Tapper's Customary Law of the Punjab, Vol. 2, p. 111, and Vol. 3, p. 78, and Sarkar's Law of Adoption, Edn. 2, p. 341). In the Bombay Presidency they are similarly common (Mandlik's Vyavahara Mayukha, Vol. 2, p. 175) and according to Mayne they are not uncommon elsewhere too (Mayne's Hindu Law, Edn. 8, p. 174). In the Madras Presidency the existence of a custom recognising such an adoption among Namudri Brahmans has been expressly upheld (*Erangoli Illath Vishnu Nambudri v. Erangoli Illath Krishnan Nambudri* (4), *Vagidindada v. Appu* (5) and *Appayya Ikkattar v. Venga Bhatta* (6)). Among Kashmiri Brahmans the adoption of a daughter's son is similarly common and recognised by the community as valid. Some of the leading members of the community, residing in these provinces and the Punjab and Kashmir, have given evidence that the restriction regarding the possibility of a valid marriage between the adoptive father and the natural mother of the boy to be adopted before she was married is not recognised among them. The Hon'ble Pandit Moti Lal Nehru (P. W. 20), one of the leading Advocates of the Allahabad High Court, for instance, deposes:

"Among Kashmiri Pandits daughter's sons and sister's sons are adopted as sons. That is my belief and conviction. I came to know of it among Kashmiri friends and relations. I have never heard of such an adoption being ever challenged in our community. I believe in it as a custom. I have heard and known such adoptions all along."

2. (1899) 21 All 412=26 I A 153 (P C).

3. (1909) 36 Cal 780=3 I C 382=36 I A 103 (P C).

4. (1884) 7 Mad 3 (F B).

5. (1886) 9 Mad 44 (F B).

6. (1905) 15 M L J 211.

On one occasion, he adds, when he was preparing for the law examination he heard his mother, since deceased, talking to a Kashmiri lady visitor about the adoption of a daughter's son which had taken place at or about that time and on his saying that such an adoption was contrary to the Hindu law, his mother remarked that whatever might have been the law such was the usage and a number of instances of such adoptions were given by her. The Hon'ble Dr. Tej Bahadur Sapru (P. W. 25), another prominent Advocate of the Allahabad High Court, similarly says:

"In our community there exists no restriction against the adoption of a person whose mother is prohibited in marriage to the person adopting. Daughter's son, sister's son and younger brothers are adopted among us as sons. It is an old custom so far as I have heard. I heard from my grandfather who died in 1906 at the ripe age of 78 or 79 and from some other elders at Delhi and in Kashmir. So far as my informants are concerned, they are all dead."

The Hon'ble Pandit Jagat Narain (P. W. 5), one of the leading vakils of this Court, gives evidence to the same effect and says that the adoption of a daughter's son was considered valid by the community according to the custom prevailing among the Kashmiri Brahmans. The Hon'ble Pandit Bisun Narain Dar (P. W. 10), a Barrister-at-law and a prominent member of the Kashmiri Brahman community, states:

"In our community we do adopt persons whose mother is prohibited in marriage to the person adopting; a sister's son, a daughter's son and a brother are adopted by us according to custom. I have heard of this usage and seen it observed in our Kashmiri community. I heard of this usage from my father, uncles and mother; of these my mother alone is alive."

Pandit Narendra Nath, Deputy Commissioner of Multan (P. W. 13), also says:

"Daughter's sons are adopted in our community. Our community is not restricted by the rule which prohibits the adoption of a boy, whose mother, if virgin, could not have been married by the adopter. I can cite instances which took place more than 40 years ago."

Similar evidence is given by Pandit Shiam Sunder Nath, Taluqdar of Bethar, District Unao (P. W. 46), Pandit Sheo Nath Chak, retired Deputy Collector (P. W. 26), and Rai Bahadur Pandit Prem Nath (P. W. 14), who retired as Examiner of Accounts, Punjab, in 1902. Pandit Tribhuwan Nath Sheopori, Additional Judge of the Small Cause Court, Lucknow (P. W. 38), deposes:

"There is no such restriction in our community against adoption as is asserted or claimed by

the Benares School of the Hindu law. The adoption of a sister's or daughter's son is recognized among the Kashmiri Pandits."

He is supported by Pandit Suraj Narain (P. W. 1), a retired Subordinate Judge, and Pandit Suraj Narain Bahadur (P. W. 7), another Subordinate Judge now posted at Partabgarh. Pandit Radha Nath (P. W. 9), a Kashmiri Brahman belonging to a respectable family residing at Lahore, testifies to his having heard of the adoptions of daughter's sons at several places and to their being treated as the sons of their adoptive fathers by the community. He gives three instances of such adoptions. Pandit Shiam Manohar Nath Sharga (P. W. 23), Munsif of Bara Banki, Pandit Jai Narain (P. W. 6), a retired Engineer and an Honorary Magistrate and a Municipal Commissioner of Meerut, and Pandit Iqbal Narain Masaldan (P. W. 11), a Barrister-at-law, practising at Lucknow, since deceased, similarly testify to the existence of a custom recognizing the adoption of a daughter's son among Kashmiri Brahmans. Rai Brij Narain Gurtu (P. W. 34), a vakil of the High Court at Allahabad and a zamindar paying land revenue exceeding Rs. 8,000 per annum, Pandit Shanker Nath (P. W. 22), a Pleader of Hardoi, Pandit Jagmohan Nath Raina (P. W. 25, examined on commission), a Deputy Collector, and Pandit Sahab Ram (P. W. 18), a retired Mir Munshi, are equally positive as to the existence of the said custom. Pandit Pran Nath Namju (P. W. 44) says that the custom recognizing the adoption of a daughter's son or of a sister's son was old and that he came to know of it from Pandit Baijnath Kunzru, who was the husband of his sister and the elder brother of the late Pandit Ajudhia Nath of Allahabad. Three ladies, Mt. Mohan Rani (P. W. 21) aged 40 years, Mt. Maharaj Rani (P. W. 36), aged 55 years and Mt. Bhayneshwari (P. W. 24), aged 88 years (all examined on commission) support the existence of the said custom from what they heard from their elders and from the instances which occurred in their community. The evidence of Pandit Hargopal Kaul (P. W. 7), a pleader of Srinagar, paying a land-revenue of Rs. 7,500 per annum, who is admitted by one of the defendants' own witnesses (D. W. 26), to be a leading member of the Kashmiri Brahman community of Srinagar, and Pandit Vid Lal Dar (P. W. 8), a Jagirdar of Kashmir and the repre-

sentative of another leading family of Kashmiri, known as the family of King Makers (vide P. W. 17), presumably on account of one of his ancestors having brought the Sikhs from the Punjab to eject the Pathan rulers, and that of the other witnesses examined in Kashmir similarly establishes that the validity of the adoption of a daughter's son is recognised in Kashmir and that a custom to that effect prevails among the Kashmiri Brahmans there.

The defendants' own witnesses have moreover, admitted that the restrictions introduced into the Mitakshara Law by the Dattaka Mimamsa and Dattaka Chandrika in regard to the invalidity of the adoption of a person, whose mother the adoptive father could not have lawfully married in his maiden state, is not recognised by the Kashmiri Brahmans either in Kashmir or in the provinces to which they migrated in search of livelihood or for other cause. *Jasim Haya Gossai* (D. W. 3), for instance, admits that a brother can be taken in adoption and that his adoption would be valid according to the custom prevailing there. *Durga Shankar* (D. W. 2), who was examined in Court, goes further and says that in this community, that is, in the community of Kashmiri Brahmans, there is no prohibition against the adoption of a daughter's or a sister's son. *Pandit Kanta Prasad* (D. W. 23), who is a Judicial Officer at Gwalior, similarly admits that among the Kashmiri Brahmans the adoption of a daughter's son or of younger brother is sanctioned by custom and that no objection is taken thereto by the caste. *Pandit Janki Nath Kaul* (D. W. 2), who was examined on commission at Delhi, acknowledges that among Kashmiri Brahmans every boy who is full born can be adopted without any regard to his Gotra, though he subsequently qualifies his statement by saying that if there is anything in the Institutes of Manu prohibiting the adoption of a daughter's son, he would not take such an adoption as valid. It may be noted, however, that the Institutes of Manu contain no such prohibition and that the Institutes of Yagnyavalkya, which are treated as of paramount authority, commentators like the authors of the Mitakshara and the Apararka, also do not refer to it. It is significant that the Mitakshara and the Apararka, the latter being a work supposed to be of great

authority in Kashmir, similarly nowhere state that a boy whose mother the adoptive father could not have married in her maiden state cannot be lawfully adopted. The restriction is mentioned by the Dattaka Mimamsa and the Dattaka Chandrika and some other minor works.

The Dattaka Mimamsa was written by Nanda Pandit of Benares in the 17th century. Nanda Pandit takes pains in the Dattaka Mimamsa to point out that a daughter can be validly adopted, a practice which is no longer recognised or sanctioned by law except perhaps by force of custom, where it may exist, among the persons following the profession of Sanyasa or penitence. His views in regard to the impropriety of adopting an only son, or a wife's brother's son, or a son more than five years old, or whose tonsure has been performed, have not been treated as binding (*Sri Thiruv. Gurulingaswami v. Sri Thiruv. Rimalakshamma* (7), *Pattu Lal v. Parbati Kuar* (8), and *Ganga Sahai v. Lekhraj Singh* (9)). The appointment of a daughter by a previous compact with the proposed bridegroom with the object of taking the first male child, which may be born of her, is expressly sanctioned by Manu, Yagnyavalkya and all text writers and commentators, Dattaka Mimamsa and Dattaka Chandrika included; and if the son born of an appointed daughter can be the son of the person who stood in the relation of a maternal grandfather to him, the adoption of a daughter's son in the Dattaka form cannot offend either the ideas or notions of the people or the spirit which underlies the rules which sanction such adoptions. The Dattaka Chandrika starts by saying that the author there propounds what he had left unwritten in the "Chandrika."

It was supposed that the Chandrika therein referred to was the Smriti Chandrika of Devanda Bhatt, who belonged to the southern country, but the last verse of the Dattaka Chandrika shows, it purports to have been written by Kuvera and not by Devanda Bhatt. If Kuvera had written treatise called the "Chandrika", dealing with questions of inheritance or succession, it is surprising that

7. (1899) 22 Mad 398=21 All 400=20 I A 113 (P. C.)

8. A I R 1915 P C 15=37 All 259=29 I C 617=42 I A 155 (P. C.)

9. (1887) 9 All 25.

he should have left unwritten there what he now seeks to propound in the *Dattaka Chandrika*. Writing as far back as in 1855, Pandit Ishwar Chandra Vidya Sagar stated that the *Dattaka Chandrika* was written under the nom de plume of Kuvera by a person named Raghumani Vidya Bhushan (Vidyasagar's Disquisitions on Widow Re-marriage, p. 182), and Pandit Bharat Chandra Shiromani, who published a Bengali edition of the *Dattaka Mimamsa and Dattaka Chandrika*, also suggested the same. In a footnote to the preface to the *Vyavastha Chandrika*, Babu Shyama Charan Sircar, a scholar of considerable repute writing in 1878, observed that many of the Pandits of Bengal attributed the *Dattaka Chandrika* to the late Raghumani Vidya Bhushan, the spiritual advisor of the Raja of Nadia and a distinguished Pandit, who flourished in the latter part of Jagannath's life and is said to have assisted Colebrooke in the preparation of his translation of *Dayabhaga* and *Mitakehara* (*Vyavastha Chandrika*, preface, p. 21). In fact it has been suggested that the book was forged in order to support a claim which was pending at that time, though no occasion arose for its use, as the case was compromised (*Sbastri's Hindu Law*, Edn. 4, p. 136, *Sarkar's Hindu Law of Adoption*, Edn. 2, p. 124). Dr. Jolly, another writer on Hindu Law, also questions the value of the book as a general authority (*Dr. Jolly's Tagore Law Lectures*, 1883, p. 22).

They were the earliest books dealing exclusively with the subject of adoption to be translated into English, and as suggested by Mayne, a statement by Macnaghten that they were equally respected all over India brought them into easy prominence (*Mayne's Hindu Law*, Edn. 8, p. 30). In certain decisions referred to in *Bhagwan Singh v. Bhagwan Singh* (2), their Lordships of the Privy Council treated them as works of high authority; but in *Sri Balusu Gurulingaswami v. Sri Balusu Ramalakshamma* (7) Lord Hobhouse pointed out that the *Dattaka Mimamsa* was written during Mahomaden rule and could not be the work of a lawgiver or judge, while the date of the *Dattaka Chandrika* was uncertain and it stood only on the footing of a work of a learned man. In *Puttu Lal v. Parbati Kunwar* (8) a caution was expressed against accepting the glosses of Nanda Pandit, where they deviated from

or added to the *Smritis*. Whatever the value of these works may be in Bengal and these provinces as a part of the general law, there is nothing to show that their reputation had at any rate reached Kashmir, or that they were known or recognized as infallible guides in the administration of the law of adoption in that part of the country.

It is contended that the opinion of persons, belonging to the Kashmiri Brahman community, is by itself not entitled to any weight, unless it is corroborated by instances, showing a uniform course of practice, recognized by all the members of that community. S. 48, Evidence Act, provides that when the Court has to form an opinion as to the existence of any general custom, the opinions as to the existence of such custom of persons who would be likely to know of its existence, if it existed, are relevant. The explanation to that section shows that the expression "general custom" includes customs common to any considerable class of persons. S. 49 of the Act similarly provides that where the Court has to form an opinion as to the usages and tenets of any body of men or family, the opinions of persons, having special means of knowledge thereon, are relevant. An immemorial custom, says Manu, is transcendent law and clear proof that it outweighs the written text of the law. But direct evidence cannot be obtained of things which occurred before the memory of man, and persons having special means of knowledge are, therefore, permitted to testify to their existence from such knowledge as they might possess of what has been practised in their community or from what they might have heard from persons having special means of knowledge of what was practised before. In *Lekraj Kuar v. Mahpal Singh* (10) their Lordships of the Privy Council, referring to certain entries in a *wajib-ul-arz*, stated that even if those entries were not to be treated as records describing the custom, they could at all events be treated as recording the opinions of persons likely to know it and as such the record of those opinions could be admitted in evidence. In *Garuradhwaia Prasad v. Superundhwaja Prasad* (11) evidence based on a tradition about a custom of the family

10. (1880) 5 Cal 744=7 I A 63 (P.C.).

11. (1901) 23 All 37=27 I A 238 (P.C.).

was admitted under S. 32, Cl. 5, and S. 49, Evidence Act, on the ground that the tradition was derived from persons who were dead and that the persons who gave the evidence had special means of knowledge about them.

The witnesses adduced by the plaintiff have, moreover, cited in support of their statements instances of the adoption of a son of a sister or of a daughter which took place in their community. (After discussing certain instances, the learned Additional Judicial Commissioner proceeded as under:—[E.] The adoptions proved in the case cover a period of nearly one hundred years. They were obviously made with due publicity, for they are well known to the members of the brotherhood. In some cases the property affected was of considerable value. In the case of Ishal Kishan who was adopted by Daya Nidhan, the property affected was worth five or six lacs (D. W. 7, examined in Court.) In the case of Kunwar Kishan adopted by Sri Kishan, the property involved was similarly worth over two lacs (P. W. 28, examined by commission). Kameshwar Nath (P. W. 36) lost by adoption a share in the property left by his natural father, which was worth over Rs. 10,000, his natural brother, Raj Kishan, getting the whole of it (Ex. Y 2). The property inherited by Gauri Prasad from Shyam Prasad by virtue of his adoption has already been referred to. Shyam Narain inherited property worth Rs. 2,000 by virtue of his adoption by his maternal uncle, Ram Narain, to the exclusion of the brother and nephew of the latter (P. W. 3, examined by commission). Kirpa Shanker similarly inherited the property of his maternal uncle, Daya Shankar, by reason of his adoption to the exclusion of his natural brother (P. W. 50, examined in Court). It is reasonable to assume that these adoptions would have been challenged, had there been no such custom.

The evidence produced by the defendants is of no value and the learned counsel who appears for them has not chosen to refer to it. What he has strenuously urged is that in most of the instances cited, the existence of collaterals living jointly, or persons who could have legitimately challenged the adoptions, was not established, that where the adoptions were made by

widows, it was not proved that they had any authority to adopt from their husbands, and that none of the so-called adoptions were cases of nomination merely for the performance of funeral ceremonies. In many instances, however, there were more daughters than one and several daughters' sons besides the one adopted. The evidence of the defendants' own witness Mathu Chandra Shastri (D. W. 23) shows that the nomination for the performance of funeral ceremonies is more or less a euphemism for adoption, for it carries with it a right to succeed. It appears from the evidence of Janki Nath Ganzu (P. W. 1), Janki Prasad Sharga (P. W. 15) and Brij Mohan Nath (D. W. 22) that a widow is allowed by custom to make an adoption without the permission of her husband. In fact as the Hon'ble Pandit Moti Lal Nehru (P. W. 20) explains, an adoption does not depend among the Kashmiri Brahmans upon the adoptive father having property. On the contrary adoptions are more frequent in the case of widows, particularly if they are young, when the husband leaves no property at all, and the widow herself is dependent for her maintenance upon her relations.

The validity of adoptions made by widows was, moreover, never questioned during the hearing of the suit in the Court below. On the other hand, when questions were put to elicit whether such a custom existed, objections were taken on behalf of the defendants to their relevancy. In *Maharaj Narain v. Banofi* (12) it was held that the Kashmiri Pandits of the Delhi District were governed in matters of adoption by custom and not by the principles of the Mitakshara form of the Hindu law and that amongst them a widow had full power, after the death of her husband and without his express permission in that behalf, to adopt any boy whom she might select, provided he was of the same tribe. The evidence adduced in that case in support of the custom included witnesses who belonged to the United Provinces. Dealing with the customs and ceremonies of the Kashmiri Hindus, Mr. Walter Lawrence, at one time the Settlement Officer of Kashmir and Jammu State, writes:

"Before concluding this account of the ceremonies of the Kashmiri Hindus, it is necessary to allude to their customs of adoption and to

marriage. Every Hindu can adopt a son either from his own Gotra or from another Gotra, and the only restriction on adoption is that the adopted son must not have been invested with the sacred thread. (The Vally of Kashmir by Lawrence, p. 266)."

In regard to the change of the family surname, the practice appears to be somewhat loose. But except where a person is brought up from infancy for love or affection, the change of the family surname generally corroborates or implies an adoption. The witnesses are generally agreed that the performance of ceremonies is not essential to validate an adoption. Some witnesses state that the Datta Home or the Jatkarm or Namkarm ceremonies are usually performed, while others say that sweets are distributed and some worship is done by the priest. But it appears from the evidence of the Hon'ble Pandit Jagat Narain (P. W. 5) that the practice is not uniform and that beyond giving and taking no rituals are actually necessary. Pandit Ram Nath Shastri (P. W. 8), Pandit Iqbal Narain Masaldan (P. W. 11), Sahab Ram (P. W. 18) and Mt. Datta Shuri (P. W. 19) say the same. So far as the adoption of plaintiff is concerned, it was accompanied by the usual ritual and formalities (P. W. 8). On hearing of it Pandit Bakht Narain, the father of defendants 3, 4 and 5 and the grandfather of defendants 6 and 7, is said to have observed that by doing so Ram Narain had sown that day the seed of poison in his family. That seed has apparently borne fruit in the shape of the litigation in which the property of Ram Narain is now involved. It is noticeable however that in the mutation proceedings which took place consequent on the death of Ram Narain, Bakht Narain did not raise any question as to the validity of the said adoption (Exs. 346 to 402, 520 and 596) and in regard to the license for arms kept by the deceased, he allowed the same to be renewed in favour of the plaintiff (Exs. 579, 580, 582, 589 and 590).

As regards Pandit Suraj Narain, it is sufficient to refer to his application of 8th December 1900 to the officer-in-charge of Tahsil Hardoi (Ex. 588), opposing the application of Pandit Bakht Narain to the entry of his name as the manager of the family and entreating that the names of each of the three branches, including that of the present plaintiff, whom he described as the adopted son of

Pandit Ram Narain, should be entered in the revenue papers. Similar admissions were made by him in other applications (Exs. 579, 580, 590 and 616). There was no lack of similar recognition by defendant 3, the eldest son of Pandit Bakht Narain. The Court below has referred to documents, in which the status of the plaintiff as the adopted son of Ram Narain was admitted by each of the above persons.

No question of estoppel can however arise, as the position of the plaintiff was in no way influenced or altered by the said admissions. They are all the same valuable as indicating that had no such custom, as is set up by the plaintiff, been in vogue, Pandit Bakht Narain, who was a Judicial Officer of considerable standing, and his eldest son, who is a pleader, would have been the last persons to refrain from challenging the validity of the adoption forthwith. The validity of the adoption was for the first time questioned in September 1903 (Ex. 488). In June 1905 Suraj Narain and his son filed a suit for partition of the family property, ignoring the adoption. They alleged that they had separated in October 1901 and were excluded from the profits. The Court of first instance accepted their contention and allowed them a decree for partition of a half share and for mesne profits with effect from October 1901. On appeal this Court directed accounts of profits to be taken from the date of the suit and that decision was confirmed by their Lordships of the Privy Council. In pursuance of that decree, Suraj Narain and his son got possession on 9th March 1909. The plaintiff has been excluded from the profits from the time of the death of Pandit Ram Narain, and he is entitled to obtain possession of a one-third share of the family property by a partition of the same with mesne profits for the period during which he has been and remains out of possession. He was a minor on the date of the death of Pandit Ram Narain and did not attain majority till 30th August 1908.

The next question relates to certain properties which the Court below has included in the decree for partition. Following the decision in the suits filed by Suraj Narain and his son against Bakht Narain and his sons and grandsons and against Ratan Lal, the Court below has included certain properties, specified in

its judgment, as belonging to the joint family and excluded others as belonging exclusively to Ratan Lal. The dispute in the appeal filed by the sons and grandsons of Bakht Narain, who died during the pendency of the suit for partition, is confined to 40 items of property, but no argument has been addressed to us except in regard to items 2 and 4 of List 5, relating to the properties said to have been held under mortgages. It is stated that the mortgages were redeemed in the lifetime of Ram Narain, but no evidence has been adduced on the point. If the mortgages were redeemed after the death of Ram Narain or during the pendency of the suit for partition brought by Suraj Narain and his son, the plaintiff shall get his share of the monies which may have been realized, when these mortgages were redeemed. In regard to the house in Hardoi, which is occupied by Rajendra Narain and his natural father, Ratan Lal, the finding of the Court below is that it forms part of the joint family property and that Rajendra Narain and his father cannot be ejected because the former holds a one-third share in the said property. As Rajendra Narain has been found to have been validly adopted by Ram Narain, the Court below rightly refused to eject him, leaving the other co-shares their remedy by partition. Ratan Lal is living on behalf of Rajendra Narain and he too cannot be ejected. The only other point remaining is that arising out of the appeal filed by Suraj Narain and his son, claiming that Rajendra Narain should be asked to make good out of his share the value of the properties which, by reason of the misconduct of Ram Narain, his adoptive father, have now gone to Ratan Lal. There is nothing, however, to show that the property, given to Ratan Lal, belonged to the joint family or that it was purchased out of joint family funds; and as held in *Suraj Narain v. Ratan Lal* (13), Ratan Lal would be treated as the owner of the said properties, and no question of compensation, therefore, arises.

On behalf of Suraj Narain and his son, it is suggested that the extent of their liability for mesne profits should be specifically determined. Having been excluded from the enjoyment of the family property from the time of the death of Ram Narain, the plaintiff is entitled to

recover mesne profits for such period as he has been out of possession from the person or persons in possession. Suraj Narain and his son have obtained a decree for a half share of the profits for the period extending from 20th June 1905 to 9th March 1909. Out of the profits or share of the income which may be awarded to them, the plaintiff is entitled to recover one-third, leaving Suraj Narain and his son in the enjoyment of the remainder. Out of the profits for the period preceding 20th June 1905 the plaintiff is not entitled to claim any profits from Suraj Narain and his son except to the extent, if any, they may be shown by defendants 3 to 7 to have realized in excess of their one-third share. In regard to the period subsequent to 9th March 1909, Suraj Narain and his son will similarly be liable for one-third of the profits of the half share over which they have obtained possession. The balance of the plaintiff's entire share of the mesne profits from 19th October 1900 to the date on which he gets possession will be recoverable from defendants 3 to 7 and the estate of Pandit Bakht Narain deceased. After the death of Ram Narain, Bakht Narain was the manager of the family and his liability and that of his sons and grandsons, who succeeded him, is, of course, unquestionable. The exact extent of the liability can be determined by the Court below under O. 20, R. 12, Civil P. C., when the accounts are gone into in the manner above stated. No other pleas are pressed. These appeals fail and are dismissed with costs.

D.V. B. R. *Appeal dismissed.*

A. I. R. 1918 Oudh 457

LANDSAY, J. C.

Sajjad Mirza—Appellants.

v.

Mt. Nanh Khanam—Respondents.

Second Appeal No. 251 of 1917, Decided on 18th February 1918.

Contract Act (9 of 1872), S. 23—Benami purchase by public servant not authorized to purchase is void.

A purchase made benami by a Government servant in contravention of Government orders in that respect is void on the ground of public policy, and the real purchaser acquires no title under such a purchase. [P 459 C 1]

(b) Benamidar—He acquires good title against real owner when purchase is void.

A benami purchaser, holding under a void transfer but remaining in possession of the property for more than 12 years from the date of the purchase, acquires by prescription a good

title to the purchased property as against the ostensible purchaser. [P 459 C 2]

Wazir Hasan—for Appellants.

Mr. Wasim for *Mr. Nasim*—for Respondts.

Judgment.—The suit out of which this appeal has arisen, was brought for the purpose of recovering a 10 biswa share in the village of Muradnagar, the plaintiffs claiming title as heirs of one Murtaza Beg to whom it is alleged the property once belonged. One of the plaintiffs, Ali Hussain, a son of Murtaza, subsequently withdrew from the suit: the result of this is that the remaining plaintiffs claim to recover a one-third share of the property in question. The defendants were the heirs of one Asad Beg, the brother of Murtaza, and certain others claiming under them by transfer, and various pleas were raised for the purpose of defeating the plaintiffs' claim; such of them as require to be discussed at this stage, will be referred to in the course of this judgment.

Meantime a short statement of the facts will serve to elucidate the points which arise for determination in this Court. It is now admitted that Murtaza Beg was at the time after the history of the property in suit begins, a Government servant in the district of Sitapur where he was employed as a Sadar Munshim in the Settlement Department. In this capacity he was subject to certain orders of Government published in a Resolution No. 1252-A, dated 17th September 1870, prohibiting servants of Government from acquiring landed property in the districts in which they were employed under pain of dismissal from service. It has been found by the Courts below and the matter is no longer in dispute that Murtaza Beg in contravention of these orders, acquired this 10 biswa share in Muradnagar by means of three sale-deeds executed in the year 1871. The transactions were benami, the object of Murtaza being to conceal from Government the fact that he had acted in defiance of its orders. One of the deeds was drawn in favour of Asad Beg, the brother of Murtaza; a second was in favour of his brother-in-law Muhammad Jafar, who was also a son-in-law of Asad Beg, the third deed was in favour of Murtaza's son Abdul Hasan. The finding is that Murtaza paid the price in each instance and that he was the real purchaser and this disposes of the de-

fence set up to the effect that the property was in fact acquired by Asad Beg for himself. Murtaza Beg died in the year 1875 and there is evidence on the record to show that at the time of his death, he was actually in possession of this property the rents of which were collected on his behalf by an agent of his named Ahmad Khan. At the time of Murtaza's death, his children were young and there is evidence, accepted by the Courts below, to show that Asad Beg assumed management of the property at the request of Murtaza's widow.

In the year 1877 Asad Beg made a mortgage of this Muradnagar property in favour of Mehrban Khan to secure a loan of Rs. 250 which, according to the recital in the deed, was borrowed for the purpose of paying Government revenue due in respect of the estate. Asad Beg then died in the year 1880 and mutation was thereafter effected in favour not of Asad Beg's heirs but in favour of Abdul Hasan who was Murtaza's eldest son, and soon after this on the motion of Abul Hasan himself, mutation was made in favour of the other heirs of Murtaza as well. After this had been accomplished, we find that in the year 1811 Abul Hasan executed three deeds of further charge in favour of Mehrban who had taken the mortgage above referred to from Asad Beg in the year 1877, and later on the equity of redemption was transferred to this mortgagee by the heirs of Murtaza. In the year 1907 Sajjad Mirza, the son of Asad Beg (defendant 1 in the present suit), sued for redemption of the mortgage executed by his father in 1877 and obtained a decree in spite of the mortgagee's defence that he had no real title to the property and that the equity of redemption had passed to him by a transfer from the true owners, i. e., the heirs of Murtaza Beg. It was held that the mortgagee could not be permitted to deny the title of his mortgagor Asad Beg. The result was that Sajjad got possession in 1908 by virtue of the decree for redemption.

Having lost the property, the representatives of the mortgagee brought a suit against the vendors of the equity of redemption and succeeded in recovering the purchase money on the ground that consideration for the transfer had failed. These are the circumstances which have led to the filing of the present suit. I

have now to notice the pleas which have been urged here in second appeal, premising that the trial Court has given the plaintiffs a decree for recovery of a one-third share of the 10 biswas of Muradnagar subject to payment of a one-third share of the money which Sajjad Mirza had to pay for redemption; this decree has been upheld in appeal by the District Judge. The first point urged is that the plaintiffs have no right to recover on the ground that the transfers of the year 1871, now found to have been made in favour of Murtaza Beg, were void as being opposed to public policy. Another point of a kindred nature is that the transfers were fraudulent in the sense that Murtaza Beg worked a fraud upon the Government which employed him by concealing the fact that he had acquired property in contravention of Government orders and thereby avoiding the dismissal from service which would have ensued had the real facts been known. This latter aspect of the case does not seem to have been presented in either of the Courts below: the other argument was advanced, however, and repelled on the strength of two Full Bench rulings of the Allahabad High Court reported as *Bhagwan Dei v. Murari Lal* (1) and *Kamala Devi v. Gur Dial* (2) respectively. The judgments in these cases overrule two previous decisions of the same Court reported as *Shyam Lal v. Chhaki Lal* (3) and in *Sheo Narain v. Mata Prasad* (4).

I may say at once that I am unable to accept the doctrine laid down in the Full Bench judgments just mentioned and that if the decision of this case turned solely upon the question of the validity or invalidity of these transfers to Murtaza Beg regarded from the point of view of public policy, I should have had no difficulty in finding that Murtaza acquired no title under the three benami deeds of the year 1871. However, I need not go into this question for the purpose of deciding this appeal. Let it be assumed that the deeds did not operate to transfer any title to Murtaza Beg either on the ground that the transactions of transfer were against public policy, or constituted a fraud upon the Government. The findings of fact are that Murtaza actually had possession of this Muradnagar pro-

perty from the time of its acquisition till the time of his death and that his heirs were in possession after his death as far as it was possible for them to be. The Courts below hold that Asad Beg's ostensible possession after Murtaza's death, was in reality possession on behalf of Murtaza's heirs and that he was acting for them when he made the mortgage with possession in favour of Meheran in the year 1877. The possession of the mortgages from that year up till the time of redemption in 1908 was the possession of the real owners and no possession adverse to them began to run prior to the latter year when Sajjad Mirza got redemption and began to assert an adverse title. On these facts it appears to me to be impossible to argue that Murtaza's heirs have still no title to the property. If their father began to hold without any title in the year 1871 and if after his death, his heirs have held proprietary possession till the year 1908 (actual possession having been with their mortgagee from 1877 till 1908) a good title to the property has been acquired by prescription. It could not for a moment be contended that the persons who sold this Muradnagar property in 1871 and who, if it be assumed that the transfers were void, continued to be the true owners, could have successfully maintained a suit against Murtaza's heirs after the lapse of twelve years' possession on their part: the title void in its inception became a good title by virtue of more than 12 years' adverse possession. These being the facts, the heirs of Asad Beg, the defendants to this suit, cannot claim that they have a title to this Muradnagar property.

They have failed to prove that the property was acquired by Asad Beg in 1871 as they asserted; and at the most they can only show about eight years' adverse possession for they came into possession only in 1908 and the present suit was brought in 1916. I am clear, therefore that title to this property is with the plaintiffs and that the suit was brought within limitation. This finding disposes of the pleas raised in the first, second and fourth grounds of appeal. There remains to be noticed only the point taken in the third ground: it is pleaded that the judgment in the redemption suit brought by Sajjad Mirza operates as *res judicata* on the question of title. It was admitted

1. (1917) 39 All 51. 3. (1900) 22 All 220.
2. (1917) 39 All 58. 4. (1905) 27 All 73.

before me that this point was not taken in the Courts below. There the argument was that the judgment which barred the present suit, was the one which was delivered in the suit brought by the ex-mortgagee after redemption to recover from the heirs of Murtaza the money which he had paid to them for the equity of redemption. That plea was bound to fail because the present defendants were no parties to that suit. As for the plea of *res judicata* now raised, if it is possible for the defendants to raise it for the first time in second appeal, I am of opinion that it cannot prevail. In the first place the heirs of Murtaza were not and could not have been parties to the redemption suit, for at the time that suit was brought, they had lost all interest in the mortgaged property as they had conveyed the equity of redemption to the mortgagee. The suit was not therefore one *inter partes* and it cannot be said that the present plaintiffs claim through the mortgagee who was the defendant in that suit. On the contrary, it has been explained that after the mortgagee was obliged to submit to redemption and lost the property he compelled the present plaintiffs, by means of a suit, to refund to him the money which he had paid to them as the price of the equity of redemption.

Further it was never decided upon the merits in that suit that the present plaintiffs had no interest in the property now in dispute. It is true that the mortgagee tried to put forward the defence that they and not Sajjad Mirza were the real owners, but the defence was ruled out on the ground of estoppel as the mortgagee who had taken the mortgage from Asad Beg, the father of Sajjad Mirza, could not be heard to allege want of title in his own mortgagor. The result was to prevent the mortgagee defendant from raising a question of title to the mortgaged property and consequently there was not and could not be any determination of that question. There is nothing, therefore arising out of the litigation in the redemption suit to bar the claim now put forward by the plaintiffs. I have now disposed of all the pleas raised in second appeal. The decree of the Court below is right and is affirmed. I dismiss the appeal with costs.

B.V./R.K.

Appeal dismissed.

* A. I. R. 1918 Oudh 460

LINDSAY, J. C.

Haider Mirza—Appellant.

v.

Kailash Narain Dar—Respondent.

Ex. No. 19 of 1918, D/- 9th May 1918.

* (a) Civil P. C. (5 of 1908), O. 21, R. 2 (1)

—Application by decree-holder to certify payment cannot be objected to by judgment-debtor—Enquiry as to truth of payment is not contemplated.

Order 21, R. 2 (1), does not contemplate an inquiry being made into the truth of the statements made by the decree holder when he comes to Court to certify a payment and the judgment-debtor has no *locus standi* to question the right of the decree-holder to make an application under that provision of the law. [P 461 C 1 2]

(b) Civil P. C. (5 of 1908), O. 21, R. 2 (1)

—Payments can be certified at anytime.

No particular time is fixed during which the decree-holder is bound to certify payments to the Court. [P 461 C 2]

(c) Civil P. C. (5 of 1908), O. 21, R. 2 (1)

—Duty of Court is to note statement of payment—Notice to judgment-debtor need not be issued.

When a decree-holder comes and informs the Court that certain payments have been made to him in satisfaction of the decree, all that the Court has to do is to make a note of the statement made by the decree-holder and no notice need issue to the judgment-debtor even if the decree-holder asks this to be done. [P 461 C 2]

(d) Civil P. C. (1908), O. 21, R. 2 (1) — Certification is not conclusive — Judgment-debtor is entitled to show that no payment was made and that it did not extend limitation.

The certifying of a payment under O. 21, R. 2 (1), is not conclusive in any way. On an application for execution of the decree being made the judgment-debtor is entitled to show either that no such payment was in reality made or that if it was, it did not operate to extend the period of limitation for execution of the decree. [P 461 C 1]

*Hari Kisan Dhaon—for Appellant.**Jagmohan Nath Chak—for Respdt.*

Judgment.—This is an appeal against an order passed by the Subordinate Judge of Tahsil Mohanlalganj. The facts may be briefly stated. In the year 1909 a decree was obtained by Mumtaz Begum against one Nawab Haider Mirza, who is the appellant in the present case. This decree was affirmed in appeal on 28th November 1910 and was for a sum exceeding Rs. 5,000. In the year 1911 the decree was assigned to the present respondent Pandit Kailash Narain Dar. It is admitted that in previous execution proceedings between the parties the respondent has been recognized as the person entitled to execute the decree in question. In October 1914 the respondent filed an application in the Court, stating that he and the

judgment-debtor had come to terms regarding the payment of the balance of the decretal sum, which then amounted to Rs. 4,000 odd. The arrangement was that the money was to be paid in monthly instalments and the first instalment fell due on 15th November 1914. The present application has been made by the decree-holder under O. 21, R. 2. He filed a petition in the Court on 1st February 1918, stating that under the arrangement for payment by instalments he had received up to the month of December 1917 a sum of Rs. 1,050. The application further stated that a sum of Rs. 3,000 was still owing from the judgment-debtor. In this petition the decree-holder asked that the judgment-debtor might be summoned and that payment of Rs. 1,050 might be recorded and certified. The judgment-debtor appeared in answer to the summons and denied that these payments had ever been made. His contention was that the decree-holder was not in a position to ask the Court to certify those payments on the ground that the decree had become barred by time, and that no money was payable the satisfaction of which could be certified to the Court. The judgment-debtor pleaded that default had occurred on 15th November 1914 and that consequently the execution of the decree was now barred.

The Subordinate Judge in a lengthy order came to the conclusion that the decree-holder was entitled to make the application to have the payment certified and having disposed of this preliminary point, he fixed a date for the taking of evidence to be produced by the parties. That stage has not yet been reached and meantime the judgment-debtor has come here in appeal, contending that the Court below was wrong in holding that the decree-holder had a right to apply for the purpose of having these payments certified, that the decree is time-barred and that no such application can now be made. I think the appeal must fail; in my opinion the appellant has no locus standi to question the right of the decree-holder to make the application under O. 21, R. 2. I may say at the same time that I think the Subordinate Judge was wrong in holding that any inquiry regarding payments was necessary at this stage. From the language of O. 21, R. 2, it is apparent that a duty is cast upon the decree-holder to certify all payments

which are made to him out of Court. It is also apparent that no particular period of time is fixed within which the decree-holder is bound to give this information to the Court; and it has been laid down in a number of cases (*cf. Tahnum v. Rahaj* (1)) that no period of limitation is prescribed for the performance of this duty by the decree-holder. It is further apparent that O. 21, R. 2, and R. (1), does not contemplate any inquiry made as to the truth of the statement made by the decree-holder when he comes to the Court to certify a payment. The only case in which an investigation is prescribed is when the judgment-debtor makes an application under O. 21, R. 2, sub-R. (2). In that case a notice is issued to the decree-holder calling upon him to show cause why the payments alleged by the judgment-debtor should not be recorded. It seems to me, therefore, that the procedure contemplated by O. 21, R. 2, is that when the decree-holder comes and informs the Court that certain payments have been made, all that the Court has to do is to make a note of the statement made by the decree-holder. That is what O. 21, R. 2, sub-R. (1), says:

"The decree-holder shall certify such payment as adjudged to the Court whose duty it is to execute the decree and the Court shall record the same accordingly."

Consequently although the Subordinate Judge was asked in this instance to issue notice to the judgment-debtor there was no occasion for this being done; and what the Subordinate Judge ought to have done was to accept the statement made by the decree-holder and record the payments as indicated by him. As regards any question of limitation in connection with the execution of a decree, all that is to be said is that no such question can arise at the present stage. There is no application before the Subordinate Judge for the execution of this decree. When such an application is made, the judgment-debtor will be in a position to raise a plea of limitation, if he is so advised; and although under the present application the payments mentioned by the decree-holder will be recorded and certified, it does not necessarily follow that these payments will be conclusive evidence in favour of the decree-holder for the purpose of showing that any subsequent application for execution is within time. When the ques-

tion of limitation does arise, if it ever does, the mere fact that certain payments have been certified will not be conclusive in any way against the judgment-debtor; and it will, in the execution proceedings, be open to the judgment-debtor to show either that no such payments were in reality made or that if they were, they do not operate to extend the period of limitation for execution of the decree. I dismiss this appeal accordingly and direct the Subordinate Judge to abstain from any further inquiries at this stage. He will do what is laid down in O. 21, R. 2, sub-R. (1), that is to say, record the payments certified to by him the decree-holder and there the present proceedings will end. The appellant will pay the respondent's costs of this appeal.

B.V./R.K. *Appeal dismissed.*

A. I. R. 1918 Oudh 462

KANHAIYA LAL, A. J. C.

Raghubar—Appellant.

v.

Mt. Rukmin—Respondent.

S. A. No. 433 of 1916, D.-7.8.1917.

Contract—Agreement among Maha Brahmans—Regulating turns to receive offerings is binding on them—Person taking advantage of such agreement cannot resile from it when another's turn comes.

An arrangement among the Maha Brahmans of a place regulating the turns in which they shall act or the method in which offerings shall be collected or divided, and which does not control or restrict the discretion of the persons to whom the services are to be rendered or by whom the offerings or gifts are to be made, is valid and binding between the parties to that agreement. A person who has derived advantages in times past by the enforcement of such agreement cannot be allowed to resile from it when it becomes the turn of another to receive benefit therefrom.

[P 463 C 1]

J. P. C. Bhattacharji—for Appellant.

Haidar Husain—for Respondent.

Judgment.—The parties to this appeal are Maha Brahmans living in Bahraich. The plaintiffs are the widows of Ganga Din, one of the Maha Brahmans. Their allegation was that, by virtue of a private understanding between the Maha Brahmans of the place, each Maha Brahman family was to get the gifts made on funeral occasions on the day or days allotted to it for the purpose and that in contravention of the said arrangement, the defendants wrongfully appropriated the gifts, made in connexion with the death and funeral ceremonies of certain persons, on the days assigned to the plaintiffs. They also alleged that some other

articles were given in connexion with the funeral ceremonies of Ramnath and were placed in charge of two persons named Ghirao and Chandrika owing to the differences between the parties. They therefore sued for the recovery of the articles wrongfully appropriated by the defendants and for a declaration that they were entitled to those articles which were in the custody of Ghirao and Chandrika. The arrangement set up by the plaintiffs was denied by the defendants, but the Courts below found that a mutual understanding of the kind mentioned existed and was in force from a very long time. They also found that the gifts in question were not meant for any particular individual but were intended for the person or persons who were entitled to receive the same under the arrangement existing between the Maha Brahmans. The local practice appears to be that a barber is sent by the intending donor to call the right man to take the gift and that the man, who comes, receives it for the benefit of himself or of such person who is entitled to the same. The Courts below found that that arrangement was valid and binding and decreed the claim to the extent proved.

Only one of the defendants, Raghubar, appeals and the point for consideration is whether an arrangement to divide offerings in future is valid in law. It was also asserted that the widows of a deceased Maha Brahman were not entitled to claim a share in the offerings, but no argument was addressed in this Court on that point nor was any such plea taken in the written statement. S. 9, Civil P. C., gives authority to the civil Courts to try all suits of a civil nature except such of which their cognizance is either expressly or impliedly barred. A suit in which the right to property or to an office is contested is a suit of the civil nature, and it has accordingly been held by their Lordships of the Privy Council in *Rama Sawmy Aiyar v. Venkata Achari* (1) that a suit to establish an exclusive right to fees paid to priests by pilgrims resorting to a temple and to recover the same from the person who had received would not lie in the absence of some agreement between the parties, unless there was any such proof of long and uninterrupted usage as in the absence of a documentary title would suffice to establish a prescrip-

1. (1865) 2 W R 21 = 9 M I A 344 (P C).

tive right. But such a right cannot be enforced against the donor or the person to whom the priestly services are to be administered, for, as pointed out in *Bhagwan Din v. Mani Ram* (2), *Baddu v. Batu Lal* (3) and *Sona Dei v. Fakir Chand* (4), every person has a right to select his own priest or to give offerings to whomsoever he chooses. If however he does not select a particular individual to act as his priest or to receive the gift and makes the offering as in a temple or a place of worship without reference to any determinate person, the offering goes to the person entitled, whether by mutual arrangement among the parties or by prescriptive right. Such a right is a right to the property given and derives its validity in turn for the benefit of himself to the prejudice of the other, or from long and uninterrupted usage amounting to a prescriptive or customary right. In *Hafiz v. Mulho* (5) and *Mahmaya Dei v. Haridas Hatdar* (6) a prescriptive right to receive offerings at a temple was accordingly upheld, and in *Oochi v. Ulfat* (7), *Raghoo Pandey v. Kessey Parey* (8) and *Sukhl Lal v. Bishambhar* (9) a right to officiate as a priest at funeral ceremonies and to receive offerings in connexion therewith was similarly recognized. An arrangement regulating the turns in which certain persons shall act or the method in which offerings shall be collected or divided, which does not control or restrict the discretion of the person to whom the services are to be rendered or by whom the offerings or gifts are to be made is therefore valid and binding between the parties that arrangement, being a right to an office or to the property comprised in the offerings or gift; and a person who has derived advantages in times past by the enforcement of that arrangement cannot be allowed to resile from it when it becomes the turn of another to receive that benefit. The appeal is therefore dismissed with costs.

U.V./R.K. Appeal dismissed.
 9. (1902) 5 O C 225. 3. (1908) 11 O C 212. 4. (1913) 35 All 412. 5. (1905) 8 O C 309. 6. A I R 1915 Cal 161. 7. (1893) 20 All 234. 8. (1894) 10 Cal 73. 9. (1917) 39 All 196 = 37 I C 661.

A. I. R. 1918 Oudh 463

KANHAIYA LAL, A. J. C.

Md. Abul Hasan Khan—Appellant.

v.

Md. Ali Md. Khan—Respondent.

S. A. No. 230 of 1916, D.-16-5-1917.

(a) Civil P. C. (1908), O. 6, R. 16—Court cannot indicate to parties how they should frame cases—Court has only to see that parties do not offend against rights of pleadings.

Order 6, R. 16, Civil P. C., authorizes a Court at any stage of the proceedings to direct that any matter in any pleading which may tend to prejudice, embarrass, or delay the fair trial of the suit be amended or struck out. But the Court is not to dictate to the parties how they should frame their cases. [P 461 C 1]

All it has to see is that the parties do not offend against the rules of pleading, which have been laid down by the law, and introduce what is unnecessary or tends to prejudice, embarrass, or delay the fair trial of the suit. The object of permitting alternative reliefs to be claimed in one litigation is to obviate the necessity of another litigation to dispose of the same controversy or the subject-matter of the same relief, though the ground upon which the relief is claimed may be different. [P 461 C 1]

(b) Civil P. C. (1908), O. 6, R. 16—Alternative claims on ground of ownership and prescriptive right held not to offend against rules of pleadings—Practice—Pleadings.

Where a plaintiff prayed for a declaration that he was entitled to irrigate his land from a certain tank basing his claim on his alleged joint ownership of the tank and also on a right of easement enjoyed by him through his tenants for a period of more than 20 years and the lower Court threw out the suit on the ground that the pleas set forth were inconsistent:

Held: that the suit did not offend against the rules of pleading and that alternative claims on the ground of ownership and prescriptive right were entertainable. [P 464 C 2]

Aditya Prasad and Ali Muhammad—for Appellant.

Zuhur Ahmad—for Respondent.

Judgment.—The parties are co-sharers in the village Banni in which the disputed tank is situated. The allegation of the plaintiff was that he was the owner of a two-thirds share in the said tank and had been irrigating his land, that is, the land appertaining to his share, from the said tank. The defendant asserted that the village was divided into two pattis, that the tank in question stood in the patti belonging to the defendant and that the plaintiff had no right to use the water of the said tank. He denied that the plaintiff or his tenants irrigated their fields from the same. The plaintiff claimed a decree, declaring his right to irrigate the land appertaining to his share from the said tank, basing his right to that relief on his alleged joint ownership and on a right of easement said to have been enjoyed by him through his tenants from a period of more than 20 years. The Courts below have thrown out the suit on the ground that the pleas set forth in support of the claim were inconsistent. The

decision in *Durga Pershad v. Mendi Lal* (1) is relied on in support of that contention. But that decision has no relevancy to the present case. The plaintiff sued in that case for the cancellation of a deed of sale, executed by one of the defendants, in favour of another defendant, and in the alternative for pre-emption of the property included in the deed. The right of pre-emption arose out of a set of facts, different from those which gave rise to the claim for the cancellation of the deed of sale. The right of relief, now claimed, arises from the same set of facts with this difference that the plaintiff's alleged joint ownership or user, whichever may be established, is made the basis of that relief. O. 7, R. 7 of the present Civil P. C., has considerably widened the scope for choice of a person seeking relief either simply or in the alternative, and the only restriction laid down for guiding the discretion of the Court is that contained in O. 6, R. 16, which authorizes the Court at any stage of the proceedings to direct that any matter in any pleading which may tend to prejudice, embarrass, or delay the fair trial of the suit be struck out or amended. The discretion is very large, but as pointed out in *Farid-un-nisa v. Muktar Ahmad* (2), the Court is not to dictate to the parties how they should frame their cases. All it has to see is that the parties do not offend against the rules of pleading, which have been laid down by the law, and introduce what is unnecessary or tends to prejudice, embarrass, or delay the fair trial of the suit. The object of permitting alternative reliefs to be claimed in one litigation is to obviate the necessity of another litigation to dispose of the same controversy or the subject-matter of the same relief, though the ground upon which the relief is claimed may be different.

A claim to a right of easement is to some extent inconsistent with a claim to joint property. But in cases where a partition has taken place, there might be circumstances in which a right of easement might be claimed within the limits of the provisions contained in S. 13, Easements Act (5 of 1882). Independently however, of S. 13 it has been held in *Narendra Nath Barari v. Abhay Charan Chattopadhyaya* (3), that a claim in the al-

ternative over the same plot of ground to rights of ownership and of easement can be properly joined. In *Durgamani Debya v. Ambica Charan Sarma* (4), alternative claims on the ground of ownership and prescriptive right were similarly entertained and in *Purnendu Narain Roy v. Dwijendra Narain Roy* (5), alternative defences of the same character were held to be permissible. The same view was taken in *Chadammi Lal v. Shib Charan* (6). In *Morgan, In re; Owen v. Morgan* (7) it was laid down that pleadings should not necessarily be treated as embarrassing, because they are inconsistent. Lindley, L. J., who delivered the judgment in that case, in commenting on O. 19, R. 4, of the Rules of the Supreme Court, requiring every pleading to contain and contain only a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, observed:

"Now I cannot myself construe that order as prohibiting inconsistent pleadings. One sees perfectly well what is meant by it, viz., that each party is to state succinctly and concisely and in a summary form the material facts on which he relies. Now a person may rely upon one set of facts, if he can succeed in proving them, and he may rely upon another set of facts, if he can succeed in proving them; and it appears to me to be far too strict a construction of this order to say that he must make up his mind on which particular line he will put his case, when perhaps he is very much in the dark."

Order 6, R. 16, Civil P. C., follows O. 19, R. 27, of the Rules framed by the Supreme Court, and the decisions passed when the old Code of Civil Procedure was in force, are consequently not entitled to weight. The Courts below ought, therefore, to have gone into the merits and determined whether the allegations made by the plaintiff in his plaint were correct or not and whether he was entitled to the relief, which he was claiming. The appeal is consequently allowed and the suit is remanded to Court of first instance with a direction to re-admit it under its original number and to dispose of it after taking such relevant evidence as the parties may adduce in the manner provided by law. The costs here and hitherto will abide the event.

B.V./R.K.

Case remanded.

4. (1906) 4 C L J 367.

5. (1908) 8 C L J 289.

6. (1905) A W N 18.

7. (1887) 35 Ch D 492=56 L J Ch 603.

1. (1889) 1 O C 174. 2. (1917) 40 I C 483.
3. (1907) 34 Cal 51.

THE ALL INDIA REPORTER

1918

SIND SECTION

CONTAINING

FULL REPORTS OF ALL REPORTABLE JUDGMENTS OF
THE SIND JUDICIAL COMMISSIONER'S COURT
REPORTED IN

- (1) 12 SIND LAW REPORTER (2) 19 CRIMINAL LAW JOURNAL
(3) 43 TO 48 INDIAN CASES

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TO
THE LEGAL PROFESSION
IN GRATEFUL RECOGNITION OF
THEIR WARM APPRECIATION AND SUPPORT

SIND JUDICIAL COMMISSIONER'S COURT
1918

Judicial Commissioners :

The Hon'ble Mr. C. G. H. Fawcett, Esq., I. C. S.
" " E. M. Pratt, Esq., I. C. S.

Additional Judicial Commissioners :

The Hon'ble Mr. C. G. H. Fawcett, Esq., I. C. S.
" " H. N. Crouch Esq., Bar-at-Law.
" " N. W. Kemp, Esq., Bar-at-Law.
" " M. H. W. Hayward, Esq., I. C. S.
" " C. A. Kincaid, C. V. O., I. C. S.

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N.B.—Column No. 1 denotes pages of OTHER JOURNALS.

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N. B.—Column No. 1 denotes pages of the ALL INDIA REPORTER, 1918 SIND.

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THE ALL INDIA REPORTER 1918

SIND J. C's COURT

A. I. R. 1918 Sind 1

CRO. CH. A. J. C.

Vishinji Goverdhan Dux & Co.—
Plaintiffs.

v.

Jasraj Gridharilal—Defendant.

Civil Suit No. 455 of 1914, Decided on
29th May 1916.

(as Civil P. C. (1908), S. 20 (c)—Cause of
action—Proposal to buy and sell from Kara-
chi accepted at Calcutta—Failure to carry
out instructions—Suit for damages at Karachi
—Karachi Court has no jurisdiction.

A firm in Karachi authorised a firm in Cal-
cutta to buy and sell certain goods on its behalf
and the latter agreed to do so. Subsequently, a
suit was brought by the Karachi firm at Karachi
against the Calcutta firm for damages suffered
through the failure of the latter to carry out
instructions, and it was objected that the
Karachi Court had no jurisdiction to hear and
try the suit:

Held: (1) that the contract of agency was as
against the Karachi firm, made in Calcutta, be-
ing so made the moment the proposal was
accepted and the acceptance put in course of
transmission; (2) that therefore the Karachi
Court had no jurisdiction to hear the suit.

[P 3 C 2]

(b) Contract Act (1872), S. 186—Autho-
rity to act as agent must be conferred and
accepted—Mere settlement of terms of re-
muneration—Agency is not created.

The relation of agency arises whenever one
person, called "the agent", has authority ex-
press or implied, to act on behalf of another,
called "the principal", and unless authority to
act is conferred and accepted, the mere settle-
ment of the terms of remuneration does not con-
stitute a contract of agency.

[P 3 C 2]

(c) Principal and Agent—Commission agent
is not agent of all persons.

A person who does a commission agency busi-
ness is not in law the agent of all the persons
or firms for whom he occasionally transacts
business or for whom he hopes to get orders.
The contract of agency is effected by the prin-
cipal requesting the agent to buy or sell and the
agent indicating his consent so to act.

[P 3 C 2]

(d) Contract Act (1872), S. 49—Claim for
damages for breach of contract—Mode of
payment—Payment according to business
custom is sufficient.

Where money is claimed not as money pay-
able under an agreement but as damages for
breach of an agreement, there is no obligation
on the party committing the breach to seek the
other party to the contract and pay him at the
residence compensation or damages for such
breach; it is sufficient if, in the absence of in-
structions as to the mode of payment, he remits
the money according to the custom which
prevails in doing business of the same kind.

[P 5 C 1]

(e) Principal and Agent—Agent—Special
authority to buy or sell—Carrying out order
cannot be deferred till communication of
rate to principal.

An agent specially authorised to pay or sell at
the best rate cannot defer carrying out an order
until he has communicated the rate of the day
to his principal: (*Authorities discussed.*)

[P 5 C 2]

*Kalumal Pahlumal—*for Plaintiffs.

*Kimatrai Bhojraj—*for Defendant.

Judgment.—Plaintiffs, who are a firm
carrying on business in Karachi in the
name of Vishinji Goverdhandas and Co.,
sue Jasraj Gridharilal, a firm of commis-
sion agents residing and carrying on busi-
ness in Calcutta, for Rs. 1,861-15-0,
being the amount of damages which the
plaintiffs allege they have suffered
through defendants' failure to carry out
their instructions. Defendants demur to
the jurisdiction of this Court and raise
other defences. The facts of the case, so
far as they are necessary for the decision
of the disputes between the parties, are
contained for the most part in the cor-
respondence and present no difficulty.
In or about August 1913, Waghji Walji
(Ex. F-1) was employed by the defen-
dants to canvass for business on their be-
half. It was his duty to circulate among

possible customers information which he received from time to time from the defendants regarding the rates ruling in the Calcutta market. Amongst other firms the plaintiffs received visits from him. Parshotam, managing partner of the plaintiffs' firm, states that Waghji told him that the defendants would charge 8-annas brokerage when a native broker was employed and 12 annas if a European were instructed and that the commission would be 8 annas, and that he agreed to these terms.

Waghji denied that there was any talk about the rate for brokerage and commission, it being understood that the usual Calcutta rates would be charged. But it is morally certain that the question of rates would be discussed before a firm would give an order to a new firm of agents and Ex. X and Ex. Y indicate that there had been objection to the rates which Waghji on behalf of the defendants was asking. I am satisfied that before the plaintiffs despatched an order to the defendants, they had discussed the rates for brokerage and commission with Waghji and it had been arranged what these rates should be in the event of plaintiffs entrusting the defendant with a commission to buy or sell. In August 1913 plaintiffs wired to defendants to sell on their behalf 150 bales of empty gunnies 2nd B Twill Any Mill January to March delivery. Defendants wired back that they had sold 150 bags at Rs. 36 (see Ex. L). As a matter of fact they had not sold. In their written statement they allege that they had sold to themselves, but no hint of this was given to the plaintiffs and nothing was done or recorded to indicate with definiteness that defendants ever considered themselves bound as purchasers. They have put in entries Exs. V and W, which purport to show that they had purchased goods about that time, but there is no evidence that these entries referred to the plaintiffs. Mr. Kiroatrai admitted that the entries had not been made in the regular course of business; the witness called had not himself made them and was unable to explain them. We may take it that defendants did nothing more than send a telegram stating untruthfully that they had sold.

On 20th December the plaintiffs wired to the defendants to sell 150 bags more of the same goods for the same delivery and defendants wired back that they had

sold them at Rs. 39.8.0. Again there was no real sale. In both these transactions Waghji was not employed as an intermediary; plaintiffs communicated direct with the defendants and defendants with the plaintiffs. On 20th January plaintiffs wired to defendants Ex. 18, "Buy 2nd 100 January till 36" (till 36 means "up to 36") and on 25th January, they wired:

"Buy 2nd 100 January profitably reply to-morrow evening, if you write high rate I will give market rate."

On 26th January the defendants wired back: "Received purchased 2nd 100 January 36-12 0" (Ex. 15). Defendants' man now admits that they did not buy any goods. Plaintiffs contend that the market rate on 25th January was Rupees 36. From the telegrams, Exs. 47-51, it appears that the rate for "ready and forward 2nd" on the 23rd January was Rs. 36 and that there was the same on the 24th, but it fell to Rs. 35-12-0 on the 26th and to Rs. 35-8-0 on 28th and to Rs. 35-8-0 on 30th January. These telegrams are corroborated by the evidence of Abdul Hussain, Ex. 38, and Gokaldas, Ex. 42. I hold that the rate for 25th January was Rs. 36. Some confusion has been caused by the fact that gunnies are sold at different rates according to the mill or mills which are declared. But the wording of the telegrams of the defendants is similar to that of Exs. 47-51: in each case the quotation is for (2nd) and I take it that this is a term which is perfectly well understood in the market. Defendants purported to buy "2nd" and it is for "2nd" that we have the rates.

On 28th January the plaintiffs wired to the defendants to buy 200 bales February-March at the market rate. The reply received (Ex. 19) was "received, may buy 2nd February-March 36, wire reply." As the market rate according to information received in Karachi was Rs. 35-8-0 or under the plaintiffs wired "Received, buy market rate 2nd 200 February-March, reply" (Ex. 20). On the same day, 29th January, the plaintiffs telegraphed again inquiring at what rate the defendants had purchased; and if they had not purchased they were to do so (Ex. 21). And on 3rd February having received no communication they reminded the defendants of their previous wires and warned them that they would not be responsible for any rate higher than Rs. 35, the rate at which

other merchants had bought on the 29th (Ex. 22). It is not denied that the defendants made no purchase on behalf of the plaintiffs in performance of these orders. The following issues were settled:

1. Has the Court jurisdiction to try this suit? 2. Were the defendants justified in appropriating to plaintiffs goods of their own mentioned in para. 3 of the written statement? 3. What was the buying rate prevailing in the market on 26th January 1914? 4. Were the defendants justified in refusing to purchase 200 bales of empty gunny bags on 29th January 1914? 5. What was the buying rate on 26th January and 29th January 1914, 28th February and 31st March 1914? 6. Are the defendants justified in refusing to give accounts of the profits of sale of 200 bales of empty bags sold on behalf of the plaintiffs? 7. For what amounts are the defendants liable in respect of the transactions mentioned in the plaint? 8. Are the plaintiffs entitled to telegram expenses? 9. What are the charges due to defendants for brokerage?

Though I have from the first entertained the opinion that this Court has no jurisdiction to try the case, I have felt compelled to take such evidence as has been offered in consequence of the diverse views taken by my brother-judges on the point involved. It was urged, in reply to the suggestion that this issue should be tried as a preliminary issue, that the point was concluded adversely to the defendants by decisions of the Appellate Side and though I believe that this is not so, it is clear from the judgments brought to my notice that a view different from my own may be taken by the appellate Bench. It has been ruled in *Salig Ram v. Chuba Mal* (1) that Expi. 3, S. 17, Act 14 of 1882, is still a correct statement of what the law is and shows clearly the true meaning of the words "cause of action" in the case of suits arising out of contracts. With this ruling I fully agree. The question therefore is whether (1) the contract sued on was made in Karachi; and (2) whether in performance of the contract any money to which the suit relates was payable expressly or impliedly in Karachi. Mr. Kalumal for the plaintiffs contends that the contract of agency was made by Waghji when he settled the terms of remuneration and brokerage. But this is not so. The

relation of agency arises whenever one person called "the agent" has authority, express or implied, to act on behalf of another called "the principal," and consents so to act (Halsbury, Vol. 1, p. 147). The terms of remuneration must necessarily be settled in some way or other, but the settlement of such terms does not constitute a contract of agency unless authority to act is conferred and accepted. If therefore Waghji did in fact make a definite arrangement with the plaintiffs as to the commission and brokerage to be paid to the defendants that would not mean that the contract on which plaintiffs now sue was then made. The parties had done no more than determine that if at any time in the future, the plaintiffs should appoint the defendants, their agents and the defendants should consent to act, then the commission and brokerage to be paid and received should be as settled. If a person does a commission agency business, he is not in law the agent of all the persons or firms for whom he occasionally transacts business or from whom he hopes to get orders. The contract of agency is effected by the principal requesting the agent to buy or sell and by the agent indicating his consent to so act.

If a person in Karachi writes or telegraphs to a firm in Calcutta instructing him to buy or sell on his behalf and the latter writes agreeing to do so, then the contract of agency is as against the Karachi firm made in Calcutta as soon as the proposal has been accepted and acceptance put in course of transmission; see *Kamisetti Subbiah v. Katha Venkatasawmy* (2). Here the instructions to sell were despatched direct by the plaintiffs to the defendants and the consent to act was given there. I hold that the contract was made in Calcutta. Was the money payable under the contract payable expressly or impliedly in Karachi? No express contract is set up nor were there any express instructions as to payment given. Now, all moneys received on behalf of the principal must be paid over or accounted for on request and where an agent fails to pay over to his principal on demand moneys received by him, the principal may bring an action for money had and received (Halsbury, Vol. 1, p. 1878). The agent should, properly, keep the money sent.

(1) [1911] 34 All. 40 = 11 I. C. 712.

(2) [1904] 27 Mad. 355.

rate from his own and if he does so and exercise reasonable and proper care in its custody, he is not responsible for its loss. If no personal request for payment be made, then the agent who is bound to comply with any reasonable instructions from his principal must, if so directed, remit the money by the channel indicated, or, in the absence of such directions, according to the custom which prevails in doing business of the same kind. An agent is entitled to be indemnified against all expenses properly incurred, and all losses arising from a lawful act done in the course of the agency. If therefore a draft be purchased on behalf of the principal, then any loss arising from the draft not being honoured would fall on the principal. If the agent were to personally bring the money from Calcutta to Karachi and that were a proper thing to do having regard to the usual practice, the principal would be bound to pay his expenses and remunerate him for his time and trouble. It follows that it cannot be the law that the agent is bound to come to Karachi to pay money due to his principal; for it would be universally deemed a wholly unnecessary act not justified by custom.

It has been contended that S. 49, Contract Act, applies and that, where the agent has not applied for instructions as to the place of payment, it is fair to assume that the principal has appointed his own residence. This was the view taken by this Court on the Appellate Side in the case of *Hemandas v. Devishah* (3). It was in consequence of the wide terms of the head note (of 6 S. L. R. 181) in the report of this decision that I felt compelled to try this case at length. The decision assumes that money payable by an agent is payable without application; also that money may, by process of suit, be rendered payable, in performance of the contract, at the place of residence of the plaintiff, although the condition precedent to the right of the plaintiff to appoint his place of residence as the place of payment (on application by the debtor) has not been fulfilled. In *Kedarmal Bharamal v. Surajmal Govindram* (4), in a somewhat similar set of circumstances, it was plaintiff's case that S. 49 did not apply; as the learned Judge Bitty, J., pointed out:

"If S. 49 did apply it would exclude the contention that the debtor must seek out his creditor."

Hemandas' case (3), however, was one not founded on breach of contract, but was for money payable in pursuance of the contract, and can therefore be extinguished from the present one.

It is next contended that there is a Common law rule that the debtor must "seek out his creditor." This is stated to be the law in a judgment on the Original Side by Tyabji, J., in *Motilal Pratabchand v. Surajmal Joharmal* (5). No English text-book has been referred to as containing this rule and I am unable to find it anywhere laid down. There is a dictum in "Coke upon Littleton" that the obligor of a bond must go to the obligee in order to pay it: see *Rebey v. Snaefell Mining Co.* (6) and there can be no doubt that if a vendor of goods sue his purchaser for non-payment, tender of payment cannot be pleaded unless it has been made to the vendor at his ordinary place of business. But the case of an agent is quite different from that of a bond debtor and also from that of a purchaser of goods. If there be a Common law rule, as is contended, it must have a quite limited application. Lastly it is asserted on the authority of the judgment in *Motilal Pratabchand v. Surajmal Joharmal* (5) and of the judgment of Fawcett, A. J. C., in *Ali Mahomed Alidina v. Shamsdin Maher Bux* (7) that, where money is remitted to Karachi by draft and the draft is cashed in Karachi, then payment is made in Karachi. This was also the view taken by Chandavarkar, J., in the case of *Kedarmal Bharamal v. Surajmal Govindram* (8). But even if it be conceded that payment is not complete until the hundi has been cashed, yet the cashing of the hundi is the act of the principal and not of the agent or on the agent's behalf. The performance of the contract of agency is complete as soon as the agent has despatched a hundi. He is bound either to pay on request or to remit. Where he remits he is under no obligation to pay in cash. Hence the cashing of the hundi in Karachi cannot give the Karachi Court jurisdiction, for

(5) [1906] 30 Bom. 167.

(6) [1888] 20 Q. B. D. 152.

(7) Suit No. 384 of 1913.

(8) [1903] 33 Bom. 361=3 I. C. 441.

(3) [1912] 6 S. L. R. 181=19 I. C. 433.

(4) [1907] 9 Bom. L. R. 903.

it is not "payment in performance of the contract."

But this is a case of money being claimed, not as money payable under an agreement, but as damages for breach of agreement, and

"there is no authority whatever for the proposition that a party committing a breach of contract should seek the other party to the contract and pay him at his residence compensation or damages for such breach of contract, which is of course an unliquidated amount: *Kamisetti Subbia v. Kotha Venkata-swamy* (2)"

Mr. Kalumal pointed out that plaintiffs were claiming Rs. 15-13-0 for moneys spent on behalf of the defendants and as their agents in Karachi. He contended that the cause of action as to this amount at least arose in Karachi, but this does not justify suing defendants in Karachi in respect of other contracts, in respect of which no part of the cause of action arose at Karachi. I hold that no money was payable in Karachi in performance of the contract and that this Court has no jurisdiction. The second issue is wrongly worded; the defendants did not appropriate any goods of their own to one of plaintiffs' contracts. They asserted that they had themselves been the purchasers in the contracts of sale. No custom has been established authorizing an agent to do this and the law forbids it. I hold that defendants were not justified in appropriating to themselves the contracts of sale. But inasmuch as the plaintiffs, knowing all the facts of the case, in their plaint treated the contracts as having been duly made and defendants accepted all responsibility as purchasers in their written statement, I must treat defendants as purchasers. I hold on the strength of the exhibits and evidence above referred to that the rate prevailing in the market on 25th and 26th January was not higher than Rs. 36, the rate claimed by the plaintiffs (issue 3).

Defendants contend that it is the custom, when orders are received to buy at the market rate, to wire the rate of the day and not purchase until it has been approved by the principal; that in this case they offered to buy at Rs. 36, but as plaintiffs would not assent to it they did nothing. It seems clear to me that defendants had by their conduct in writing the rate accepted the proposal of the plaintiffs that they

should act as their agents in the purchase of 200 bales. They were therefore bound to carry out their reasonable instructions, and buy as directed at the best market rate. There could have been no difficulty or risk in doing this; all that they had to do was to employ a respectable broker to make the contract on the best terms. It is so common a thing for brokers to be given instructions to buy or sell at the best rate that very strong evidence indeed would be required before the Court could hold that there was a special local custom to the contrary, under which the agent could defer carrying out the order until he had communicated the rate of the day to his principal and received his sanction to it. In a quickly fluctuating market such as the gunny market where the prices change almost daily, sometimes several times in a day, to await the instructions would be to lose the market. There is certainly not enough evidence on record to establish a special custom. I hold on this issue in the negative.

The buying rate on 28th and 29th January was Rs. 35-8-0. We are not concerned with the rates on 28th February and 31st March for it was at the end of January that defendants committed breach of contract, they had no instructions to buy in February or March. No finding is necessary on issue 6 for the defendants sold no bags on behalf of the plaintiffs and made no profit. As to the damages to which plaintiffs are entitled; perfectly clear instructions were given on 26th, 28th and 29th January to buy the 300 bales at the market rate: there is no doubt that defendants deliberately refrained from buying because by so doing they would have at once incurred a personal liability to plaintiffs to pay the differences. It was not until plaintiffs received Ex. 24 about the end of February that they became aware that defendants claimed to be the purchasers under the selling contracts and to have cancelled the January lot and that they intended to cancel the February lot. It was then too late to make other arrangements for the January and February lots.

It may be contended that plaintiffs might have bought the March lot through some other agency, and tendered it to the defendants and not having done so they suffered no real loss, but defen-

dants in their letter Ex. 24, put an unreasonable obstacle in their way by refusing beforehand to accept delivery from anyone but a person holding a general power-of-attorney. To arrange for this would have taken a considerable time and plaintiffs had very good reason to suppose that defendants would not under any circumstances accept delivery. Mr. Kikla contends that if his clients are held liable as purchasers, they are entitled to plead that no delivery was made and that consequently they are free of all liability under the sale contract. But they are liable as agents for not covering the first series of contracts and for not realizing the profit which plaintiffs would have undoubtedly made had their instructions been carried out. Had the instructions been followed defendants would have lost as purchasers. As it is they are liable as agents for not carrying out through the second series of contracts. I consider therefore that defendants should be held liable in respect of all three lots for not having purchased as and when instructed. The rate on 26th January was Rs. 35 12.0 and on 28th and on 29th Rs. 35.8.0. Defendants will be entitled to deduct half per cent. for commission on the three contracts of purchase which they failed to carry out but for which they are held liable, but nothing for brokerage, for if they had received it they would have had to pay it away as they were themselves the purchasers under the contracts of sale, they are entitled to no commission.

The findings on issues 7 and 9 will be that plaintiffs are entitled to the difference between the rate at which the defendants stated they had sold, and as to 100 hales Rs. 36 and as to 200 hales Rs. 35.8.0. Defendants will be entitled to commission at Rs. half per cent. as on the purchase contract. Plaintiffs claim Rs. 15.13.0 for telegrams sent on behalf of defendants, as the defendants' agents. The amount has not been disputed and I allow it (issue 8).

Note:—Mr. Kalumal after hearing the terms of this judgment asks that the plaint may be returned under O. 7, R. 10. I order that it be returned for presentation to the proper Court. I make no order as to costs. The question of jurisdiction was not free from doubt, and the behaviour of the defendants both in the conduct of the business entrusted to

them and in the defence of the suit has been such as to disentitle them to any sympathy.

V.B./R.K.

Plaint returned.

A. I. R. 1918 Sind 6

FAWCETT, A. J. C.

Ludhomal Purtomal & Co.,—Plaintiffs.
v.

Secretary of State—Defendant.

Civil Suit No. 248 of 1916, Decided on 22nd September 1916.

(a) Civil P. C. (1908), O. 6, R. 17—**Amendment of plaint should not be allowed when applied not in good faith.**

Ordinarily, the amendment of a plaint ought not to be allowed where the application for amendment is not made in good faith.

[P 8 C 1]

(b) Civil P. C. (1908), O. 6, R. 17—**Amendment—Application at late stage merely to get advantage on other side—Plea clearly afterthought—Application is not in good faith.**

An application made at a late stage of the suit, merely to get an advantage over the other side in the course of arguments on a preliminary issue and raising a plea which clearly is an afterthought, is not an application made in good faith, as the effect of allowing the application might be to take away from the defendants the defence they have raised, and therefore unjustly prejudice them.

[P 8 C 1]

(c) Civil P. C. (1908), O. 6, R. 17 and O. 23, R. 1—**Application for amendment of plaint refused—Withdrawal of suit with liberty to institute fresh suit would not be granted.**

Where a Court has refused an application to amend a plaint, it ought not to allow the plaintiff to withdraw the suit with liberty to institute a fresh suit, as if in such a case permission is granted, it would practically be the same as if the Court had allowed the application for amendment of the plaint already refused.

[P 8 C 2]

(d) Limitation Act (1908), S. 19 and Arts 30 and 31—**Art. 31 applies to suit to recover compensation for non-delivery of goods—Letter denying liability does not amount to acknowledgment.**

On 24th November 1913, plaintiff booked certain goods by the N. W. Ry. consigned to himself; the goods were delivered to a third person under an indemnity bond by the railway. In May 1915 the plaintiff brought the present suit, alleging that he had suffered monetary loss which he claimed with interest. He relied upon a letter from the railway to himself, as an acknowledgment of liability operative under S. 19, in which he was informed that the delivery of the goods under an indemnity bond was perfectly correct and that his claim, which was against the person to whom the goods had been delivered and not the railway, could not be entertained. The defence was that the suit was barred by limitation under Arts. 30 and 31.

Held (1): that the suit, as framed, was one to recover compensation for non-delivery of goods and was governed by the period prescribed in Art. 31, the cause of action being that the

defendants had not performed their contract, not that they had performed their contract improperly so as to make it a case of misfeasance instead of one of non-feasance, and that, as the cause of action arose in December 1913 and the suit was not instituted till May 1915, it was clearly time barred. (P 2 C 1)

(2) that the letter relied upon by the plaintiff from the railway contained no acknowledgment of liability within the meaning of S. 19, but on the contrary, amounted to a denial of liability. (P 9 C 2)

T. G. Elphinstone—for Plaintiffs.

M. Lobo—for Defendant.

Judgment.—In this suit the plaintiffs admittedly booked three cases of electrical appliances consigned to themselves to Tando Adam by the N. W. Ry. on 21st November 1913. In paras. 2 and 3 of the plaint it is alleged that the defendants (i.e., the Secretary of State for India in Council) wilfully neglected to deliver the said three cases to the consignees and that owing to their failing to deliver them the plaintiffs suffered a certain monetary loss, which the plaintiffs claim to recover with interest, etc. Para. 4 of the plaint states that the cause of action arose in December 1913, when the defendants refused to deliver the cases, and that the plaintiffs rely upon an acknowledgment of the railway authorities under S. 19 from Act. The first point taken in the defendants' written statement is that the suit is time barred under Arts. 59 and 31, Sim. Act, and that the cause of action, if any, arose in November 1913. A preliminary issue has accordingly been framed: Whether the suit is time barred, as alleged. This was framed on 7th September and arguments on the point were heard yesterday when, as they were unfinished, the further hearing was adjourned till today.

Mr. Elphinstone for the plaintiffs has now put in an application that the Court should allow them to amend their plaint (1) substituting for para. 2:

"that the defendants failed to deliver the said three cases in accordance with their contract and illegally delivered the same to other person under an indemnity bond";

(2) by adding to para. 3 an allegation that the loss alleged was due not only to the defendants' failure to deliver in accordance with their contract but also their conversion of the said 3 cases, and

(3) by putting back the date, when the cause of action is stated in para. 4 to have arisen, from December 1913 to 17th August 1914, when the defendants are

said to have finally refused to deliver the three cases in accordance with their contract. Mr. Lobo for the defendants opposes the application. The first question which I think the Court should decide is, whether this amendment is, in the language of O. 6, R. 17,

"necessary for the purpose of determining the real question in controversy between the parties."

Mr. Elphinstone has strongly urged that it is necessary, especially as the defendants in their written statement themselves mentioned the delivery by them of the goods to a third party, which delivery is stated in the proposed amendments to have been done illegally and to amount to a conversion of the goods. Mr. Elphinstone also relies on a letter from the District Traffic Superintendent of the railway to the plaintiffs, dated 19th May 1914, in which he says that this delivery of the consignment to the third party was perfectly correct. It is therefore urged that the real question in controversy in this suit is whether this delivery was justified as defendants contend, or illegal as plaintiffs contend. It is, no doubt, the case that if the suit is fought out that would be the main question in dispute. But, in my opinion, it does not follow that therefore the amendments now proposed to be made in the plaint are necessary for the purpose of determining that question. Under O. 14, R. 1, issues arise in a suit when a material proposition of fact or law is affirmed by one party and denied by the other, and each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue. Here the defendants in their written statement have pleaded that the delivery was justified and that plea is controverted by the plaintiffs. It is in no way necessary to have an amendment of the plaint in order to enable them to deny the proposition which the defendants have put forward in their written statement. An issue would therefore under O. 14, have to be framed in the suit on this point on the pleadings as they stand, and no amendments are necessary in order to enable that issue to be raised and to enable the Court to determine that particular controversy.

I therefore do not think that the proposed amendments fall within the class of cases mentioned in the last

sentence of R. 17, where the Court is bound to allow them.

The only question therefore that remains is whether the Court in the exercise of its discretion should now allow the amendments. On this point undoubtedly a fact to be taken into consideration is that the application is made at a very late stage of the case so far as regards the preliminary issue now before the Court. And I think that there can be no doubt whatever that the real object of the application is to put the plaintiffs in a better position than they otherwise are in regard to their contention that the suit is not time barred. It is an ordinary rule that amendments should not be allowed where the application for amendment is not made in good faith: see the cases cited in Mulla's Civil P. C., Edn. 5, p. 369. Though I do not mean to cast any aspersions on the plaintiffs or their advisers, I do not think that this application can be said to be one made in good faith when it is really made merely in order to get an advantage over the other side in the course of arguments on the preliminary issue and by raising a plea which is very clearly an afterthought. As the case stands, without giving any decision on the point, it may be said that the defendants certainly have strong arguments in support of their contention that the suit, being one for non-delivery, is clearly time barred under Art. 31, Lim. Act. If the amendments are allowed, the strength of these arguments, at any rate, may be materially prejudiced by the addition of this plea of misdelivery or conversion, since it will be urged that this takes the suit out of the category of those covered by Art. 31. Though the case of *Weldon v. Neal* (1) is not directly applicable, yet the principle underlying it, in my opinion, applies to this case, for the effect of allowing the application at any rate might be to take away from the defendants the defence they have raised under the Law of Limitation, and therefore unjustly prejudice them. In the circumstances I think there is no sufficient ground for allowing the application and I refuse it.

Upon delivery of the above order Mr. Elphinston applied to the Court for permission to withdraw the suit, with liberty to institute a fresh suit under O. 23, R. 1. Mr. Lobo objects also to

this application. The case does not fall under Cl. (a), sub-R. (2) of that rule, viz., where the suit must fail by reason of some formal defect, because the point regarding the alleged bar of limitation is much more than a purely formal defect. The only question is whether there are sufficient grounds for allowing plaintiffs to institute a fresh suit under Cl. (b), sub R. 2. As to this, it is clear that if the permission asked for is granted it would be practically the same as if the Court had allowed the application for amendment of the plaint already refused, subject to plaintiffs paying up all defendants' costs up to date, with only the added penalty of paying additional court-fees (Rs. 15) in the fresh plaint. The leave to amend was refused on grounds which show that it is not a case where any injustice to the other side by allowing the amendments can be compensated for by costs. And to give permission for the withdrawal of the suit would be inconsistent with this, because it would practically be saying that the injustice to the defendants can be compensated for by costs and allowing the plaintiffs to achieve their object by paying these and a little more in court fees, etc. I therefore do not think that there are sufficient grounds for granting the permission asked for, and that there is no real unfairness in keeping the plaintiffs to the allegations actually contained in the plaint and disallowing the further additions which are clearly intended merely to meet the contention as to limitation set up by the defendants, not only in this Court but also in the Small Cause Court, where the plaint was originally filed.

I now come to the merits. Mr. Elphinston has very fully and ably argued the question for his clients and has satisfied me that in any case the suit does not fall under Art. 30, Lim. Act. Mr. Lobo for defendants also admits this. The only question therefore is whether this is a suit against a carrier for compensation for non-delivery of goods, so as to fall under Art. 31. On this point Mr. Elphinston has cited a ruling of the Punjab Chief Court in *Fakir Chand v. Secy. of State* (2), where Rattigan, J., held that the word "non delivery" in this article does not include misdelivery, and that the case of misdelivery falls within the pur-

(1) [1887] 19 Q. B. D. 394.

(2) [1913] 19 I. C. 477.

view of Art. 115 of the Act. With due deference I do not think that the grounds given are fully sufficient for holding that the legislature did not intend to include such a case as the present one under the word non-delivery. Mr. Lobo has pointed out that whatever be the manner in which the carrier may have dealt with the goods, whether he may have misappropriated them or delivered them to some one else, the complaint of the plaintiffs in both cases is one that they have suffered injury through the non delivery to them of the goods. And in this plaint as I have already pointed out the cause of action is specifically alleged to be a failure or neglect to deliver. What gives plaintiff this cause of action is that the defendants have not performed their contract with him, not that they have performed their contract improperly so as to make it a case of misperformance instead of one of non-performance. The fact that the defendants allege that delivery was given to a third party which the plaintiffs say was a misdelivery is, it seems to me, immaterial in considering whether the description of the suit is or is not one in which plaintiffs seek compensation for non-delivery of the goods. In this case I think there can be no doubt whatever that it is such a suit and that the case therefore falls under Art. 31, Lim. Act.

As regards the time from which limitation starts, the ordinary rule is that goods have to be delivered by a carrier within a reasonable time, and such time would at any rate not be later than December 1913, when according to the plaintiffs the cause of action arose. The suit should therefore have been brought at any rate before the end of 1914, but was in fact not instituted till May 1915. I must therefore hold the suit barred unless the plaintiffs show that they are saved by some acknowledgment falling within the scope of S. 19, Lim. Act. The plaintiffs rely on a letter from the District Traffic Superintendent at Karachi of 19th May 1914, Ex. 5, as an acknowledgment of liability operative under that section. In that letter he informs the plaintiffs that the action of the Station Master, Tando Adam, in giving delivery of the consignment to the Electrical Trading Company on the indemnity bond is perfectly correct and that he regrets he cannot entertain their claim which is

against the above firm and not against the railway.

Mr. Elphinstone contends that this is a sufficient acknowledgment having regard to the terms of Expl. (1) of the section, and he relies on the case of *Haji Nam Goolam Hossein v. Bombay and Persia Steam Navigation Co.* (3), as a somewhat similar case supporting this contention. He says that in that case there was an acknowledgment that 35 cases had been short delivered, i.e., 35 cases which ought to have been delivered, had not been delivered, and that that was held by the High Court to be a sufficient acknowledgment of liability. That however does not appear to me to be a correct statement of what led the learned Judges to hold that the acknowledgment in that case was a good one because there was in that case a distinct acknowledgment that the 35 cases in question ought to have been delivered to the plaintiffs, and there was also a re-offer of the cases in question to the plaintiff. That, it was said:

"Implied an acknowledgment of liability of the company to account to the plaintiff for the cases."

It is also quite clear that S. 19 itself requires that there should be an acknowledgment of liability in respect of the right claimed by the plaintiffs. In the present instance the letter relied on does not contain any acknowledgment of liability to account to the plaintiffs for the 3 cases in dispute but on the contrary, the letter denies such a liability and says that any claim the plaintiffs had was against the Trading Company and not against the Railway. I think therefore it is clear that there has been no acknowledgment of liability within the meaning of S. 19, Lim. Act. Nor has there been any acknowledgment of a state of facts, from which it is a necessary consequence that the defendants are liable to the plaintiffs. I hold therefore that this letter which was as shown by subsequent correspondence approved by the higher Railway authorities is not an acknowledgment of liability sufficient to save the bar of limitation otherwise arising under Art. 31, Lim. Act. The suit of the plaintiffs must therefore be dismissed with costs.

V.R./R.K.

Suit dismissed.

A. I. R. 1918 Sind 10

FAWCETT, A. J. C.

Khushiram Milkiram—Plaintiffs.

v.

Messrs. Ralli Brothers—Defendants.

Civil Suit No. 498 of 1915, Decided on 12th March 1918.

(a) Contract Act (9 of 1872), S. 118—Sale of cotton—Trade usage in Karachi—Breach of warranty—Claim as to allowance—Surveyor's report must be brought to manager before delivery—Surveyor's report is not binding on sellers.

There is a trade usage at Karachi by which, if an Indian buyer of cotton from a European firm wishes to claim an allowance, the surveyor's reports must be brought to the manager before delivery is taken, and the manager then has the option of accepting the award or refusing to do so and tendering other cotton in place of that for which an allowance has been awarded, provided this is done within the time specified for delivery. [P 11 C 1,2]

In the ordinary case of a buyer of produce from a European firm at Karachi the processes of drawing samples and their analyses are processes of which the performance rests with the purchaser in order to satisfy himself that the goods tendered for delivery are according to the contract and therefore the surveyor's report is not binding on the sellers, unless it is shown that they accepted it. [P 11 C 1]

(b) Evidence Act (1 of 1872), S. 115—Estoppel is only rule of evidence.

Estoppel is only a rule of evidence which precludes a person from denying the truth of some statement previously made by him or the conventional statement of facts upon the basis of which an agreement has been entered into. [P 12 C 1,2]

(c) Contract—Performance—Intention of party cannot be relied.

The intent of a party is necessarily uncertain as to its fulfilment and no person has a right to rely upon it. [P 12 C 2]

Harchandrai & Co.—for Plaintiffs.*T. G. Elphinston*—for Defendants.

Judgment.—The plaintiffs' firm of *Khushiram Milkiram* had purchased Sind ginned cotton from several merchants who gave them delivery orders on the defendants' firm of *Messrs. Ralli Brothers*. In the contracts Exs. 5 to 7, the quality of the cotton to be supplied by the sellers, *Messrs. Ralli Brothers*, is described as:

"Ginned Sind cotton in full pressed bales of the crop 1914-15 to be surveyed by a European cotton expert."

Cl. 7 also provides that "all other conditions" should be "as customary." Under the contracts delivery was to be made at seller's option at any time from 3rd to 25th July 1915. Defendants accordingly gave orders on 10th July 1915 for the delivery of the bulk of the cotton (Exs. 27 to 31). The remaining

order (Ex. 32) is dated 19th July 1915. They also on 14th July gave permission to plaintiffs to sample the cotton through the Bombay Company, whose manager Mr. Lang had been selected by the plaintiffs to survey the cotton (Ex. 33). Accordingly samples were drawn from six lots of cotton; and Mr. Lang on 16th and 17th July gave the survey reports Exs. 8 to 13, in which he awarded plaintiffs an allowance of from 4 to 8 annas per maund in respect of the various lots. The main dispute in this case is, whether the plaintiffs showed these reports to the defendants before taking delivery of the cotton which they did on 22nd to 24th July. Plaintiffs' case is that Mr. Lang was appointed by both the parties to select the cotton, and inspect the samples and that both parties are bound by his selection and report. On the other hand the defendants deny that the samples were drawn by the parties, and assert that Mr. Lang was appointed selector by the plaintiffs alone and that his report in no way binds the defendants. They also deny that the reports were shown to defendants' manager or any other authorized agent prior to the plaintiffs taking delivery, and plead that not having done so or claimed an allowance before taking delivery, the plaintiffs could not claim it afterwards. They further assert that by trade usage the survey report must be shown to the cotton manager before delivery is taken and that if he does not accept the allowance given, he has an option to re-tender other cotton in place of the cotton in respect of which the allowance has been made. The plaintiffs deny that the defendants have any such option to re-tender. Defendants also contend that in any case the amount due to the plaintiffs would be under Rs. 1,000 and that the suit should have been brought in the Small Cause Court. They accordingly claim that they are not in any event liable for costs. On these pleadings the following issues have been raised:

(1) Have plaintiffs right of suit against defendants? (2) Are the merchants who contracted to purchase from defendants necessary parties? (3) Was Lang appointed by the plaintiffs only or by both parties and is his report binding on defendants? (4) Had defendants, in any case, option to re-tender other goods?

(5) Was Lang's report presented to defendants before delivery and can the allowance now be claimed after delivery of the goods has been taken from defendants? Is not such a claim barred by estoppel? (6) General issue with particular reference to interest and costs.

The first two issues were dropped by Mr. Elphinstone for defendants. On issue 5 it is admitted the Mr. Lang was appointed by the plaintiffs and was paid by them. No doubt this was with the concurrence of the defendants but they could not object, as he was a "European cotton expert." The evidence also shows that the samples were drawn, as usual, by a man of the Bombay Company, and even if one of Ralli's men was then present (as Sugnasing says was the case), this hardly constitutes them "samples drawn by the parties" as they are described in the reports Exs. 8 to 13. Of course in one sense Mr. Lang may be said to have been in the position of an arbitrator (Cf. Halsbury's Laws of England Vol. 3, Art. 415, p. 200) for his duty was to give a fair opinion without favouring either party: but it is quite clear that he was not an arbitrator deciding a dispute between the parties and able to bind them by his award. An instance of this latter kind, in which an allowance was awarded, will be found in *Ruttonsey Rowji v. Bombay United Spinning & Manufacturing Co., Ltd.* (1). The present case is quite different, being the ordinary one of a buyer of produce from a European firm in Karachi, where as held in *Firm of Motumal v. Firm of Ruttanji* (2) and *Firm of Ruttonji Burjorji v. Firm of Motumal Bhagchand* (3) the processes of drawing samples and their analyses are processes of which the performance rests with the purchaser in order to satisfy himself that the goods tendered for delivery are according to the contract. I hold therefore that Mr. Lang's reports are not binding on the defendants, unless it is shown that they accepted them.

Issues 4 and 5 can conveniently be taken together. Defendants allege a trade usage by which, if an Indian buyer of cotton from a European firm wishes to claim an allowance, the surveyor's reports must be brought to the manager

before delivery is taken, and the manager then has the option of accepting the award or refusing to do so and tendering other cotton in place of that for which an allowance has been awarded, provided this is done within the time specified for delivery. In my opinion this trade usage is established by defendants' uncontradicted evidence on the subject. It is true that it was only adopted in the case of sales of cotton to Indian buyers, for the first time in the season 1911-15 (Ex. 52.) But this is because prior thereto the European firms in such cases used to sell cotton on their own (i. e., seller's) selection and not as now on buyer's selection.

In the case of other commodities the same system of a survey by a European expert has been in force for very long and the trade usage in question was merely extended to cotton in 1911-15. It has therefore acquired such notoriety as to make it a valid usage which should be taken to form part of the contract. Plaintiffs' manager Asardas and his man Sugnasing admit they were aware of a custom under which they had to take the surveyor's reports to the office of the European firm before taking delivery: and it is proved that plaintiffs did so in a previous case in June 1915 (Exs. 47 to 51). No doubt the date on which the award Ex. 47 was taken to the defendants is not expressly shown: but there is the strongest presumption that it was prior to the taking of delivery. This corroborates the allegation as to trade usage for the object of taking the reports to the office before taking delivery is clearly to give an opportunity to the office of accepting or refusing the claim to an allowance. And it is reasonable that they should have such an opportunity prior to giving delivery. Under S. 118, Contract Act, the buyer in such a case has a right either to accept the goods tendered though of inferior quality, or to refuse them and unless there is something to the contrary in the contract, he cannot be compelled to take the goods with an allowance for inferiority in quality (Cf. Pollock and Mulla's Contract Act Edn. 3, p. 445). In these circumstances it would be unreasonable that the European firm should be compelled to let the buyer take delivery of the goods, though the firm considers the surveyor's allowance excessive, and has other goods available for tender, in place of the surveyed goods,

(1) [1917] 41 Bom. 518=37 I. C. 271.

(2) [1914] 7 S. L. R. 141=24 I. C. 265.

(3) [1916] 9 S. L. R. 160=32 I. C. 720.

within the time fixed for delivery. The usage is also a legal one for it is quite consistent with S. 118, Contract Act. The last clause of that section lays down that if the buyer accepts the goods and intends to claim compensation for loss caused by breach of warranty, he must give notice of his intention to do so within a reasonable time after discovering the breach of the warranty. What is a reasonable time is a question of fact (Cf. Pollock and Mulla, *ib.* p. 421); and in cases of the kind it clearly must be held to be a time shortly after the buyer gets the survey reports and before he takes delivery, so as to enable the seller to consider the awards and decide what action to take on them. Even however if the usage were inconsistent with S. 118, this would not necessarily affect its validity, see *Irrawaddy Fictilla Co. v. Bugwandas* (4). In such a case of course the acceptance of, or rather the offer to accept, the tendered goods by the buyer is conditional on the allowance awarded by the surveyor being given him by the seller. Similarly the tender of the goods by the seller is, so far as regards the seller's liability to give the allowance awarded by the surveyor, conditional on his receiving notice of the buyer's intention to claim the allowance within the time aforesaid and subject to the option to re-tender. In other words, any implied promise of the seller to give the allowance on the goods tendered is conditional on a reciprocal promise of the buyer to claim that allowance within a reasonable time after he gets the survey reports and before he takes delivery; and the case falls under the general rule that

"the non-performance of a promise which is a condition precedent releases the other party from his obligation to perform the contract;" Halsbury's Law of England, Vol. 7, Art. 898 at p. 434 and Pollock and Mulla, p. 248.

In any case if the plaintiffs did not give notice of their intention to claim the allowance or other compensation "within a reasonable time after discovering the breach of the warranty,"

they are not entitled to claim the allowance under S. 118, Contract Act. It is therefore unnecessary to fall back on the doctrine of estoppel, which seems to be inapplicable here. An estoppel is only a rule of evidence which precludes a person from denying the truth of some statement previously made by him or the con-

ventional statement of facts upon the basis of which an agreement has been entered into (Woodroffe and Amir Ali's Law of Evidence, Edn. 6, p. 761). Here there may have been a representation by plaintiffs that they had accepted the goods without any intention to claim an allowance on them, but even so this cannot be the basis of an estoppel, for the intent of a party is necessarily uncertain as to its fulfilment and no person has a right to rely on it; see Woodroffe and Ameer Ali, p. 788, foot-note (5), and *Jethabhai v. Nathabhai* (5). One point may be briefly noticed in this connexion. Mr. Lang in his evidence says:

"If I knew the goods had been surveyed, I think I would inquire as to the result before tendering the goods or allowing delivery to be taken. If the buyer has taken delivery orders, he can go and get the cotton from the godown at any time without reference to me; but if the buyer has taken samples, the godown keeper would not in the ordinary course allow him to take delivery without further orders from the office."

Mr. Anastasiadi, the defendants' cotton manager, on the other hand, says that no steps are taken to ascertain what the surveyor's report is before delivery of any lot is given, and that, unless the buyer brings the award to the office, they take it for granted he is satisfied with the goods tendered. This is obviously the course which a firm with large transactions would naturally adopt in order to facilitate business; and it is perfectly legal, as the law places the obligation on the buyer to give notice of his intention to claim compensation for breach of warranty. I hold therefore that the defendants had an option to re-tender other goods (issue 4), and that unless plaintiffs presented Mr. Lang's reports to defendants before taking delivery, the allowance cannot be claimed under S. 118, Contract Act, or under the terms of the contract between the parties (issue 5). The case thus resolves itself into a simple issue of fact, whether plaintiffs presented the reports to the defendants before delivery. On this point, Sugnasing says that he took the reports to Ralli's office and there showed them to the bill clerk, who directed him to take delivery. But this is opposed to the evidence of the bill clerk in question, Mr. Rodrigues, who asserts that to the best of his memory these reports were never brought to him till Sugnasing came on 2nd August

1915 to make up the bill, and if they had been brought before, he would have at once told him to go and settle the allowance question with the cotton manager before taking delivery.

Sugnasing's allegation is also clearly opposed to the probabilities of the case. Mr. Anastasiadi's evidence and the various survey reports on the record show that it is his practice to endorse on the reports, when presented to him, a note as to whether they are accepted or whether they are refused and a re-tender should be made. In accordance with this practice the presumption is that if the reports had been taken to the office before delivery, an endorsement of the kind would have been made on them. But admittedly no such endorsement was made before delivery was taken; and the evidence of Rodrigues is corroborated by the fact that when the report was brought to him on 2nd August, he referred Sugnasing to the manager and an endorsement of this kind was made by Mr. Anastasiadi in apparent ignorance of the fact that delivery of the goods had already been taken. Similarly it is contrary to the probabilities that, if (as the plaintiffs' manager Asardas and Sugnasing allege) the survey reports were taken to the defendants' godown at the Thole Yard and shown there to the godown superintendent without any such endorsement on them, he would have allowed delivery to be taken. Mr. Anastasiadi on the 2nd August on discovering the mistake at once wrote to the plaintiffs stating that the remarks made on the reports had been put on them by mistake, and it is noticeable that the plaintiffs' pleaders did not assert that the reports had been brought to the office before delivery was taken till 7th August 1915 (Ex. 17). Asardas and Sugnasing have a strong motive for saying that the reports were actually presented before delivery, and their assertion on this point must be treated with considerable caution. I have no hesitation in believing the evidence of Mr. Anastasiadi, which is supported by the probabilities, that as a matter of fact they were never shown to him until 2nd August, after delivery had been taken. I also feel no doubt whatever that plaintiffs' man Sugnasing has antedated the presentation of the reports to the bill clerk Rodrigues, and that they were

never shown to him until 2nd August. Whether this was done deliberately or through an oversight, it is unnecessary to enquire. I therefore answer the first part of issue 5 in the negative and hold that plaintiffs are not entitled to the allowances claimed in the plaint.

Regarding the general issue no attempt has been made to show that the account of what is due to the plaintiffs contained in the bills (Exs. 54 to 59) and Ex. 63 is incorrect, and I see no reason to suppose that the correct amount due to the plaintiffs apart from the allowance claimed in the suit is Rs. 273.61, as shown in Ex. 63. This amount was deposited in Court on 10th March 1916. There was apparently some misunderstanding which led to this sum not being paid earlier to the plaintiffs, and it seems to me that this was mainly due to the Head Clerk, Mr. Derozi, who refused to allow plaintiffs to give a receipt which would expressly prevent their being prejudiced thereby in regard to their claim for allowances. I think defendant should pay interest at six per cent. per annum on this amount from date of suit, namely, 7th December 1915, up to the date of deposit in Court, namely, 10th March 1916. On the other hand, it appears clear that plaintiffs have deliberately exaggerated the amount due to them, even claiming interest at 9 per cent. instead of the usual rate, so as to bring their claim within the jurisdiction of this Court instead of that of the Small Cause Court. Taking this into consideration as well as the lies told by Sugnasing and Asardas, I order that plaintiff should pay the defendants' costs on the whole amount claimed as between pleader and client. The suit is dismissed with costs accordingly, except in regard to the sum of Rs. 273.61 and interest thereon allowed above.

V.R./R.K. *Suit partly decreed.*

A. I. R. 1918 Sind 13

FAWCETT, A. J. C.

Ramchand Gurdasmal and another—
Plaintiffs.

v.

Gobindram Gurdasmal and others—
Defendants.

Civil Suit No. 330 of 1913, Decided on 11th July 1916.

(a) Arbitration — Validity — Award not stamped—Validity is not affected.

The fact that an award duly signed by the arbitrators is not stamped, does not affect its original validity. [P 14 C 2]

(b) Arbitration—Valid award extinguishes original cause of action.

A valid award ordinarily operates to merge and extinguish all claims raised in the submission, and after the award has been made the submission and the award are the only basis by which the rights of the parties are governed and constitute a bar to any action on the original cause of action. [P 14 C 2]

(c) Arbitration—Award—Burden of proof is on party objecting to.

Where a party contests the validity of an award the onus is on him to prove that the award is bad. [P 14 C 2]

(d) Arbitration — Agreement authorizing arbitrators to give award in any way they like—Award is binding on parties.

An agreement to recognize any award the arbitrators might make, even though it is beyond the scope of the disputes mentioned in the reference is binding on the parties to the reference. [P 16 C 1]

(e) Arbitration—Reference to—Partition of joint family property.

The ordinary rule that as the submission only refers to the arbitrator the question between the parties, the moment he touches the interests of a stranger his authority and his award are void, can have no application to cases of partition of joint family property. [P 17 C 2]

(f) Arbitration—Validity—Agreement authorizing arbitrators liberty to get information from one or all—Award ex parte—Award cannot be objected.

Where the parties by their conduct and by the terms of the reference show that the arbitrators are at liberty to get information from one or all of them without there being necessarily a formal meeting with all the three parties present, it is not open a party to object to the award that it was passed ex parte and without just cause. [P 18 C 1, 2]

(g) Arbitration — Agreement authorizing arbitrators to arrive at a decision in whatever way they like—Unsigned will can be regarded as a genuine and valid document.

Where arbitrators are expressly authorized to proceed with or without making inquiries, and to arrive at a decision in whatever way they like, it is open to them to take into consideration a document purporting to be the draft of a will unsigned by the testator and to regard it as a genuine and valid document. [P 20 C 1, 2]

(h) Arbitration—Award — Objection to—Decree inconsistent with plaintiff cannot be given.

A party who seeks to upset an award, and who fails to do so, cannot claim a decree on a ground which is quite inconsistent with his plea. [P 21 C 1, 2]

Tolasing Khushalsing—for Plaintiff.
Isardas Oodharam and Tahilram Maniram—for Defendants.

Judgment.—The plaintiff Ramchand Gurdasmal sues his two brothers Gobindram and Goverdhandas for partition of

joint family property left by their deceased father and separate possession of a one-third share. The suit was instituted on 2nd September 1913. The defendants plead that the suit is barred by an award, dated 4th September 1913, which was passed by the three arbitrators to whom the parties had made a written reference, dated 24th April 1913. In para. 3 (b) of the amended plaintiff, plaintiff contends that this award is void or voidable on certain grounds there stated. On these pleadings the following issues have been raised? (1) Is the suit barred by reference or award if any between the parties? 1 (a) Is the award void or voidable, as alleged in para. 3-B of the plaintiff? 1 (b) Is the suit maintainable in the present form in view of the alleged agreement set up in para. 3 (b) of the plaintiff? The award in question (Ex. 37) has been duly proved and the defect of want of stamp is now cured. The document was signed by three arbitrators, and even if it was intended to be fair copied on to a stamped paper, it does not affect its original validity; cf. *Nagabushanam v. Seshachalam* (1). Unless this award is bad for misconduct on the part of the arbitrators or other sufficient cause, it bars the suit. For as held in the case of *Ramchand v. Kodumal* (2), a valid award ordinarily operates to merge and extinguish all claims raised in the submission, and after the award has been made, the submission and the award are the only basis by which the rights of the parties are governed and constitute a bar to any action on the original cause of action. The onus is therefore on the plaintiff to show the award is bad on account of any of the objections that have been raised in para. 3 (b) of the amended plaintiff.

The first objection taken is that the award was passed more than three months after the reference was entered upon. This objection avails only if the Arbitration Act of 1899 applies. The reference was signed by the plaintiff and defendant 1 at Shikarpur and by defendant 2 at Sukkur, at which places the arbitrators reside or work; and there is nothing to show that the parties contemplated the Act being applicable. At the same time I can see no answer to the contention that the case does fall under S. 2, Arbitration Act for one of

(1) [1862-63] 1 M. H. C. R. 178.

(2) [1912] 5 S. L. R. 240=15 I. C. 819.

the properties in suit is situated in Karachi, and a suit in regard to the subject-matter submitted to arbitration could be, and actually has been, filed at Karachi. I think therefore that the provisions of the Arbitration Act must be held applicable to the reference in question.

But it is proved that the reference was not signed by defendant 2 till after 24th April. Virumal in his first deposition says that it was a month or two later, and in answer to interrogatory No. 2 says it was about two months after. This latter statement is confirmed by the plaintiff's letter (Ex. 29) where plaintiff, writing on 26th July 1913, says it is "from the last five weeks that you have collected signatures from Govardhan." It seems to me therefore probable that defendant 4 did not sign this reference till some time towards the middle or end of June. There is no precise evidence as to the date when the arbitrators entered on the reference, but it would in the ordinary circumstances certainly be after defendant 2's signing the reference. Again the only meeting referred to in the award is one of 27th August and the correspondence, Exs. 28, 30 and 41, points to nothing much having been done till August. Even assuming that the arbitrators entered on the reference immediately after defendant 2 signed, it is not proved that three months had elapsed from then to 4th September 1913. And in any case under the provisions of the Arbitration Act this Court can extend the time so as to prevent this objection being fatal: see the case of *Haridas v. Ootomal* (3). If, on the other hand, the reference falls under the ordinary common law, then all that is required is that the award should be within a reasonable time, and this requirement was, in my opinion, satisfied in this case. I therefore hold that this objection has failed.

The second objection is that the award was passed after the power of the arbitrators had been validly revoked. If the Arbitration Act applies to the reference, then S. 5 of the Act bars this plea. Otherwise admittedly the plaintiff could not revoke the reference unless for "just cause." In this case the only cause alleged is the plaintiff's complaint of the arbitrators' delay in making an award, as

appears from his letter, Ex. 29. But there can be no doubt that there was no unreasonable delay in this particular case. As already pointed out, even the three months allowed by the Arbitration Act had not expired before the award was signed and there was certainly no such delay as would justify the revocation of the plaintiff's authorization to the arbitrators given in the reference of 24th April 1913.

Defendants contend that in any case there was a waiver of this revocation by the plaintiff's conduct in attending the meeting of the arbitrators on the 27th August. According to all the three arbitrators, he attended the meeting, answered questions put to him, and showed no unwillingness for the arbitration to proceed. The plaintiff in his evidence, on the other hand, first of all said that he only went to Shikarpur on the 27th August in order personally to tell the arbitrators that they could not act. In addition to his having informed them of his revocation by notice. In his examination a week or so later he makes a material change and says that the reason he went was to ask the arbitrators Shivadas and Dwarkadas to show him the document which is referred to in these proceedings as the "will." Now in his previous cross-examination he had said that he did not then know of the existence of this will and his explanation of this glaring discrepancy is, I think, a lame one. Plaintiff further admits that he went to Shikarpur on the 27th August in response to a telegram sent by the arbitrators asking him to attend on that date. He also admits that on the 27th August he went with the arbitrator Virumal to the pleader Mr. Sakhawatrai, as stated in Virumal's deposition. In these circumstances, I think, there can be no reasonable doubt that he went to Shikarpur not with any such particular purpose as he alleges, but in response to the telegram already mentioned in order to attend the meeting of the arbitrators. The plaintiff's deposition and his demeanour in Court convince me that he does not hesitate to lie when he thinks it suits his purpose, and that his testimony cannot be relied on. I have no hesitation in preferring the evidence of the arbitrators as to his actually attending such a meeting, though there are no doubt some discrepancies in their evidence as to the

(3) [1912] 6 S. L. R. 89=16 I. C. 861.

duration and time of that meeting, and the arbitrator Virumal probably exaggerates the time it lasted. The evidence of the arbitrators that enquiries were made of the plaintiff at this meeting is corroborated by various recitals in the award as to the admission by the plaintiff regarding various amounts, etc. I hold therefore that the plaintiff did attend such a meeting and (if it were necessary) I think the defendants could rely on his conduct in doing so as amounting to waiver of his revocation of the authority given by him to the arbitrators in the reference. This objection therefore in my opinion also fails. I now come to the 3rd objection, namely, that the award is in excess of the reference. On this point defendants rely on the conditions in the reference that

"whatever decisions regarding the above mentioned contentions or the disputes raised personally by the parties the arbitrators arrive at with or without taking any evidence shall be binding upon us. We will not raise obstacles of any kind, whether written or verbal, in the way of decision by the arbitrators. But any obstacle thus raised by any party concerned should be considered as null and void."

This is no doubt an agreement to recognize any award the arbitrators might make, even though it might be beyond the scope of the disputes mentioned in the reference, and there is authority for holding that such an agreement is binding on the parties to a reference. Thus according to English law, as summarized in Halsbury's Laws of England, Vol. 1, Art. 996:

"it would seem that parties may by their submission agree that neither of them will set aside the award on grounds of misconduct by the arbitrators,"

and in the case of *Cursetji v. Crowder* (4) Farran, J., recognized that the parties might agree that a reference may be conducted in any particular way, and to waive their objection to an irregular course of conduct on the part of the arbitrator. On the other hand in the case of *Hurdwary Mull v. Ahmed Musaji* (5) Fletcher, J., held that it was not competent for the parties by an agreement to oust the jurisdiction of the Court, vested in it by S. 14, Arbitration Act of 1899, to set aside an award, if misconduct on the part of the arbitrators were shown or if it were shown that the award was improperly procured, when

the parties desire that the award should be enforced under the provisions of the Act. No full grounds are given for this decision, and it could not of course apply in cases where the agreement not to dispute an award operates as an estoppel. This case is also distinguishable, because here it is not a question of any of the parties desiring to enforce the award under the provisions of the Arbitration Act and the Court is not considering the award under the special provisions of S. 14 of the Act. In *Basrio Fuddoo v. Mahomed Ladha* (6), which was a case under the Arbitration Act, an agreement that the arbitrators might decide the disputes without hearing the parties or their witnesses, was held to be valid. I think therefore that the defendants are entitled to rely on this agreement as barring this objection. But as this view may not be taken in appeal, I think it best to consider the objections raised under this particular head on their merits.

The first contention is that the arbitrators had no jurisdiction to award the plaintiff 1/4th share in certain joint family properties instead of 1/3rd share. This assumes that in the reference the defendants admitted plaintiff's right to 1/3rd in all the joint property. But, in my opinion, this is a presumption that is not justifiable. Defendant 1 merely denies that plaintiff is entitled to 1/4th share without saying how exactly the property should be divided between the parties. Defendant 2 no doubt says that after getting an allowance for certain things the remaining property should be divided in three equal shares. But this does not, in my opinion, tie the arbitrators down to give the plaintiff at least 1/3rd. Both the defendants refer to further rights which were to be explained personally to the arbitrators, and by the terms of the reference the latter are appointed "for the final settlement of the disputes existing between (the parties)." The plaintiff himself claimed more than 1/3rd share and this claim was disputed by the defendants. The amount of his share was therefore referred to arbitrators without any limitation as to the amount of his minimum share. In support of this construction, reference may be made to the plaintiff's own letter, Ex. 41, in which he says :

(4) [1891] 18 Bom. 299.

(5) [1909] 1 I. C. 371.

(6) [1913] 7 S.-L. R. 113=24 I. C. 264.

"I have all the time left the matter entirely in the hands of arbitrators at their discretion whether to allow me an inch or no from the property."

In his deposition he attempts to explain this way by saying this was ironical. It is no doubt very likely that the passage preceding this particular sentence, in which he says "he was very pleased to see the arbitrators acting to the satisfaction of his brothers," was meant to be ironical; but this particular sentence is a separate one put by plaintiff under a separate heading marked 3, and to my mind it does not read as if it was intended to be otherwise than a serious statement. The reference also gives authority to the arbitrators to decide not only about the contentions expressly stated therein but also the disputes that might be placed before them by the parties orally. Such disputes would undoubtedly cover for instance defendants' contention in para. 4 of their written statement that

"plaintiff is in possession of a hardware shop and cash to the extent of Rs. 20,000 which is a part of the property liable to be partitioned and which should be brought into hotchpot."

This contention would appear also to have been raised before the arbitrators, for Virumad in his evidence mentions that he tried to persuade the plaintiff to give an account of his earnings but the plaintiff refused. And this also is stated in the arbitrators' award. The award shows that it was largely in consequence of this refusal of plaintiff that his share has been reduced and I think defendant 2's admission that the plaintiff was entitled to 1/3rd share was clearly based on the understanding that all the joint property should be brought into hotchpot and that any other construction of it would be unreasonable. If it was intended by the parties that this question of the plaintiff's separate earnings was to be excluded from the scope of the reference it should have been clearly expressed in it. As it is I hold that the arbitrators had authority to decide as they did, that plaintiff's separate earnings constituted joint property as they might be under Hindu law, if they were obtained with the aid of the joint family property: and even if the arbitrators erred in this finding it does not vitiate their award. This disposes of the objection that the arbitrators were not justified in awarding plaintiff less than a

1/3rd share and the further objection that they went beyond the scope of the reference in treating plaintiff's separate earnings as joint family property.

Under this head it is also urged that the arbitrators had no jurisdiction to hold that the Karachi immovable property was not joint family property and that the plaintiff was not entitled to a share in it. But the arbitrators in their award did not say that it was not joint family property but that it was acquired by Gurbomal from his self-acquired earnings and exclusively belonged to him. In the hands of the sons it might, in the absence of a devise of the property by Will as to which: see *Jugmohandas v. Mangaldas* (7) and *Parsotam Rao v. Janki Bai* (8), constitute joint family property though not ancestral: see *Mulla's Hindu Law*, Edn. 2, pp. 176 and 177. In any case there is nothing in the reference which barred them in holding that it was not joint family property. And Mr. Isardas in this connexion points out that even in the plaintiff's contentions as set forth in the reference the word "ancestral" is qualified by "etc." This objection in my opinion therefore also fails.

The last contention under this heading is that the arbitrators went beyond their jurisdiction by deciding points relating to strangers to the reference. No doubt the ordinary rule is that as the submission only refers to the arbitrator the question between the parties the moment he touches the interests of strangers he exceeds his authority and his award is void. But this strict rule of English Law obviously cannot be applied in partition cases like this, and the reference clearly referred the question of maintenance allowances and of marriage and shraddh ceremony expenses to the arbitrators. The plaintiff himself in his contentions refers to the question of presents given to sisters, etc., and marriage and shraddh expenses as among those to be settled, and he is almost necessarily estopped from raising the plea like the present one. Unless such questions were settled there would be no final settlement of the disputes and the defendants presumably would not have agreed to the arbitration. I hold therefore that the objection that the award is bad for ex-

(7) [1886] 10 Bom. 528.

(8) [1907] 29 All. 244.

ceeding the scope of the reference is not substantiated.

The next objection raised is that the award has been passed after the institution of the suit. On this point it is sufficient to refer to the case of *Sawyer v. Louis Dreyfus & Co.* (9), where it was held that S. 14, Arbitration Act, does not apply to a case like the present.

Then it is said that the award has been passed ex parte without "just cause". As already remarked the reference is very wide and it includes terms approving the decision of the arbitrators even if it be made without enquiries and in any way they liked. This is very natural as the arbitrators were old friends of the family of 20 or 30 years standing, as plaintiff himself admits in his letter Ex. 41. They already knew the main facts giving rise to the controversy, and I think it is quite clear that the parties never intended them to act with the formality and strictness applicable in cases where the arbitrator is a stranger who knows nothing about the dispute. Plaintiff himself privately corresponded with the arbitrators regarding the dispute, and the parties by their conduct and by the terms of the reference show that the arbitrators were at liberty to get information from one or all of them without there being necessarily a formal meeting with all the three parties present. This is confirmed by Exs. 28 and 41. In Ex. 28 Virumal mentions that:

"it was only the other day that Goverdhan's representatives came to tell us all about Goverdhan's claim".

In his reply in Ex. 41 plaintiff writes, "for my part everybody has clear monopoly to act ex parte." In his deposition plaintiff admits that this para. 11 in Ex. 41 does express his view of the matter, at any rate, prior to his revocation of the reference. In this case the only formal meeting appears to have been that of the 27th August, when the plaintiff, as I have already held, was present, and in my opinion the plea that the arbitrators improperly acted ex parte is not established. I now take up the objection that the award has been based on the alleged will of Gurdasmal which was neither produced nor proved before the arbitrators, and when the parties had agreed to divide the property debors the said alleged will. This seems to me to be the plaintiff's

main grievance and is a more substantial objection than the others. The document referred to is a draft will, which the deceased father of the plaintiff got drawn up for him about a year before his death, but which he never signed. It was found after his death, in a box containing this and other documents which the deceased used to keep at the otak of the arbitrator Seth Shivaldas. The latter, in explanation of the document not being signed, says that the deceased told him that he intended to consult a pleader by name Shivaldas and one or two other friends about it, and the arbitrator Dwarkadas confirms this statement. Shivaldas' evidence regarding this will is corroborated by his letter, Ex. 39, and is in my opinion reliable. The plaintiff's pleader admits for the purpose of arguments that as the case stands, the document should be held to be a genuine draft will prepared by the deceased in the manner stated by Shivaldas. And even if any dispute can be raised regarding the genuineness of the document in question, it is clear that the surrounding circumstances at any rate justify the arbitrators in treating it as a genuine document, and that they had substantial grounds for believing what Shivaldas has stated in the matter. The objection urges that this will was neither produced nor proved before the arbitrators.

It was however certainly produced before them. Virumal says that it was shown to him at Seth Shivaldas' otak and he is corroborated in this by his letter, Ex. 28, in which he mentions having read the document in question. Shivaldas, as already mentioned, knew of its existence before. The 3rd arbitrator Dwarkadas no doubt says that he saw it for the first time when the award was written. But at the same time he says that he knew of its existence and that Shivaldas might have told him its contents before that. Its existence is also proved to have been known to the parties to the reference. Plaintiff at first denied having had any knowledge of it, but when his attention was drawn to Exs. 38—40, he had to admit that he had heard about it. As regards the question of its being placed before the arbitrators, it is to be noted that S. 6, Evidence Act, does not apply to the case, for under S. 1, Evidence Act, the provisions of that Act, do not apply to proceedings, before an

arbitrator, in this respect differing from the English law which holds that arbitrators are bound by the same rules of evidence as Courts of law: see *Enoch & Zaretsky, In re* (10). The arbitrators were therefore clearly justified in treating the will as a genuine document. The objection further says that the parties had agreed to divide the property debors the said alleged will, but no evidence has been adduced as to any such agreement, nor has it been relied on in argument.

All that was contended was that the will was not mentioned in the reference and therefore it must be deemed to be excluded. As to this it is sufficient to say that no particular documents nor any restrictions in the matter of evidence are mentioned in the reference. On the contrary the reference contains an expressed authorization to the arbitrators to proceed with or without making inquiries and to arrive at a decision in whatever way they liked: and in view of this, this contention clearly fails. It is not a case where there was any clear necessity to refer to the will at all, and the omission to do so does not, in my opinion, justify the inference that the parties intended it to be excluded from consideration. The objection is therefore reduced to the question whether the arbitrators were justified in taking this document in consideration. Now no doubt it is the law that, though the Evidence Act, does not apply to proceedings before an arbitrator, yet the latter must not receive and act upon evidence or decide upon grounds which would render his award utterly unfair or worthless. Also as stated in the case of *Cursetji v. Crowder* (4) it is a well-established principle of law that an arbitrator ought not to hear or receive evidence from one side in the absence of the other side, without if he does giving the side affected by such evidence the opportunity of meeting and answering it.

A good illustration of this is contained in that case. There the arbitrator had received certain papers and documents from the defendants in a suit referred to his arbitration, together with a letter from the defendants containing some comments on the documents sent to him, and made his award without giving the

plaintiffs any opportunity of seeing the said papers and documents and of meeting the inferences deducible from them. The papers in question were documents which referred to particulars of ruling rates of coal p. 312 (of 18 *Bom.*) that were in dispute and affected the arbitrator's decision. It was consequently held that there was such a breach of duty on the part of the arbitrator as entitled the plaintiffs to have the award set aside. A recent instance of another kind is contained in the case of *W. Ford Baker & Co. v. Masfie* (11). In that case a contract for the sale of sugar contained no provision for the suspension of deliveries.

"If the production by the sellers was prevented or lessened by causes beyond their control."

nor any similar clause. Owing to a cause beyond their control, the production by the sellers was "prevented or lessened," and they suspended delivery. Dispute having arisen, recourse was had to arbitration. A former contract between the parties containing such a suspension clause as the above was produced to the arbitrator by the sellers. The arbitrator made an award simply that "the sellers are entitled to suspend delivery under this contract." The Court was satisfied that, in making this award, the arbitrator was influenced by the terms of the earlier contract. On this it was held that the award must be set aside, the arbitrator having been guilty of legal misconduct, inasmuch as he had, in making the award, looked to a document other than the contract, which was the only matter before him, or, in other words, he, allowed to be given, and had acted upon evidence which was wholly inadmissible, and which went to the root of the question submitted to him for decision. But the present case is quite a different one. Even if plaintiff did not know the arbitrators contemplated taking this will into consideration and was given no opportunity of being heard against it, this would not necessarily prejudice him. The document was not one which he could seriously contest, in the sense of showing it was not genuine or its contents untrue. All that he could urge would be that it was unjust or had no legal validity. But he clearly had an opportunity to raise

(10) [1910] 1 K. B. 327.

(11) [1915] 84 L. J. K. B. 2221.

these pleas, and in fact appears to have done so. Even before the reference he was in communication with Shivaldas as to the document prejudicing, or (as he puts it) "deviating" his rights (Ex. 38); and in his final story of what happened on the 27th he says the arbitrators themselves told him that there was no will, but only a rough unsigned document which was not genuine and that could not be relied on.

This of course is an obvious lie, but it corroborates the evidence of Shivaldas that the will was referred to at the meeting of 27th August, though he is not supported by the other arbitrators in his statement, that it was actually produced and inspected during that meeting. It was not necessary to produce it as the general tenor of its contents was, I think, undoubtedly known to the arbitrators and parties. In his letter, Ex. 39, Shivaldas offered to show the document to the plaintiff, and it is very unlikely that the plaintiff did not go and see it when he was at Shikarpur later on during that month about the time he signed the reference. Shivaldas no doubt in his evidence says that he cannot say whether the plaintiff knew of this will before 27th August, but his memory is obviously faulty as shown by Exs. 38-40. I hold on the evidence that the plaintiff knew of the will and its contents, and had had an adequate opportunity of meeting and answering it, and in my opinion there was nothing improper in the arbitrators taking it into consideration. It was a document which was clearly reliable as evidencing what the deceased father, at any rate shortly before his death, thought should be arranged about the division of the family property between his sons, and presumably he would be in the best position to judge fairly in the matter. According to Hindu law, in cases like this not governed by the Hindu Wills Act or Succession Act, it is not necessary that a written will should be signed or attested, and *prima facie* it had therefore greater validity than a similar document would in English Law. At the same time I do not mean by this to prejudice the decision of issue 7, for, as stated in the case of *Vinayak v. Govindram* (12), in order to make it a valid will it is necessary to be shown that the document is a complete

(12) [1870] 6 B. H. C. R. 224.

instrument and expressed the deliberate intention of the testator. All I decide^t present is that the arbitrators could take it into consideration and they did not act improperly or unjustly in doing so. I hold therefore that this objection is also invalid.

The further objections taken in para. 3 (b) of the amended plaint that the award is written on an unstamped paper, and that the award was not made on the date on which it is alleged to have been made, are not now pressed. The only other objection taken in the arguments is that the award is invalid as being incomplete, in that it does not make any actual partition between the parties. This objection is not included amongst those mentioned in para. 3 (b) of the plaint, but it can be taken as covered by the words "inter alia" in that paragraph. As ruled by the Privy Council in the case of *Makund Ram Sukal v. Salig Ram* (13), the ground for holding an award to be invalid on account of its not disposing of all the matters referred appears to be that there is an implied condition in the submission of the parties to the arbitration that the award shall dispose of them all. But here there is no such condition implied or expressed in the reference, for as there stated, the main object of the reference was to finally settle the disputes between the parties. No doubt it is the case that the plaintiff asks that he should get his share separately, but there is no express or implied indication that the arbitrators were expected actually to partition the whole property by metes and bounds. This would in fact appear impossible for them to have done in the case of the immovable property at Shikarpur, in which the parties' cousins had shares, so the presumption is against any such intention. The case is also quite different from that of *Ghulam Hussein v. Sakinabai* (14), where the subject matter referred was a suit that had been filed for partition and possession. In that case it was of course a necessary consequence that there should be an actual partition by metes and bounds. But here a division by a declaration of shares was quite sufficient for a settlement of the disputes between the parties, and no actual division by metes and

(13) [1894] 21 Cal. 590=21 I. A. 47 (P. C.).

(14) [1913] 6 S. L. R. 146=19 I. C. 374.

bounds was necessary. As ruled in the case of *Bhaurao v. Radhabai* (15), in cases where an award directs partition to be effected, it dissolves the joint family and from the moment of its date it severs their interests.

This completes the consideration of the objections raised to the award, and for the reasons given above I answer issue I-A in the negative. It follows that under issue I the suit must be held barred by the award. It is not necessary to decide issue I-B.

After the above judgment had been delivered, Mr. Rupchand for the plaintiff claimed that the suit should not be dismissed, but that the plaintiff was entitled to a preliminary decree for partition, on the basis of the award. He argues that as the suit was filed before the award was made, the case should be treated as if the suit had been compromised, where a decree issues in terms of the compromise.

The matter must however be considered with reference to the amended plaintiff, which affords the only basis on which plaintiff's suit was allowed to proceed. In this amended plaintiff, he seeks to upset the award, and now that he has failed in that he cannot claim a decree on a ground which is quite inconsistent with his plaintiff, in which he contends the award is invalid: cf. *Vinayak v. Govindray* (12).

This view has the authority of the Privy Council to support it. The case of *Eshwanchunder Singh v. Shamachurn Bhatto* (16) decides that

"the determinations in a cause should be founded upon a case either to be found in the pleadings, or involved in or consistent with the case thereby made"

and that

"the state of facts, and the equities and ground of relief originally alleged and pleaded by the plaintiff are not to be departed from."

In accordance with this principle, there are numerous rulings to the effect that a plaintiff cannot be allowed to abandon his own case, adopt that of the defendant, and claim relief on that footing: cf. *Shibkrishna Sircar v. Abdul Hakeem* (17), *Mylapore Iyasawmy v. Yeo Kay* (18), *Balmukund Kesuridas v. Bhagwandass Kesuridas* (19) and *Nogendra*

(15) [1902] 33 Bom. 401=2 I. C. 431.

(16) [1866 67] 11 M. I. A. 7 (P. C.).

(17) [1880] 5 Cal. 602

(18) [1887] 14 Cal. 801=14 I. A. 168 (P. C.).

(19) [1911] 9 I. C. 401.

Mohan Ray v. Pyari Mohan Saha (20). No doubt it can be said that the original plaintiff contains nothing inconsistent with the relief now claimed, but as already remarked, it is the amended plaintiff which the Court has now to consider; and in any case the original plaintiff was clearly an attack on the arbitration proceedings, which included the award as its natural sequel. I therefore refuse this request and hold that plaintiff's suit must be dismissed. If the award is not acted on by defendants, he has his remedy. I can hardly conceive that the present suit would bar a separate suit on plaintiff's title under the award, since defendants themselves admit plaintiff's title thereunder, and this title surely cannot therefore be held to be a "matter which might and ought to have been made a ground for defence or attack" in this suit within the meaning of Expl. 4, S. 11, Civil P. C. But Mr. Rupchand's application will in any case suffice to dispose of any such bar. As to costs, I see no sufficient reason for departing from the ordinary rule that these should follow the event, and plaintiff must bear defendants' costs including those of defendant 3, for whom a separate pleader's fee is allowed. But in drawing up the bill of costs, allowance should be made for those already paid by plaintiff under this Court's order of 27th September 1915, and defendants are not entitled to include in their costs the amount of stamp and penalty paid by them in respect of the award. As the award was mainly in their favour there is no reason why they should not have arranged for the stamp at or about the time it was drawn, especially in view of the plaintiff's suit against them. If they had done so they would have been entitled to recover the proportionate share of the stamp payable by the plaintiff under S. 29 (g), Stamp Act of 1899.

V.R./R.K. *Suit dismissed.*
(20) [1915] 43 Cal. 103=30 I. C. 420.

A. I. R. 1918 Sind 21

CROUCH, A. J. C.

Dwarkaparsad—Petitioner.

v.

Firm Dipchand Parsram and another—Opposite Parties.

Application No. 75 of 1917, Decided on 20th August 1917.

Arbitration Act (1899), Ss. 5 and 8—Arbitrator neglecting to act—Procedure under S. 8 is to be followed.

Once a valid submission has been made to an arbitrator, it is irrevocable without leave of the Court, under S. 5 and if the arbitrator refuses or neglects to act, the procedure laid down by S. 8 should be adopted. So long as the arbitrator holds his mandate unrevoked, the parties cannot appoint a fresh arbitrator. [P 22 C 1]

E. Castellino—for Petitioner.

Kimatrai Bhojraj—for Opposite Parties.

Judgment.—This is an application to file an award under the Indian Arbitration Act. The application is opposed on the ground (*inter alia*) that the arbitrator whose award it is sought to file was not validly appointed. It is admitted that both parties appointed Bhai Relomal as their arbitrator and that a reference to him was duly signed. This was on 7th February.

At that time, Bhai Relomal was not in Karachi and, on 8th February Messrs Beharilal Keshowdas, through their pleader called on Messrs. Dipchand Parsram to nominate another arbitrator. To this, Messrs. Dipchand Parsram replied as follows:

"The delay is on part of your client, as when we had given Bhai Relomal's name, he was here and your client replied after a long time. The arbitrator is expected within a week and if he does not come, we shall appoint another arbitrator."

This letter was sent on 9th February. On 13th Messrs. Castellino and Sobhanmal for Beharilal called on Dipchand Parsram to nominate another arbitrator, and on 28th February having received no reply, they again wrote (Ex. 8) nominating Dwarakaparsad as their arbitrator and warning them that, if they did not nominate some other person within 7 days, they would appoint the gentleman named as sole arbitrator. On 11th March, Beharilal Keshowdas signed a reference on behalf of both parties to Dwarakaparsad. The reference ignores the previous nomination of Bhai Relomal. Mr. Kimatrai, for Dipchand Parsram, contends that, once there had been a submission to Bhai Relomal, it was irrevocable without the leave of the Court and that, if Bhai Relomal neglected to act, the other side should have proceeded under S. 8 of the Act. This contention must prevail. Mr. Castellino suggests that by their letter of 9th February (Ex. 9) Dipchand Parsram agreed to revoke, and did revoke, the submission to Relomal. But that letter contained

nothing more than an expression of intention and, even if we were to construe it as a legal agreement to name an arbitrator, the proper procedure, on its breach, would have been under S. 8 of the Act. Further, Relomal, on 14th March still held his mandate from the parties; it is not suggested, and there is no evidence, that he had surrendered it. This mandate was, under S. 5, irrevocable without leave of the Court. I must hold that the award was improperly procured and set it aside. The application is dismissed with costs.

V.R./R.K. *Application dismissed.*

A. I. R. 1918 Sind 22

CROUCH AND HAYWARD, A. J. CS.
Sobhraj Dwarkadas—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 120 of 1917
Decided on 23rd November 1917, against order of City Magistrate, Sukkur.

(a) *Workman's Breach of Contract Act (1859), S. 1—"A Magistrate of Police"*—Meaning explained—Offence committed beyond jurisdiction of Magistrate could be tried by him.

The term "a Magistrate of Police" in S. 1 must be limited to a Magistrate in the territorial limits of whose jurisdiction the employer resides or carries on business. There is nothing in S. 1 which gives special jurisdiction to a Magistrate, within whose jurisdiction the contract was made or the offence received, to try an offence committed beyond his jurisdiction. Both under the Common law of England and under the Criminal P. C. no Court, unless expressly authorized by Statute, can try any offences other than those committed within the area of its jurisdiction.

[P 23 C 2]

(b) *Interpretation of Statutes—Intention of legislature*—It must always be presumed that legislature does not intend to make any alteration in law beyond immediate scope and object of statute.

It must always be presumed that the legislature does not intend to make any alteration in the law beyond what explicitly declares, either in express terms or by implication, or in other words beyond the immediate scope and object of the Statute. In all general matters beyond, the law remains undisturbed. It is in the highest degree improbable that the legislature would overthrow fundamental principles or depart from the general system of law without expressing its intention with irresistible clearness. [P 23 C 1, 2]

Sri Kishendas—for Applicant.

E. Raymond—for the Crown.

Crouch, A. J. C.—This is an application under S. 439, Criminal P. C., to revise an order of the City Magistrate, Sukkur, dismissing a complaint filed under the Workman's Breach of Con-

tract Act. The contract was made and the advance was received in Sukkur; the parties are British Indian subjects residing in the Sukkur district the work was to be performed in Khairpur. The Magistrate held that he had no jurisdiction as the work was to be performed outside British India. Mr. Srikishendas has appeared for the applicant and contends that the Magistrate, having jurisdiction in the place where the complainant resided and carried on his business and where the contract was made could take cognizance of the case even though the work was to be performed outside British India. He relied on *Ali Mohamed v. Emperor* (1) and *Lal Mohan Chowbey v. Hari Charan Das Bairagi* (2). Quoting words that have no importance for our present purpose, S. 1 of the Act runs as follows:

"When any workman shall have received from any employer, resident or carrying on business in any presidency town, an advance of money on account of any work which he shall have contracted to perform, if such workman shall wilfully and without lawful or reasonable excuse neglect or refuse to perform such work, such employer may complain to a Magistrate of Police, and the Magistrate shall thereupon issue a summons or a warrant for bringing before him such workman and shall hear and determine the case."

It is clear that the offence with which the Magistrate is to deal is that of "wilfully neglecting or refusing to perform the work undertaken." This is brought out even more clearly by the preamble to the Act, which recites that

"It is just and proper that persons guilty of such fraudulent breach of contract should be subject to punishment."

The effect of the Act was to make breach of contract in certain cases punishable as a crime. By S. 3, Criminal P. C., 1882, it was declared that in every enactment passed before that Code came into force, the expression "Magistrate of Police" should be deemed to mean "Presidency Magistrate". By S. 19 of that Code, and S. 20, Act 5 of 1898, a Presidency Magistrate exercises jurisdiction in all places within the presidency town for which he is appointed. Now it must always be presumed that the legislature does not intend to make any alteration in the law beyond what it explicitly declares either in express terms or by implication or in other words, beyond the immediate scope and object of the Statute. In all

general matters beyond, the law remains undisturbed. It is in the highest degree improbable that the legislature would overthrow fundamental principles, or depart from the general system of law, without expressing its intention with irresistible clearness.* Hence we must limit the term "a Magistrate of Police" or "Presidency Magistrate" to a Magistrate in the territorial limits of whose jurisdiction the employer resides or carries on business. For the right of the employer to lodge a complaint is conferred by the fact of his having his residence or place of business in a certain place; and the Magistrate has special jurisdiction because he is appointed for that place. There is nothing in this section which gives special jurisdiction to a Magistrate in the place where the advance was received or the contract was made, and both under the Common law and under the Criminal Procedure Code, no Court, unless expressly authorized by Statute, can try any crimes other than those committed within the area of its jurisdiction.

The offences created by the section could, under the ordinary law, be tried by any Court having jurisdiction in the place where it was committed, that is, where the work had to be carried out. Under the Common law of England, the exercise of criminal jurisdiction was limited to crimes committed within the limits of England and its ports and harbours. The jurisdiction of the offences is the special province of the Sovereign within whose territory they are committed, and this general principle is recognized in the Penal Code (sections 1-3). It cannot be assumed that the legislature intended to override this fundamental principle of English Criminal Procedure in the absence of any indication of such intention. I am of opinion therefore that the lower Court acted rightly in acquitting the accused. The case of *Ali Mohamed v. Emperor* (1) merely decides that residence and carrying on business within the area to which the act has been extended confers a right to lodge a complaint before the nearest Magistrate empowered in that area. The decision followed *Lal Mohan Chowbey v. Hari Charan Das Bairagi* (2). In that case the defendant had entered into a contract with the complainant at Calcutta to do work in

(1) [1916] 10 S. L. R. 56=35 J. C. 484=17 Cr. L. J. 309.

(2) [1899] 25 Cal. 637.

*Maxwell 8th Edn. P. 113.

the North Western Provinces, and the question for decision was whether a Presidency Magistrate had jurisdiction in view of the fact that the breach had taken place outside his jurisdiction, and the decision was in the affirmative. The judgment reads as if the Court considered that jurisdiction was conferred by the fact that the contract had been made in Calcutta, but it may be inferred from the report that complainant had his place of business in Calcutta. The decision forms no authority whatever for contending that a Magistrate can deal with a breach of contract committed outside British India. I would reject the application.

Hayward, A. J. C.—I concur. The jurisdiction is *prima facie* local. No authority has been advanced for extending the scope of the Workman's Breach of Contract Act beyond British India. Offences thereunder are not offences within the meaning of Ss. 4 (1) and 40, I. P. C. V.R./R.K. *Application rejected.*

A. I. R. 1918 Sind 24

PRATT, J. C. AND CROUCH, A. J. C.

Emperor

v.

Nadar—Opponent.

Criminal Report No. 16 of 1918, Decided on 14th March 1918.

Criminal P. C. (1898), S. 250—Order to pay compensation where complaint is vexatious in one particular only is not justified.

An order for compensation under S. 250, cannot be justified merely because the complaint filed was vexatious in one particular. An award of compensation can only be made where there has been a complete discharge or acquittal of the accused on all the heads of the charges against him. [P 24 C 2]

T. G. Elphinstone—for the Crown.

Judgment.—This is a report by the Additional Sessions Judge, Sukkur, inviting our revision of an order made by the First Class Magistrate, Tando Adam, under S. 250, Criminal P. C., directing the complainant to pay the accused a sum of Rs. 50 as compensation for bringing a false or vexatious complaint. The complainant, a Bania and a petty land owner, refused to grant the accused a further lease of his land, and this refusal led to a quarrel in the course of which the complainant sustained injuries which necessitated his going to hospital. The complainant then filed a complaint against the accused for hurt under S. 323, I. P. C., and criminal intimidation under S. 506, I. P. C., and theft under S. 379, I. P. C. The charge of theft referred to the loss of complainant's ear-ring.

The complainant said that the ear-ring was dropped on the ground in the course of a quarrel and the accused picked it up and refused to return it. The Magistrate discharged the accused on each of these offences, but it cannot be said that the charges under S. 323 or S. 506 were frivolous or vexatious. A threat was uttered and the Bania did receive injuries in the quarrel and his witnesses depose that those injuries were inflicted by the accused. But the Magistrate has discharged the accused only because he thinks the witnesses are unreliable and their evidence perhaps exaggerated. There is however reason for thinking that the charge under S. 379 was vexatious. The Magistrate disbelieves the evidence that the accused took the ear-ring and accusations of theft are very often introduced into complaints of petty assaults in the hope of the complainant receiving immediate attention either from the Magistrate or from the police. But we do not think the order for compensation can be justified merely because the complaint filed was vexatious in one particular. No doubt the words used in S. 250 are that the accusation is frivolous or vexatious, and this wording might be construed as referring to the accusation in respect of each individual charge. But if this be the correct construction of the section, it would lead to the result that the accused might under the same complaint be convicted and sentenced on one head of charge and yet awarded compensation on another head. It was held in the case of *Mukti Bawa v. Jhotu Santra* (1) that this was not the correct construction of the section and the award of compensation could only be made when there has been a complete discharge or acquittal.

We think the intention of the section is that an accused person who has been unnecessarily brought to Court should receive compensation from the person making the false accusation. That is not the case here, for whether the accused did or did not steal the ear-ring there were good grounds for the complainant obtaining process to enforce his attendance in Court to answer other charges of hurt and criminal intimidation. We accordingly reverse the order made by the Magistrate under S. 250, Criminal P. C., and direct the compensation, if paid, to be refunded.

V.R./R.K.

Order reversed.

(1) [1897] 24 Cal. 53.

A. I. R. 1918 Sind 25 (1)

PRATT, J. C. AND CROUCH, A. J. C.

Emperor

v.

Sumar and others—Opponents.

Criminal Report No. 10 of 1918, Decided on 23rd February 1918, made by 2nd Adil Sess. Judge, Hyderabad.

Criminal P. C. (1893), S. 250—Order to pay compensation against person only instigating to give false information is invalid.

S. 250 does not warrant an order to pay compensation against a person who only instigates the giving of false information but who does not himself make the complaint or give the information to the Police. [1918 C 2]

*T. G. Elphinstone—*for the Crown.

Judgment—This is a report by the Additional Sessions Judge, Hyderabad, under S. 438, Criminal P. C., for revision of an order passed by the City Magistrate, Hyderabad.

The case before the City Magistrate was one in which 2 accused were prosecuted for the offence of theft on an information to the police by Din Mahomed, who had been instructed to do so by Haji Ahmed, the owner of the stolen cattle. The City Magistrate discharged the accused and finding that the prosecution was frivolous or vexatious, made an order under S. 250, Criminal P. C., requiring Haji Ali Ahmed whom he describes as the complainant, to pay to the accused Rs. 100 as compensation. The Additional Sessions Judge refers the case to us on the ground that it was not competent for the City Magistrate to make that order.

The Magistrate was clearly wrong in describing Haji Ahmed as the complainant, for no complaint had been filed in the case. The case was instituted not upon complaint, but upon information to the Police which was lodged by Din Mahomed. If the Magistrate considered that Din Mahomed was responsible for the false accusation, it was open to him to require Din Mahomed to pay compensation. But if the Magistrate found that Din Mahomed was not responsible for the false accusation, he could not make an order against Din Mahomed for the reasons given by this Court in the case of *Emperor v. Kouro* (1), viz., that the object of the section is that compensation should be recoverable from the person responsible for the false accusation. But as pointed out by the Additional Sessions Judge, the effect of that ruling is that when the per-

son who actually gives the information does not know his complaint to be false, he cannot be made to pay compensation, and it does not imply the converse proposition that the person responsible for the false accusation can be made to pay the compensation, even if he does not himself make the complaint or give information to the Police.

Section 250, Criminal P. C., does not warrant an order to pay compensation against a person who only instigates the giving of false information. We, therefore, reverse the order of the lower Court and direct that the compensation, if paid, be refunded to Haji Ahmed.

Y.N. R.K.

Order reversed.

A. I. R. 1918 Sind 25 (2)

PRATT, J. C. AND KEMP, A. J. C.

Mt. Jankibai—Applicant.

v.

Shivram Babaji—Opponent.

Criminal Revn. Appln. No. 38 of 1918, Decided on 9th May 1918, from order of Adil City Magistrate, Karachi.

Criminal P. C. (1898), S. 488—Hindu wife leaving husband's house without cause—She is entitled to maintenance on return to husband's house.

The duty of a husband to maintain his wife under the Hindu law is absolute and under the Criminal Procedure Code it is subject only to the wife's chastity. When a Hindu wife therefore leaves her husband's house without good cause, her right of maintenance is only suspended and she has the right to return to her husband's house at any time and claim to be maintained by him. [1918 C 1]

*U. B. Chandiramani—*for Applicant.

*Parstam Tolaram—*for Opponent.

*T. G. Elphinstone—*for the Crown.

Judgment.—This is an application for revision of an order made by the Additional City Magistrate, Karachi, under S. 488, Criminal P. C., refusing the applicant's petition to order her husband, opponent, to pay her maintenance. The applicant left her husband on 4th June 1916, alleging that her husband ill-treated her. On 8th June 1916 the husband gave notice accusing her of theft and forbidding her to enter his house. Next month the applicant filed a suit for restitution of conjugal rights, but it was dismissed for want of prosecution in December 1916. She then filed this application for maintenance on 18th January 1918 and on this application the Magistrate, holding that cruelty was not proved and that she left her husband of

her own accord, concluded there was no justification for the application. But the allegation of cruelty is only relevant to the claim for separate maintenance under the proviso to sub-S. (3) and sub-S. (5). Under Hindu law the duty of the husband to maintain his wife is absolute, *Parami Ramoyya v. Mahadevi* (1), and under the Criminal Procedure Code it is subject only to the wife's chastity, S. 488 (4).

Further even if she left her husband's house without good cause, her right of maintenance is only suspended: see *Surampalli Bangaramma v. Surampalli Brambaze* (2). She has the right to return to her husband's house at any time and claim to be maintained by him. The husband's refusal to maintain her is avowed in his notice of 8th June 1916, but Mr. Parsram relies on the dictum in *Gavarishanker v. Bai Beva* (3) that if the wife voluntarily leaves the husband without being justified in doing so, she is not entitled to claim maintenance. That passage only refers to the wife's claiming separate maintenance. This is evident from the context, which implies that cruelty or ill treatment is evidence of refusal to maintain, as was subsequently held in *Bhikaiji v. Maneckji* (4). The applicant is clearly entitled either to maintenance by her husband in his house or to receive a separate maintenance allowance. We accordingly reverse the order of the Additional City Magistrate and remand the application for disposal on the merits.

V.R./R.K. *Application remanded.*

1. (1910) 34 Bom 278=5 I C 960.
2. (1908) 31 Mad 328.
3. (1903) 5 Bom L R 614.
4. (1907) 9 Bom L R 359.

A. I. R. 1918 Sind 26

HAYWARD, J. C. AND CROUCH, A. J. C.

Pamandas Khemchand and others — Plaintiffs—Appellants.

v.

Hiranand Khatanmal and others — Defendants—Respondents.

Second Appeal No. 43 of 1914, Decided on 20th October 1916, from decision of Joint Judge, Hyderabad.

(a) Civil P. C. (1908), O 34, R. 1—Court cannot sell right, title and interest of persons not party to suit—Separate suit by first and second mortgagee without impleading

each other—Sales under separate decrees—Right of purchasers indicated.

A Court cannot sell the right, title and interest of any person who is not a party to the suit.

[P 28 C 1]

Where two separate suits are filed by a first and second mortgagee respectively, neither impleading the other, and each brings the property mortgaged to him to sale, the present right of possession and enjoyment of the property passes to the first purchaser and this right cannot be sold again.

[P 28 C 1]

Where the second mortgagee brings the property to sale first, and the purchaser obtains possession, the purchaser under the first mortgagee's decree has no right to turn him out but he can, *qua* first mortgagee bring the property to sale in a properly framed suit.

[P 28 C 1]

Where the first mortgagee brings the property to sale first, and the purchaser obtains possession, the purchaser under the second mortgagee's decree has no more than the rights of the second mortgagee; he has no right to possession.

[P 28 C 1]

(b) Civil P. C. (1908), O. 34, R. 1—Suit by puisne mortgagee—Prior mortgagee impleaded—Court should not ordinarily permit sale subject to mortgage.

A puisne mortgagee may sue for sale without making the prior mortgagee a party to the suit; but where the prior mortgagee is impleaded, the Court should not ordinarily permit a sale subject to the first mortgage. The proper form of the decree is Form No. 8 in Appendix D, Civil P. C.

[P 28 C 2]

(c) Civil P. C. (1908), O. 34, R. 1—Duty of Court in ordering sale.

When a person holding both a first and a second mortgage sues on the second mortgage only, the Court should ordinarily refuse to order a sale unless it be free of both the mortgages.

[P 28 C 2]

Kimatrai Bhojraj—for Appellants.

Motiram Ramchand—for Respondents.

Crouch, A. J. C.—In this case plaintiff obtained a mortgage decree on a first mortgage, ordering that properties in lists D, E, F, G and H to be sold subject to the condition that properties D, E, F and G were to be sold before H, which had been bought by private sale by defendants 8—13 and had passed into their possession. The mortgagor had however executed three other several mortgages of properties D, E, and F respectively in favour of the plaintiff. On each of these three mortgages a separate suit had been instituted and orders for sale had been obtained. Sales in pursuance of these decrees were effected but at a date subsequent to the date of the decree obtained under the first mortgage. The purchasers were the defendants 8 and 9 and some strangers. At the sale, it was notified that a decree for sale had been obtained by the first mortgagee.

In execution of his decree on the first mortgage, plaintiff applied for sale of properties G and H. No one appeared to oppose, and an ex parte order was passed for the sale of these two properties. But on the application of defendants 8-13, who contended that property H should not be sold until G had been exhausted, for G had not been mortgaged a second time and was still in the hands of the mortgagor, and also D, E and F sold, the Court held that execution should proceed against G only in the first place, leaving plaintiffs to file a fresh application for the sale of properties D, E, F and H. On appeal this order was affirmed, but there was a declaration added that properties D, E, F and G should be exhausted before H was brought to sale. Plaintiff's legal representatives now appeal, asking that (1) G be sold and that if the whole debts be not realized, that H be sold; and that it be declared that properties D, E and F are not liable to be sold at all having already been sold under the decree of the second mortgage; (2) they allege they have a grievance in that the first Court varied its order for sale though passed after due notice; and (3) that in any case, the original order of the first Court that the properties G and H be brought to sale should be restored. The two last objections may be disposed of very briefly. It is contended that the first Court had no power to review, or amend an order for sale once duly passed, and that the original order for sale of all the properties should be restored. But it is not admitted that the original order was duly passed, for it is not admitted that notice was issued. This is a question of fact into which we cannot inquire in second appeal and one for the solution of which the record offers no material. Further we are of opinion that a Court has full power to vary any order for sale in execution which it has passed through ignorance of material facts. We cannot restore the order which we consider was legally and properly set aside.

Mr. Kimatrai contends that, once a property has been sold under a mortgage decree, it cannot be sold over again, and that if it be again sold the conflict between the two purchasers will be determined not by the priority of the mortgages under which the property was brought to sale, but by the priority of the purchase. If this be the law, no

title will pass to the purchaser under the sale which would be held under the order now appealed against and his clients would be exposed to litigation. In support of these somewhat startling assertions, Mr. Kimatrai has been able to cite reported decisions which seem to offer support, and it becomes necessary to deal with the points raised at some length. It will, I believe, simplify the discussion if I first state as briefly as possible what the law is. As we are dealing with simple mortgages only, it is unnecessary to bring the complications occasioned by the English form of mortgage into discussion.—(1) When an owner mortgages his property by simple mortgage, the mortgagee obtains nothing more than a right to obtain from the Court an order that the property be sold. Inasmuch as the estate is not vested in the mortgagee, there is no right of foreclosure: see Ss. 58, 60 and 67 (a), T. P. Act, 1882. The rule follows inevitably from the form of mortgage. As the properties with which we are now concerned are not situate in Karachi we need not consider the effect of S. 69.

(2) If a mortgage be without possession, the mortgagor retains (1) a right to redeem; and (2) the right of physical possession and enjoyment, and also a limited *jus abutendi*: see S. 66, T. P. Act. (3) When a mortgagor sells his interest in the mortgaged property or executes further charge on it, he can transfer or charge only such right, title and interest as is still vested in him; for no one can legally dispose of property which is not his. Ordinarily, he can transfer the right of present possession and enjoyment of the right to redeem and nothing more. After executing the second mortgage he has the right to redeem the second mortgage and if the second mortgage be without possession he also retains the present right to possession. (4) Where a first mortgagee brings the mortgaged property to sale in a suit in which the mortgagor, but not the second mortgagee, is a defendant, the purchaser takes (1) the right of the mortgagor to present possession and enjoyment; (2) the right of the mortgagor to redeem the second mortgage; and (3) the right of the first mortgagee to bring the property to sale. In such case, the first mortgage is deemed to be kept alive and not to merge in the equity of redemption and

can be used as a shield against the claim of the second mortgagee: *Mata Din Kasodhan v. Kazim Husain* (1) and *Chandulbai v. Basarmal Topanmal* (2).

The Court cannot sell the right, title and interest of any person who is not a party to the suit. *Umes Chunder Sircar v. Zahur Fatima* (3) and *Chandulbai v. Basarmal Topanmal* (2). Hence it follows that a puisne mortgagee who is not impleaded is not affected by a sale. The right to redeem the first mortgage and the liability to be redeemed by the mortgagor or his transferee, persist. Neither in this rule nor in the following do I purport to deal with the effect of notice or estoppel both of which may have results which do not properly come within the scope of the law of mortgage. (5) Where a second mortgagee brings the mortgaged property to sale in a suit to which the mortgagor, but not the first mortgagee, is a defendant, the purchaser takes (1) the right of the mortgagor to present possession and enjoyment and (2) the right to redeem the first mortgage. (6) From these two rules it follows that where there are two separate suits filed by the first and second mortgagees respectively, neither impleading the other, and each brings the property mortgaged to him to sale, the present right of possession and enjoyment passes to the first purchaser and this right cannot be sold again.

Hence, where the second mortgagee brings the property to sale first and the purchaser obtains possession, the purchaser under the first mortgagee's decree has no right to turn him out but he can, qua first mortgagee, bring the property to sale in a properly framed suit. And where the first mortgagee brings the property to sale first, and the purchaser obtains possession, the purchaser in the suit filed by the second mortgagee has no more than the rights of second mortgagee; he has no right to possession. (7) Where the first mortgagee, before the second mortgagee has brought the property to sale, obtains a transfer of the right, title and interest of the mortgagor, then having the legal title of the mortgagor vested in him, he can foreclose the second mortgagee. This was the position dealt with in the case

of *Chandulbai v. Basarmal Topanmal* (2). If the second mortgagee chose to exercise his right of redemption, the first mortgagee, as holder of the equity of redemption, would, it seems, be entitled in his turn to redeem both the first and second mortgages; but this is a position which no Court seems to have been called on to deal with. (8) A puisne mortgagee may sue for sale without making the prior mortgagee a party to the suit but where the prior mortgagee is impleaded, the Court should not ordinarily permit a sale subject to the first mortgage. For, it is the duty of the Court to make a decree which shall deal finally with the question between the parties and preclude the necessity of further litigation for enforcement of any right arising out of the mortgage or mortgages in question.

The proper form of decree is No. 8 in Appx. D, Civil P. C. The second mortgagee and the mortgagor are given successive opportunities to redeem. If the second mortgagee fails to redeem the first mortgage, his suit is, at the option of the first mortgagee, either, dismissed—that is, he is in effect foreclosed—or the property is sold free of both mortgages. The right of a puisne mortgagee to sue without impleading the prior mortgagee is given by the explanation to O. 34, R. 1. It follows that, where the person who holds both a first and second mortgage sues on the second mortgage only, the Court should ordinarily refuse to order a sale unless it be free of both mortgages. As to the duty of the Court see *Venkataramana Iyer v. Gompertz* (4) and *Sundar Singh v. Bholu* (5). We are now in a position to apply the law to the facts of this case. When the plaintiff brought the properties D, E and F to sale by right of his several puisne mortgages, the Court should properly have insisted on the property being sold free of all charges which the plaintiff held; had it done so, very much unnecessary litigation would have been avoided. But where property is sold in execution of a mortgage decree, the question what was the nature and extent of the interest sold depends not on what the Court might have done or ought to have done but on what the Court did, what the Court intended to sell and what the purchaser had reason to think that he was buying: see the cases cited in the judg-

1 (1831) 13 All 432 (F.B.).

2 A I R 1914 Sind 131=23 I C 67=8 S L R 264.

3 (1891) 18 Cal 164=17 I A 201 (P.C.).

4 (1905) 31 Mad 425.

5 (1893) 20 All. 322.

ment of Stanley, C. J., in *Inayat Singh v. Izzatunnissa Begam* (6). In this case, both Courts have held that the sale was subject to the decree for sale obtained under the first mortgage, and accordingly the defendants, 8-13, obtained only the right to redeem the first mortgage and the right to present possession. The plaintiffs as first mortgagees now have the right to bring the property mortgaged to them to sale free of all encumbrances, unless their mortgage be redeemed. I will now examine the various cases which Mr. Kinnaird has relied in argument.

In *Venkatanarasimham v. Ramiah* (7) the same property was mortgaged to two several persons. The first mortgagee brought the property to sale in a suit to which the second mortgagee was not a party, purchased it himself and obtained possession. The second mortgagee then brought the property to sale in a suit to which the first mortgagee was not a party, purchased it and succeeded in disposing of the plaintiff. The plaintiff sued for possession. It was held that nothing whatever passed to the defendant by the second sale and possession was awarded to the plaintiff. The learned Judges were not in agreement as to whether the defendant's mortgage was capable of being still enforced. This is an illustration of Rr. 4, 5 and 6 above given. Both Judges held that defendant took nothing by his purchase of the rights and interests of the mortgagor because those rights and interests had been sold to the plaintiff, but they did not agree that defendant as second mortgagee had lost anything by the sale to plaintiff. Kinnaird, J., was of opinion that his right had not been affected by the sale; Innes, J., thought it possible that defendant might be barred of any further remedy by having already brought a suit on his mortgage.

In *Nanack Chand v. Teluckdye Koer* (8) the owner of certain property mortgaged it, on the same day by two several deeds, to two several mortgagees. Both mortgagees obtained decrees on their mortgages as against the mortgagor only. The defendants got their decree first and under it brought the right, title and interest of the mortgagor to sale, purchased it themselves and obtained possession. The plaintiffs subsequently got a decree on

their bond and also bought the right, title and interest of the mortgagor and bought the suit for recovery of possession. It was held that the right to possession depended not on the priority of the mortgage but on the priority of possession. This was of course, a perfectly correct statement of the law applicable to the particular facts. For, whether the defendant's mortgage was first or second, he nevertheless obtained by his purchase the present right to possession vested in the mortgagor and if plaintiff desired to raise the question of priority of mortgage, he should have done so in a properly constituted suit. In *Sundar Singh v. Bholu* (5) the plaintiffs sued for sale on a second mortgage. They had already obtained a decree for sale on a first mortgage. It was held that there was nothing in the Civil Procedure Code or the Transfer of Property Act which prevented the holder of two independent mortgages over the same property from obtaining a decree for sale on each of them in a separate suit. But the learned Judges added the following obiter dictum:

"What benefit the two decrees will be to the plaintiffs it is difficult to see, except that the plaintiffs may execute one of these decrees by sale of the property, and if there is a surplus arising from the sale, they may probably attach that surplus in execution of the other decree. One thing is quite clear that the plaintiffs cannot sell the property twice over, and they cannot sell under the second decree subject to the first. That would be selling the equity of redemption, a right which is not acknowledged or recognised by Act 4 of 1882 and would be a mischief which has been guarded by S. 93 of that Act. This Court in *Mata Din Kasodhan v. Kazim Husain* (1), which has been followed in many other cases, has so guarded the intention of the Legislature as to put an end to the abuses which existed before Act 4 of 1882 came into force, and that there can be no sale of equity of redemption apart from the property itself at the instance of the mortgagee."

Though isolated sentences in this passage suggest that novel rules of law were being laid down, the passage taken as a whole is found to do no more than declare that the Courts should not allow a person who holds two independent mortgages to bring the property to sale piecemeal (R. 8). In *Mata Din Kasodhan v. Kazim Husain* (1) the first mortgagee had obtained a transfer of the right, title and interest of the mortgagor. The second mortgagee brought a suit for sale of the property without asking for redemption. It was held that the first mortgagee, not having exhibited an intention of forgoing altogether his rights

6. (1905) 27 All 97.

7. (1878-80) 2 Mad 103.

8. (1890) 5 Cal 265.

under his mortgage-deed was entitled to keep it alive and to use it as a shield against the claim of the plaintiff to the extent of the amount due to him on the day on which he took the assignment of the mortgagor's interest, and also that the plaintiff could not bring the property mortgaged to him to sale without first redeeming the prior mortgage.

The bare decision in this case presents no special features and is in accordance with Rr. 7 and 8. But in his judgment Edge, C. J., expressed the opinion that under a decree for sale in a mortgage suit the property which might be effectively brought to sale was the specific immovable property and not merely the rights and interests of the plaintiff and his mortgagor in such property and that as a general rule a mortgagee had no right to bring mortgaged property to sale without redeeming the prior mortgage. It is difficult to understand what is meant by saying that is the "specific immovable property" which is brought to sale. Mr. Kimatrai contends that under a sale in execution of a mortgage decree the whole specific immovable property, the fee simple in fact, is sold, and consequently cannot be sold again. But, in a properly drawn decree it is not the property without qualification that is sold but the "mortgaged property." And it is well established that no Court has jurisdiction to dispose of property or interests in property vested in persons not parties to the suit before it. With the exception of dicta of the learned Chief Justice in this judgment there seems to be no authority whatever for contending that the Court can sell the fee simple of an estate notwithstanding that it is not wholly vested in the parties whose rights it is adjudicating.

In asserting that a puisne mortgagee cannot bring the property to sale without first redeeming the first mortgage the learned Chief Justice may be construed as having raised a mere rule of procedure into a rule of substantive law having universal application. But it would be fairer to restrict the application of every part of his judgment to the facts with which he was actually dealing. If this be done it is consistent with the view adopted in recent legislation. Unfortunately the confusion suggested by this judgment has been completely cleared up by the framers of the new Civil Pro-

cedure Code. Formerly, the Transfer of Property Act contained not only the law as to mortgages but also the rules of procedure to be followed in enforcing rights under mortgages with the result that there was no clear demarcation between substantive law and pure procedure. By repealing all the sections which deal with procedure and repeating all essential rules in O. 34 and adding in the appendix some extremely useful and instructive forms of decree the legislature has put the questions now before us outside the region of controversy. R. 4 and the forms of decrees make it clear that only the mortgaged property should be sold. The Act does not state that the interests of parties not impleaded are not affected by any sale probably as suggested by Messrs. Woodroffe and Amir Ali, because it was considered unnecessary to do so: it is too obvious to need assertion. That the equity of redemption can be sold when the prior mortgage is not impleaded is made clear by the explanation to R. 1. O. 34.

In *Akatti Moidin Kutti v. Chirayil Ambu* (9) the proprietor of certain land mortgaged it to plaintiff in 1890 and in 1893 executed a second mortgage to the defendant. In 1895 the defendant sued on his puisne mortgage, obtained a decree and purchased the property in 1899. Plaintiff then sued defendant for possession. It was held that defendant was entitled to retain possession. As defendant had purchased the mortgagor's present right to possession he was entitled to retain it until plaintiff had enforced his rights in a properly framed suit. It must be assumed that plaintiff was not a party to the suit filed by defendant and that defendant was not a party to the previous suit filed by the plaintiff; the report is silent on the point.

In *Kutti Chettiar v. Subramania* (10) the same property had been sold twice over in execution of two several mortgages. The first sale was in execution of the decree on the puisne mortgage obtained in a suit to which the first mortgagee had not been made a party. Plaintiff, the purchaser at the second auction, sued to recover possession from the purchaser at the first auction. It was held that any relief to which he was

9. (1903) 26 Mad 486.

10. (1909) 32 Mad 485=1 I C 1077.

entitled could not be enforced in a suit for possession.

This decision is an illustration of Rr. 4 5 and 6. But in the judgment the following passage, on which great reliance has been placed by Mr. Kimatrai, appears:

"When therefore defendants bought the house in execution of their decree no saleable interest was left in the judgment-debtor. As pointed out in *Venkateswarammah v. Ramiah* (7), *Narvel Chaud v. Telukdige Koer* (8) and *Sheth Moidin Kutti v. Chiragji Ambaji* (9) where there is a question not even the purchasers at two distinct Court sales held on different dates in execution of two several mortgage-decrees, the Court in deciding between the two competing titles is guided not by the dates of the several mortgages but of the several purchases. For both the mortgagees have an equal right to sell the property, and once it is sold at the instance of one mortgagee there is no further saleable interest left in the judgment-debtor to be sold again.

This passage offers no difficulty if we realize that the Court was referring to suits for possession, and that the right to possession was the only matter in dispute. The Court did not hold that plaintiff was entitled to no relief. An examination of the above cases makes it clear that they give no support to Mr. Kimatrai's main contentions. His case was founded in a confusion between "possession" and "absolute ownership." I would therefore dismiss the appeal with costs. Mr. Kimatrai asks that the Court will amend the order of the lower Court by ordering the sale of the properties D, E and F, but appellant must pursue the ordinary course and file a regular application for sale. It is possible that he may be now barred from obtaining the order.

Hayward, J. C.—I concur in the conclusion reached by my learned brother. It appears that the plaintiffs obtained a first mortgage on certain properties represented by D, E, F, G, and H. They subsequently obtained second mortgages on the same properties. Third parties then purchased the properties represented by H. The plaintiffs did not commence by suing out their first mortgage but obtained decrees on their second mortgages and proceeded to sell the properties represented by D, E and F. The plaintiffs in the meanwhile have obtained a decree on their first mortgage on the condition that they proceeded first against the properties represented by D, E, F and G and afterwards against the properties re-

presented by H. They therefore sought to sell not the properties already sold and represented by D, E and F but the properties represented only by G and asked for permission to sell after those the properties represented by H. The original and first appellate Courts both held in effect that the equity of redemption only has been sold of the properties represented by D, E and F and that it would be necessary to sell further the remaining interests in the properties represented by D, E and F after the sale of properties represented by G before permission could be granted to sell the properties represented by H according to the condition in the decree.

This second appeal has been brought to obtain a declaration that there remain no interests to sell in the properties represented by D, E and F and a direction for the sale after the properties represented by G of the properties represented by H. The respondents strongly object as they are the third parties who purchased the properties represented by H. It seems to me that their objections must be upheld. So far the equity of redemption only has been sold in the properties represented by D, E and F and the purchasers have merely bought the right to redeem the prior mortgage. There was in my opinion no legal bar to such a sale as pointed out by my learned brother and the result is that the purchasers must, in order to prevent a further sale of the interests remaining in the properties represented by D, E and F, redeem the prior mortgage. The cases quoted before us in support of a contrary conclusion would appear to have been mainly cases of competition in ejectment suits between different purchasers at different sales under different mortgage decrees and to have no relation to regularly constituted mortgage suits. Such is the case of *Chandulbai v. Basarmal Topanmal* (2). We have moreover here to give directions for the execution of the prior mortgagee's mortgage decree and not to consider whether it was proper to have allowed this piecemeal sale of the various interests in the properties under the subsequent and prior mortgages. It might no doubt be argued that the procedure was at the time improper though it would apparently have been proper now under O. 34, R. 1, of the Schedule to Civil P. C., as pointed out in the note at p. 321 of Shepherd and

Brown on S. 75, T. P. Act, Edn. 7.
Appeal accordingly dismissed with costs.
V.K./R.K.

Appeal dismissed.

A. I. R. 1918 Sind 32

PRATT, J. C. AND CROUCH, A. J. C.
Mahomed Yakub—Appellant.

v.

Mt. Radhibai—Respondent.

Misc. Civil Appeal No. 5 of 1917, Decided on 16th October 1917 against order of District Judge, Hyderabad.

(a) Civil P. C. (1908), O. 23, R. 1 and 3—Withdrawal of suit after decree is not permissible—Compromise regarding removal of guardian duly appointed is illegal—Guardians and Wards Act (1899) Ss. 40 and 42.—

The procedure of withdrawal from a suit under O. 23, Rule 1, applies only to pending suits, before a decree has been made. An application for guardianship duly made under the Guardians and Wards Act, and on which an order appointing a guardian has been duly made, cannot be withdrawn under O. 23, R. 1, by the applicant during the course of an appeal filed by the opponent, in spite of both the appellant and the respondent being consenting parties to the withdrawal. Nor can the respondent's withdrawal be recorded as a compromise under O. 23, R. 3, inasmuch as its effect would be to withdraw from the determination of the Court the consideration of the welfare of the minor and to defeat the provisions of Ss. 40 and 42, Guardians and Wards Act. [P 32 C 2; P 33 C 1]

(b) Guardians and Wards Act (1899) Ss. 17 and 19 (b).—Paramount consideration in appointing guardian is welfare of minor.

Section 19 (b) recognises the natural right of the father, but as the section is controlled by S. 17 the paramount consideration in appointing a guardian is the welfare of the minor. [P 33 C 2]

(c) Hindu Law—Minority and Guardianship—Mere conversion of father is not per se sufficient to deprive him of natural rights of guardianship—Caste Disabilities Removal Act (1850), S. 1.

That portion of the Hindu law which disqualifies a father, on account of the loss of caste involved in his conversion to any other religion, from becoming the guardian of his children after his conversion having been abrogated by Act 21 of 1850, the mere fact of conversion of a Hindu father to Islam is not, per se sufficient to deprive him of his natural rights of guardianship over his children. [P 31 C 1]

Fazal-i-Hussein and T. G. Elphinstone
—for Appellant.

Abdul Rahman and Mahomed Yakub
—for Respondent.

Pratt, J. C.—This is an appeal by Dr. Wassanmal alias Sheikh Mahomed Yakub against an order of the District Judge, Hyderabad, appointing his wife Radhibai guardian of the persons of four of their minor children—two girls aged 13 and 7 and two boys aged 4 and 2 years respectively.

The appellant, who was a Hyderabad Amil, was converted to Islam on 6th August 1916 and his wife the respondent thereupon applied to the District Judge to be appointed guardian of these children. The order under appeal was made on this application of the respondent and the appellant contends that his conversion does not affect his natural right to be guardian of his children and that the District Judge erred on the merits in deciding that he was not fit to be their guardian. Subsequent to the order of the District Judge the respondent Radhibai returned to the protection of her husband and her counsel states that she withdraws her application to be appointed guardian. It is contended that we should give effect to this withdrawal by setting aside all orders that have been made on her application.

The procedure provided in the Civil Procedure Code is applicable, so far as may be, to proceedings under the Guardians and Wards Act 8 of 1890. But O. 23, R. 1 (1), does not allow a plaintiff who has appealed to get rid of the decree that has been made by the simple process of withdrawing the suit. The case of *Satyabhamalabi v. Ganesh* (1) is an authority on the point, and it was there said that rights actually vested and created by the decree cannot be annulled by the plaintiff's withdrawal of his own free will and without the consent of the Court. There have been conflicting decisions as to whether a plaintiff-appellant can in appeal withdraw with leave of the Court under O. 23, R. 1 (2), from a suit which has been dismissed. But we think the correct view is that taken in *Eknath Ranoji v. Ranoji Bawaji* (2) that this procedure only applies to pending suits and before the decree has been made. The effect of these two cases is that withdrawal with or without leave of the Court from a suit or of a suit does not enable a party in appeal to get rid of the decree.

No doubt here the party seeking to get rid of the order of the lower Court is the party in whose favour the order has been made, but that does not affect the question for the same line of reasoning applies. A party in whose favour a decree or order is passed could get it set aside by adjustment or compromise under O. 23,

1. (1905) 29 Bom 13.

2. (1911) 35 Bom 261=10 I C 813.

R. 3. If the respondent's withdrawal be regarded as a compromise under which the appellant is declared guardian, then in my opinion that would not be a lawful compromise and the Court should not record it. Its effect would be to withdraw from the determination of the Court the consideration of the welfare of the minors and it would defeat the provisions of S. 40, Guardians and Wards Act, under which the guardian cannot be discharged without leave of the Court and of S. 42 which empowers the Court in that event to appoint another guardian. The appeal must therefore be heard and decided on the merits.

Under S. 19 (b), the District Judge could not appoint the mother guardian unless he found that the father was not fit. The District Judge considers that up to the date of his conversion the appellant was fit to be guardian of his children and has based his order solely on events that occurred at the time of the conversion. These events are those deposed to by Radhibai. On the evening that he embraced Islam the appellant took his wife and children out for a drive on the pretext of giving them an outing. He took them to a house where he confined them and separated the mother from the children. Then in the morning he brought Radhibai back to his brother's house and left her there and disappeared with the children. This evidence has been believed by the District Judge, and we think it more probable than the suggestion that the children were removed without appellant's knowledge by some of the Hindu relations. We have also no doubt that the appellant withheld the children from the Court and wilfully disobeyed orders made from time to time for their production. The telegrams from Kashmir are particular show that the appellant was aware of the whereabouts of the children. On these facts the District Judge says the appellant was guilty of cruelty in separating the children from their mother, that he subordinated the children's interests to a fanatical zeal for their conversion and that he withdrew the children from the guardianship of the Court.

These do not appear to me to be sufficient reasons for depriving the father of his natural rights. If he is condemned for cruelty in separating the children from the mother, allowance must be made for his fear that the mother would sepa-

rate the children from him. I think what was operating upon his mind was not fanaticism but fear of the Hindu relations.

The District Judge refers to a dictum of Bowen, L. J., in the case of *Agar-Ellis, In re. Agar-Ellis v. Laurence* (5), where withdrawal of a ward from the jurisdiction of the Court was instanced as a case where the Court would interfere with the rights of the father. But the learned Judge was then referring to the partial restriction on the rights of the father when he is restrained by the Court from taking a ward of the Court out of jurisdiction. This is made clear by the corresponding passage in the judgment of Cotton, L. J., at p. 333 of the same report. The case is one which does not support the District Judge's order for it proceeds on the ground that the Court should not, except "in very extreme cases," interfere:

"with the discretion of the father but should leave to him the responsibility of exercising the power which nature has given to him by the birth of the child."

I shall not however refer to English cases for two reasons. In the first place, as pointed out by my brother Crouch in the interlocutory judgment in this matter the dicta of English Judges refer to different social conditions. And in the second place, the whole law is contained in Act 8 of 1850, which is a consolidating Act. As said by Lord Herschell, in *Bank of England v. Morgan* (4):

"The purpose of such a statute surely was that on any point specifically dealt with by the law should be ascertained by interpreting the language used instead of as before by examining over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions."

If we refer to the Act the law is perfectly simple. S. 19 (b), recognizes the natural right of the father, but this is controlled by S. 17 according to which the paramount consideration is the welfare of the minor. If a reference is necessary on this point I would mention the cases of *Skinner v. Orde* (5); *In the matter of Saithri* (6) and *In re Gullai and Lillai* (7).

It is suggested that as S. 17 refers to what is consistent with the law to which the minor is subject, Hindu children can-

(3) [1883] 24 Ch. D. 317.

(4) [1891] A. C. 107=60 L. J. Q. B. 145.

(5) [1870-72] 14 M. L. A. 509=10 B. L. R. 125.

(6) [1892] 16 Bom. 507.

(7) [1908] 32 Bom. 50.

not be subject to the guardianship of a Mahomedan father. But the father is guardian under Hindu law and that portion of Hindu law which disqualifies the father on account of the loss of caste involved in his conversion is abrogated by Act 21 of 1850. Thus the question whether the appellant is a fit person to be guardian of his children must be decided by considerations affecting the welfare of the minors. Now after the District Judge made his order the main ground on which Radhibai's application had been made was removed by her return to her husband, for the appellant is now able to provide a home for his children. The question of the appellant's conduct at the time of his conversion I have already dealt with. There remains only the question of religion. The mere fact of conversion is not per se a reason for declaring the father unfit, for the Courts cannot say that one religion is better than another. But the girl of 13 and perhaps also the girl of 7 are old enough for Hindu beliefs and Hindu ritual to have made some impression on their minds. Their conversion would be a break in the continuity of their spiritual development. It would also have the effect of breaking the ties of relationship and affection connected with their Hindu life. But now that the mother has returned to live with the father a breach with Hindu relations is, I am afraid, inevitable. And as to religion the parents have agreed that the children shall make their own selection when older. This is not an ideal arrangement but is perhaps the best possible in the circumstances.

As the parents are living together and are able to provide a home for the children, I think the welfare of the children will be promoted by their living in that home. The elder girl who is old enough to express an intelligent preference wishes to live with her parents. I think we should allow the family to resume its normal life and should refrain from passing any order which might disturb the harmony of the family by impairing the authority of the father as head of the family and natural guardian of the children. Although the respondent has not contested the appeal, we have heard two Hindu relations who have opposed it with a heat which betrays the odium theologium. They suggest that the appellant might at some future time drive

Radhibai out of his house and deprive the children of her care. I cannot believe there is any ground for this suggestion but if the appellant does break up the children's home, the respondent will be able to renew her application. I would accordingly reverse the order of the District Judge and make no order as to costs.

Crouch, A. J. C.—I concur. The word "suit" in O. 23, means, I consider, the attempt to gain an end by legal process, and the withdrawal by the plaintiff from such an attempt cannot have the effect of depriving any other party of rights conferred by any order passed by the Court in the suit, or relieve the plaintiff himself of any duties so imposed. Once a person has on his own petition, been appointed a guardian, the question whether or not the guardianship should be terminated is one for the Court to decide, and a mere statement that he withdraws his petition cannot change the special status of the minor which has been created by the Court. If this Court were now dealing with the case on the original side, there can be no doubt that it would be not only unnecessary but improper to remove the father from his position as guardian and appoint the mother. The mother is content to live with her husband and the children, so far as they are competent to express an opinion, raise no objection to residing with their parents, under the usual conditions. The father has been guilty of robbing, which amounts to such misconduct as in law renders him unfit to be guardian; the mother has shown herself to be a person of resolute character and strong convictions, with a powerful backing in her religious opinions. The mere possibility that the father's influence may override that of the mother, and that the children may at some future time be forced to adopt an uncongenial religion, forms no good ground for taking the very serious step of depriving the father of that authority which is vested in him by law and which he is anxious to retain and transferring it to the wife who is unwilling to accept it.

The case as presented to us in appeal is essentially different from that with which the lower Court had to deal, and though in ordinary cases I consider that great weight should be attached to the opinion formed by the trying Court of the fitness or unfitness of a person to be guardian, I

have no hesitation in the present case in agreeing to an order reversing that of the lower Court.

V.R./R.K.

Order reversed.

A. I. R. 1918 Sind 35

PRATT, J. C. AND CROUCH, A. J. C.

Kodumal Kalumal—Plaintiffs—Appellants.

v.

Volkart Bros.—Defendants—Respondents.

Misc. Civil Appeal No. 7 of 1918, Decided on 3rd April 1918, from the order of Fawcett, A. J. C., Sind.

(a) Arbitration Act (1899), S. 19—Order under S. 19—Appeal lies under Civil P. C. (1908), S. 104 (e).

An appeal lies under S. 104 (e), against an order passed under S. 19, Arbitration Act, staying or refusing to stay a suit, where there is an agreement to refer to arbitration. [P 35 C 2]

(b) Arbitration Act (1899), S. 19—Appearance in suit.

An appearance by a defendant for the purpose of making a stay application can be treated as an appearance in the suit. [P 36 C 1]

(c) Arbitration Act (1899), S. 19—"After appearance"—Meaning explained.

The expression "after appearance" in S. 19 is merely directory, and neglect of this procedure would not invalidate an order of stay made by the Court. [P 36 C 1]

(d) Arbitration Act (1899), S. 19—Agreement to refer—It is duty of the Court to stay suit.

Under S. 19 where there is an agreement to refer, it is *prima facie* the duty of the Court to stay a suit and the onus is on the plaintiff to show why he should not be bound by his agreement. [P 36 C 1, 2]

(e) Arbitration Act (1899) — It is discretionary with arbitrator to apply for Court's opinion on any question of law.

The provision of English law whereby an arbitrator can be compelled to refer a point of law for the opinion of the Court does not apply in India. Under the Arbitration Act an arbitrator is the sole judge of both questions of fact as well as of law arising under the reference and it is discretionary with him to apply for the Court's opinion on any question of law. [P 36 C 2]

Wadhmal Oodharam—for Appellants.

T. G. Elphinstone—for Respondents.

Judgment.—This is an appeal from an order made by the Additional Judicial Commissioner staying a suit filed by the appellants against Messrs. Volkart Brothers under S. 19, Arbitration Act. The preliminary objection raised by Mr. Elphinstone on behalf of the Volkart Brothers is that no appeal lies. It is true that no provision is made for an appeal in the Arbitration Act, 9 of 1899, but we think it clear that an appeal lies under S. 104 (e) Civil P. C. That subsection allows an

appeal from an order staying or refusing to stay a suit where there is an agreement to refer to arbitration. There is no ground for the suggestion that the word "order" in S. 104 is limited to an order under the Civil Procedure Code. The word "order" is defined in S. 2, sub-cl. (11), in very wide words as "formal expression of any decision of a civil Court which is not a decree." S. 104 takes the place of S. 588, old Civil P. C. in which the phrase was "the following orders under this Code." The words "under this Code" have been omitted from the present Civil Procedure Code, which refers merely to the "following orders." Again the section itself makes a distinction between orders under the Code and others generally, for subsection (b) specially refers to orders under any of the provisions of this Code. It seems clear that S. 104 (a) gives a right of appeal from any order made by a Civil Court staying or refusing to stay a suit where there is an agreement to refer to arbitration, whether under the Civil Procedure Code or under the Arbitration Act 9 of 1899.

The first point raised by the appellants refers merely to a matter of procedure in the lower Court. Mr. Wadhmal complains that the lower Court wrongly refused the application for adjournment which he had made on 25th February and that he had not therefore sufficient time to put his case before the Court. This however is a matter within the discretion of the Court, with which we should be reluctant to interfere unless very strong case had been shown. We do not think that such a case has been shown. The notice of the application was served upon Mr. Wadhmal three days before he applied for adjournment and the length of the arguments which he addressed to the lower Court shows that he had had sufficient time to prepare his case. The next point raised is that the application for stay is premature and should not be entertained, because it was made on the 19th February 1918 at a time when no summons had been served upon the defendant. So that he could not be said to have appeared in the suit. This objection is based upon the words of S. 19, Arbitration Act, which directs that a party may apply for stay at any time after putting appearance and before filing a written statement or taking any other steps in the proceedings. This section was copied

from the corresponding section of the English Act and under the English procedure whereby a defendant may waive service and appear gratis without being served at all. Such appearance is also contemplated by the proviso to O. 9, R. 2, Civil P. C. The appearance for the purpose of making the stay application could therefore be treated as an appearance in the suit. But in any event we think the expression "after appearance" in the section is merely directory, for, what the section is intended to prevent, is a party filing an application for stay after he has attorned to the jurisdiction of the Court; as appears from the wording of the corresponding section in the Arbitration Schedule of the Civil Procedure Code. Neglect of this procedure does not therefore invalidate the order made by the Court.

Now coming to the merits of this case, the appellant's first contention is that he as a plaintiff, has a right to come to Court and that the onus is on the other party, the defendants, to show why the suit should be stayed. But the wording of S. 19 is perfectly clear. It shows that the Court must be satisfied by the plaintiff that there is a reason for not staying the suit and not acting on the submission to arbitration. In this respect the section is in accord with what has been described as a classic passage in the judgment of Lord Selborne, L. C. in the case of *Willesford v. Watson* (1). It is as follows:

"But I think that the legislature and the Act of Parliament under which the Court is now asked to act have given the answer to that argument. If parties choose to determine for themselves that they will have a domestic forum instead of resorting to the ordinary Courts, then since that Act of Parliament was passed a *prima facie* duty is cast upon the Courts to act upon such an agreement."

The parties here have made that agreement. They probably knew what were the reasons in favour of determining these questions by arbitration, and what were the reasons against it, and made it part of their mutual contract that these questions should be so determined. The plaintiffs cannot therefore be now heard to complain if that part of their contract is carried into effect. It is therefore a *prima facie* duty of the Court to stay a suit and the onus is on the plaintiff to show why he should not be bound by his

agreement to refer to arbitration. The reasons that have been shown are three: Firstly, it is said that the dispute involved complicated questions of law which can be better determined by the Court than by the arbitrators. Mr. Wadhmal contends that it is the law in England that wherever there is a complicated question of law to be decided the Court should stay the suit. But the English cases do not apply where questions of fact as well as of law are in dispute. Under the English Act the arbitrators can be compelled to refer a point of law for the opinion of the Court, and on this there is authority that where the only matter in dispute is a question of law, the Courts will be disposed to refuse the stay since it would be idle to remit to the arbitrator that which the arbitrator would in his turn have to remit to the Court. But this argument does not apply in India, for the Arbitration Act, contains no provisions under which the arbitrators can be compelled to refer to the Court a question of law. The machinery of the Indian Act is adequate for the disposal both of questions of fact and questions of law, and S. 10 B of the Act gives the arbitrators power to invoke the assistance of the Court for a decision of a question of law, if they so desire.

We do not however go to the length of saying that there may not be cases involving complicated questions of law which the Court would be better able to try than the arbitrators. But Mr. Wadhmal has entirely failed to convince us that any such question arises in the present case. What are the questions of law in this case which the arbitrators would be incompetent to decide? In the first place it is said that a question arises as to the construction of the contract. But the contract is a simple mercantile contract and one which we think any man of business would be perfectly competent to construe. Next it is said that the defendants might raise a defence under a recent English Statute, viz., Emergency Act of 1917, referred to by my learned brother in his judgment in *Misc. Appeal No. 40 of 1918* [*Messrs. Volkart Brothers v. Messrs. Kodumal*]. But that Statute has no application to the present contract. Next it is said that the plaintiffs anticipate that the defendants will raise a defence that there is a custom affecting the contract

whereby the plaintiffs are bound to take delivery although the goods may have been shipped after the time limited by the terms of the contract. But it does not appear that there is any occasion to raise this plea for, Cl. 13 of the contract makes a special provision for late delivery. And even if such a plea were raised, it would be a customary right arising out of the contract and falling within the scope of the very wide arbitration clause.

Next it is urged that the arbitrators would be unable to call the evidence necessary for the trial of the suit because the plaintiff would have to prove the dates of the sailings of the steamers leaving Java. But under present conditions the Courts would find great difficulty in executing commissions in Java and no such evidence is necessary for the sailing dates could be easily proved before the arbitrators from Reuter's cables. The next point raised is that the class out of which the arbitrators are to be selected is prejudiced because all European merchants are importers, and therefore their sympathy would be with the defendants. But the class out of which the arbitrators are to be selected is not limited to sugar merchants. The arbitration is to be by two European merchants resident in Karachi, and we cannot believe that two disinterested European merchants cannot be found in Karachi. It is said that the European merchants would be unwilling to act as arbitrators in this case and that arbitration would fail for that reason. But in that event it would be open to the appellants to make an application to revive the suit. Apart from these considerations, this Court would be loth to interfere with the discretion exercised by the lower Court, as suggested in the case of *Jaipal Kunwar v. Indar Bahadur Singh* (2), where it was held that the Court of appeal will not interfere with the discretion judicially exercised by the lower Court. That was the consideration that governed the judgment of Lord Moulton in *Bristol Corporation v. Aird* (3). We accordingly confirm the order of the lower Court and dismiss this appeal with costs.

V.R./R.K. *Appeal dismissed.*

(2) [1904] 26 All. 238=31 L.A. 67=7 O.C. 239 (P.C.).

(3) [1913] A.C. 241.

A. I. R. 1918 Sind 37

CROUCH AND HAYWARD, A. J. CS.

Notandas—Appellant.

v.

Kishnibai—Respondent.

Misc. Civil Appeal No. 14 of 1915, Decided on 9th November 1917, from order of Joint Judge, Sukkur.

Probate and Administration Act (1881), Ss. 76 and 98—Order fixing capital and giving directions for administration are outside scope of sections.

Sections 76 and 98 contemplate orders merely directing the exhibiting of accounts in Court. Orders purporting to fix the capital of the trusts and giving directions for their administration are entirely outside the scope of these sections.

[P 24 C 1]

Isardas Oodharom—for Appellant.

Kimatrai Bhograj—for Respondent.

Judgment.—This is an appeal against two account orders passed by the Joint Judge of Sukkur-Larkana purporting to be under the Probate and Administration Act. It appears that the appellant *Notandas* is a trustee under the will of one Doulumal, who died in 1913, leaving his property in trust for the provision of a small monthly pension to his widow *Kishnibai*, and for the distribution of the remainder in charity. The appellant obtained probate of the will in Certificate Case No. 37 of 1903 in the District Court of Sukkur-Larkana, and that probate order was confirmed in May 1906, by the Sadar Court of Sind. The respondent *Kishnibai* subsequently filed a suit against the trustee claiming the whole of the estate on the ground that the will was void for uncertainty. That suit was dismissed and the dismissal confirmed on appeal in 1909 by this Court.

The appellant appears, after obtaining probate, to have submitted accounts from time to time, though the actual accounts have not been placed before us. But such documents as have been included in the paper-book, show that such accounts were filed and examined by the officers of the District Court, Sukkur-Larkana. It is said that these accounts were finally passed on 2nd December 1911. The respondent *Kishnibai* will not admit that, though she is not prepared to deny that the accounts were submitted and passed. It is difficult to believe that those accounts were not finally passed in the course of the eight years which elapsed between the death of the testator and the alleged final order of 1911 of the District Court. But however that may be, it

seems to us quite clear that the orders now in question dated 9th April 1915 and 19th May 1915 were not orders merely exhibiting the accounts in Court as contemplated by Ss. 76 and 98, Probate and Administration Act. These orders purport to fix the present capital of the trust at some Rs. 30,000, i. e., the capital as it stood some 12 years after the death of the testator. They further go on to provide for the future administration of the trust making directions for the manner in which the pensions should be paid out of the trust funds and the repairs effected out of the trust property and finally ordering that further accounts should be submitted half yearly to the Court. We agree with the decision of the learned Judicial Commissioner in the case of *Hemandas Ramrakhiomal v. Chellaram Dhalloomal* (1) that such orders are entirely outside the scope of Ss. 76 and 98, Probate and Administration Act. We therefore set aside these orders and allow this appeal with costs.

V. R. / R. K. *Appeal allowed.*

(1) [1915] 9 S. L. R. 134=32 L. C. 554.

A. I. R. 1918 Sind 38

PRATT, J. C. AND CROUCH, A. J. C.

Jivanji Mamooji—Plaintiff—Appellant.

v.

Ghulam Hussain Sheikh Tayab—Defendant—Respondent.

First Appeal No. 14 of 1915, Decided on 16th October 1917, against order of Fawcett, A. J. C., Sind.

(a) Interpretation of Statutes—Words and phrases should be assumed to be used in their technical meaning.

The first and most elementary rule of construction is that it is to be assumed that words and phrases are used in their technical meaning if they have acquired one. [P 39 C 1]

(b) Provincial Insolvency Act (1907), S. 16—"Pending"—Meaning explained.

A legal proceeding is said to be "pending" as soon as commenced and until it is concluded, that is, so long as the Court having original cognizance of it, can make an order on the matters in issue, or to be dealt with therein: 9 S. L. R. 34, Overruled. [P 39 C 1]

(c) Provincial Insolvency Act (1907), S. 16—Court cannot deny exercise of rights conferred by statute.

Court has no inherent authority to terminate the proceedings in an insolvency and deny to creditors and debtors, the exercise of rights clearly conferred by Statute. [P 39 C 1, 2]

(d) Provincial Insolvency Act (1907), S. 16—Receiver and insolvent not discharged—Insolvency proceedings are pending.

Insolvency proceedings are not considered as

still "pending" within the meaning of S. 16, where the Receiver has not yet been discharged and the insolvent has not applied for and obtained his discharge. [P 39 C 2]

(e) Provincial Insolvency Act (1907), S. 16 (2)—"Leave" cannot be after institution of suit.

The "leave" to commence a suit, referred to in S. 16 (2) should be obtained before the institution of the suit, and cannot be obtained subsequently to its institution. [P 39 C 2]

Dipchand Chandumal—for Appellant.

Kalumal Pahloomal—for Respondent.

Crouch, A. J. C.—This is an appeal against an order of Fawcett, A. J. C., dismissing a suit of the appellant on the ground that no leave to commence the suit had been granted by the Court exercising jurisdiction under the Provincial Insolvency Act. Ghulam Hussain Sheikh Tayab had been adjudicated an insolvent in Insolvency Proceeding No. 1 of 1901. The insolvent had absconded and the matter proceeded in his absence. Such assets as could be discovered were realized and a final dividend was declared and paid. On the matter being called up on 6th August 1913 the insolvent was still absconding and it was suggested that the matter should be put on the dormant file. The Court (Hayward, A. J. C.) passed the following order:

"The insolvent has not appeared to claim discharge. The proceedings should therefore be struck off the file and sent to the Record Room."

The present suit was filed on 23rd September 1913, in respect of a debt which was provable in the insolvency proceedings. The plaintiff had not obtained leave under S. 16, Provincial Insolvency Act, to file the suit and a preliminary issue:

"Is the suit maintainable because of the pendency of the insolvency proceedings against the defendant?"

was decided in the negative and the suit was dismissed. In his judgment the learned Judge held on the authority of *Hawes, In re, Jeffery, Ex parte* (1) and *McHenry, Ex parte, McHenry, In re* (2) that, as the Receiver had not been discharged, the proceedings were still pending and that the leave mentioned in S. 16 of the Act must be obtained previous to the institution of the suit.

Mr. Dipchand Chandumal, who appears for the appellant, has argued, firstly, that the proceedings were not pending, and secondly, that in any case the proper order should have been not of dismissal,

(1) [1874] 9 Ch 144=43 L. J. Bk 27.

(2) [1887] 21 Ch D 25=68 L. J. Ch 27.

but of stay of the suit until the necessary leave had been obtained. Now the first and most elementary rule of construction is that it is to be assumed that words and phrases are used in their technical meaning if they have acquired one. When the Provincial Insolvency Act was drafted "pending," as applied to a legal proceeding, had been the subject of definition in several cases and there was then no longer any doubt as to the meaning which Courts attached to it. Stroud in the edition of 1890, refers to the cases decided up to that date and states:

"A legal proceeding is 'pending' as soon as commenced, and until it is concluded, that is so long as the Court having original cognizance of it, can make an order on the matters in issue, or to be dealt with, therein."

This definition was put in rather more emphatic terms by Jessel, M. R., in *Claygett's Estate, In re, Fortham v. Claygett* (3) and its correctness has not been impugned. As pointed out in the judgment of the lower Court there were several orders which the Court could have made in the insolvency proceedings, in particular, the debtor could at any time, have applied under S. 44 for an order of discharge and the Court could have passed an order granting or refusing it. I accept Mr. Dipchand's contention that the two cases relied on by the lower Court constitute no safe guide to the construction of S. 16 for there is no provision in the Provincial Insolvency Act for the discharge of a Receiver. It is clear from the judgment of the learned Judicial Commissioner in the case of *Firm of Gopaldas v. Pahlumal Hemanmal* (4), on which special reliance is placed by appellant, that it had not been brought to his notice that there was direct authority for construing the word "pending."

Mr. Dipchand urged that a Court has an inherent right to terminate any proceedings before it, and did so in intention and effect when it passed the order of 6th August 1913. He has however quite failed to convince me that the Court can arbitrarily terminate the proceedings in an insolvency and so debar the insolvent from obtaining his discharge, an unscheduled creditor from proving his debt, and the Receiver from getting in and distributing property of which he becomes aware at a late stage. He has nothing

to appeal to beyond the vague and dangerous phrase "inherent authority," but no Court can have inherent authority to deny to creditors and debtors the exercise of rights clearly conferred by Statute. Nor did the Court in this case purport to finally bar all the rights of creditors or of the insolvent. The effect of the order was merely to strike off the matter from the list of those cases which it was the duty of the office to bring up before the Court from time to time for orders, and to place the record in the place appropriate to files which are not required for reference within any defined time. I would hold that the insolvency proceedings were still pending when the suit was commenced.

If the insolvency proceedings were pending, then S. 16 prima facie, constituted a clear bar to the filing of the suit. If the full facts had been disclosed in the plaint itself, it would have been the duty of the Court to reject it under O. 7, R. 11, Civil P. C., and if the plaint was liable to rejection it would seem to follow that the only course open to the Court on being informed of the bar was to dismiss the suit. If we look exclusively to the clear words of the section, there can be no doubt whatever that in the absence of leave a creditor has no right of suit. This was the view taken by Davar, J., in *In re Dwarakadas Tejchandras* (5). As soon as the defendant has brought to the notice of the Court that the insolvency proceedings are still pending against him, the statement by plaintiff that he has "the leave of the Court" becomes a material proposition of fact which he must allege in order to show that he has a right to sue, and as soon as the Court realises that the plaint discloses no complete cause of action, dismissal is the only course, for, had the plaint frankly stated the full facts, it would have been rejected in limine, and no plaintiff can obtain a right of suit by deceiving the Court.

Again as pointed out in the judgment in *Baloo Piroo v. Aladian Mitha* (6), the Court exercising jurisdiction under the Insolvency Act can give leave only to "commence a suit;" it cannot give leave to continue a suit which has been instituted contrary to a rule of law. The

(3) (1882) 20 Ch D 637.

(4) (1915) 17 S L R 34=30 I C 37.

(5) A. I. R 1915 Bom. 134=31 I. C. 48=40 Bom. 235.

(6) O. S. No. 239 of 1911.

Official Receiver and the debtor are otherwise amply protected against the final result of any suit; the provision that no creditor shall commence a suit without leave gives protection against a particular form of interference with the winding up of the estate. Under the Act no creditor is bound to prove in the insolvency, and the order of discharge does not release the insolvent from an un-scheduled debt. Hence any unscheduled creditor who can obtain a decree can put pressure on the insolvent for the rest of his life, and, where the disclosed assets are insignificant, it may be more profitable to a creditor to institute a suit than to file a claim. But the winding up of the estate would be almost impracticable if a large number of creditors were to institute proceedings. The mere cost of ensuring that the estate was adequately protected in all the suits would waste a considerable portion of the assets, the books of accounts would have to be taken from Court to Court and the Official Receiver might in several cases have to appear in person. Hence if the trying Court condones the unlawful institution and merely stays the suit, while leave is being sought from the Court exercising insolvency jurisdiction, the Official Receiver can fairly claim that he has not received that special form of protection from proceedings in the ordinary civil Courts to which he is clearly entitled.

The decisions cited by Mr. Dipchand, based as they are on statutes with provisions essentially different from those of the Provincial Insolvency Act, afford little assistance in solving the problem before us. In *Brownscombe v. Fair* (7) the defendant against whom bankruptcy proceedings were pending applied that a suit instituted against him might be stayed under S. 10, Bankruptcy Act, 1883, and it was held that the plaintiff should not be allowed to continue the action. There was no request that the suit should be dismissed, but the stay order was unconditional. The Provincial Insolvency Act contains no provisions similar to those of S. 10, English Act, and the only procedure by which relief similar to that conferred by an unconditional stay order can be given is dismissal. The decision in *Firm of Gopaldas v. Pahlumal Hemanmal* (1) followed that of the Privy Council in *Mahammad Azmat Ali v. Lalji*

(7) [1888] 55 L. J. 85.

Begum (8). That was a case under Ss. 4 and 6, Pensions Act, 1871, and it was held that the provision in S. 6 that

"a civil Court, otherwise competent to try the same, shall take cognizance of any such claim upon receiving a certificate from such Collector" justified a Court in proceeding to hear a suit even though the plaintiff had not filed his certificate until some time after institution. "Cognizance" is defined by Webster as

"(1) jurisdiction or the power given by law to hear and decide controversies; (2) the hearing of a matter judicially."

Hence, the section was clearly open to the construction that a Court might proceed with the hearing on receiving a certificate. Similarly, the word "entertain," which according to Webster means "(1) give reception to; (2) receive and take into consideration," was construed in *Rendall v. Blair* (9) as equivalent to "proceed with the hearing." And this construction was adopted in *Bando Subrao v. Jambu Tavnappa* (10) when S. 47, Deccan Agriculturists' Relief Act was in question. *Fernandez v. Rodrigues* (11) was a case under S. 30, Civil P. C., (14 of 1882), and it was held that the words:

"One or more of such parties may with the permission of the Court sue or be sued"

enabled a plaintiff to obtain the permission after institution. This has been laid down in *Srinivasa Chariar v. Raghava Chariar* (12), *Chennu Menon v. Krishnan* (13) and *Baldeo Bharthi v. Bir Gir* (14). "To sue" is to proceed with an action and to follow it up to its proper termination (Webster) and is obviously, not the same as "to commence an action." But the Courts have not hesitated to dismiss any suit that has been instituted in clear breach of a rule of law. Thus when a suit was brought in defiance of the provision in the Court of Wards Act (Bengal Act 9 of 1879, S. 55) that

"no suit shall be brought on behalf of any ward . . . unless the same be authorized by some order of the Court"

it was dismissed, *Dinesh Chunder Roy v. Golam Mastapha* (15). So also the terms of S. 433, Civil P. C., 1882, were strictly enforced in *Chandulal Khushaiji*

(8) [1882] 8 Cal. 422=9 I. A. 8=4 Sar. 310 (P. C.).

(9) [1890] 45 Ch. D. 139=59 L. J. Ch. 641.

(10) [1910] 7 I. C. 286.

(11) [1897] 21 Bom. 784.

(12) [1900] 23 Mad. 28.

(13) [1902] 25 Mad. 399.

(14) [1900] 22 All. 269.

(15) [1889] 16 Cal. 89.

v. *Awad* (16). I would hold therefore that the lower Court had no alternative but to pass the order complained against and would dismiss the appeal with costs.

Pratt, J. C.—I concur and resile from my judgment in *Firm of Gopalidas v. Pakhlmal Hemamal* (1). The word "pending" should be construed not as I there construed it, but in the sense that it was still possible to the Court to make an interlocutory order in the proceedings. This construction does not involve hardship for in the circumstances of the present case, leave would have been given as a matter of course. I also agree that the suit could not have been stayed in order to enable the plaintiff to obtain leave. The Privy Council case under the Pensioners Act is distinguishable for the reasons given in *Comptroller of Customs v. Lord* (16). The plaintiff should have obtained leave to withdraw from the suit with liberty to file a fresh suit when the term of S. 16, Provincial Insolvency Act, was dissolved. But this procedure cannot be adopted in appeal. *Khanji Bhopalji v. Hanaji Bhopaji* (17). The order made by the lower Court was therefore correct.

V. 35, 36 & 37. Appeal dismissed.

(16) (1907) 21 Bom. 331.

(17) (1911) 35 Bom. 201 = 10 L. C. 41.

A. I. R. 1918 Sind 41

PRATT, J. C. AND FAYRETT, J. J. C.

Goverdhandas Vishandas Motanchand
—Plaintiffs—Appellants.

v.

Ramchand Manjimal — Defendants—Respondents.

Misc. Civil Appeal No. 9 of 1918, Decided on 5th April 1918, against order of Crouch, A. J. C.

(a) Arbitration Act (1899), S. 19—Arbitration tribunal—Ultimate decision resting with umpire who would tilt scales against one party—Stay should be refused.

An arbitration tribunal in which the ultimate decision rests with the nominee of a class to which one of the parties belongs cannot be said to be an impartial tribunal. [P 45 C 2]

When a Court finds that an agreement of reference to arbitration provides for the appointment of an umpire who would most certainly tilt the scales against one party, the Court should retain its jurisdiction to try the suit and refuse any application for stay thereof. [P 45 C 2]

(b) Arbitration Act (1899), S. 19—Scope. An order for stay under S. 19 ought not to be restricted by a time limit. [P 45 C 2]

(c) Arbitration Act (1899), S. 19—Agreement providing reference to arbitration of two merchants or certain Association—Association loosely constituted—Establishment of

valid tribunal matter of difficulty. — Per Pratt, J. C.—Court should hesitate to enforce arbitration—Per Fayreth, J. J. C.—Agreement was not void under S. 20, Contract Act, and could not be avoided—Contract Act (1872), S. 20.

Where an agreement of reference provided that in case of dispute the matter should be referred to the arbitration of two merchants who were members of the Karachi Indian Merchants Association and in case of disagreement between the arbitrators, to an umpire to be named by the said arbitrators or in case of their inability to do so by the Managing Committee of the Association, and it was proved at the trial that the body of the Association was so imperfectly constituted and the Association so loosely constituted that the establishment of a valid tribunal of arbitrators was a matter of considerable difficulty:

(a) Per Pratt, J. C.: That under such circumstances the Court would hesitate to enforce arbitration. [P 43 C 2]

Per Fayreth, J. J. C.—That both the parties appeared to be under a mistake of fact as to the validity of the constitution of the Association, but as the matter was not once raised in the agreement, the agreement of reference was not void under S. 20, Contract Act, and hence could not be avoided on this ground. [P 44 C 1]

(d) Arbitration Act (1899), S. 20—Court should exercise discretion with caution in granting stay or granting leave to revoke submission.

The Court should exercise its discretion, in refusing to stay a suit or granting leave to revoke a submission, in a sparing and cautious manner and should not do so, unless the applicant can establish that there is good ground for apprehending that there will be a failure of justice if the reference to arbitration is allowed to proceed. [P 47 C 2]

Strangman—for Appellants.

Kutamal Pakhoomal and *F. J. Dever-*
teuil—for Respondents.

Pratt, J. C.—This is an appeal from an order made by the learned Additional Judicial Commissioner staying under S. 19, Arbitration Act, 1899, a suit filed by the plaintiffs-appellants against the respondents. The suit was upon a contract under which defendants had agreed to sell to the plaintiffs cotton at the rate of Rs. 35-2-0 a maund deliverable in January not later than the 25th. The plaintiffs contended that the defendants had committed a breach of this contract by failing to deliver, and the suit was for damages for that breach. The contract was on Karachi Indian Merchants Association terms and contained an arbitration clause which was in the following form:

"Any dispute whatsoever, including construction of this document, arising out of this contract shall be referred to the arbitration of two merchants who are members of the Karachi Indian Merchants Association under the provisions of the Arbitration Act, 1899, as subsequently

amended. If one party fails to appoint an arbitrator for seven clear days after the party having appointed his arbitrator has served the party making default with a written notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference. Should the two arbitrators be unable to agree, the dispute shall be referred to an Umpire nominated by the said arbitrators. If the two arbitrators are unable to agree, to an Umpire, the latter shall be nominated by the Managing Committee of the Karachi Indian Merchants Association. The decision of the arbitrators or the Umpire, as the case may be, shall be final and binding."

To enforce this agreement of reference the defendants applied for stay of the suit. It was *prima facie* the duty of the Court to act on the agreement and stay the suit and the onus was, therefore, on the plaintiffs to show cause why the suit should not be stayed. The plaintiffs did show cause and called evidence, but the lower Court ordered the suit to be stayed without calling upon defendants. The case against stay of the suit was based on two main grounds. In the first place plaintiffs contended that the tribunal of arbitration constituted under the agreement of reference would not be impartial and that there was the reasonable prospect of bias. In the second place they contended that there would be difficulties in constituting the tribunal of arbitration as the class from which the arbitrators were to be selected could not easily be ascertained with the result that even if parties went to arbitration the award might be impeached on the ground that the arbitrators nominated did not belong to the class and were not empowered to act.

Now on the first point the plaintiffs showed to the satisfaction of the lower Court that the market rate of ready cotton on due date was Rs. 57'59 per maund, whereas contracts made on the Indian Merchants Association terms had been settled at Rs. 41 to 43½. Plaintiffs contended that this lower rate was not an actual market rate but an artificial rate under which certain contracts had been settled or compromised by cross-contracts. The plaintiffs urged that the parties would more certainly appoint arbitrators, one in favour of the higher and the other in favour of the lower rate, and that the final decision would, therefore, rest with the Umpire selected by the members of the Managing Committee of the Karachi Indian Merchants Association.

They then gave evidence that the majority of this Managing Committee were either pecuniarily interested in the lower rate or were in favour of the lower rate; and contended that the arbitration would be vitiated by the bias of the Umpire.

The lower Court thought that the arbitration might never reach the Umpire. It expressed a hope that each party would appoint an independent arbitrator and these arbitrators might be able to settle the matter without the appointment of an Umpire. Possibly this pious hope might be realized, but that does not conclude the matter. If the agreement of reference provides that the final decision should rest with an Umpire who is biased, that is surely a matter which the Judge should consider when exercising his discretion as to whether or not he should surrender his jurisdiction to try the suit. Mr. Kalumal contends that the fact that the members of the Managing Committee are in favour of the lower rate is not evidence of bias, for that lower rate is an actual market rate. His case is that cotton delivered under the Karachi Indian Merchants Association terms is cotton of an inferior quality and fetches lower price because the condition as to place of delivery is not so favourable as in the case of cotton bought under the other contract terms prevailing in the market. But this was not the view of the lower Court. The judgment does not proceed on this ground. The learned Additional Judicial Commissioner held that the lower rate of the Association contract is due to the fact that in these contracts there is no intention to give or take delivery. This finding is altogether outside the pleadings; it is not the case of either party that delivery was not intended. Moreover that finding would involve the conclusion not only that the main contract is void as one of wager, but also that the collateral contract of reference to arbitration is equally invalid.

On the question of bias, therefore, it seems to me that there is a case for defendants to rebut. The second ground arises out of the rules of the Karachi Indian Merchants Association. The plaintiffs contend that if both the arbitrators and the Umpire are to be appointed from among members of the Association and its Managing Committee, it should be reasonably certain who those members are.

The annual report of the Association gives a list of members which includes several firms, implying that every partner of the firm named is a member. On the other hand R. 1 (2) of the rules of the Association says expressly that not more than one member of the firm shall be admitted as a member. The Judge seeks to reconcile this discrepancy by suggesting that the name of the firm in the list of the members in the annual report is false description of the name of the actual partner who is a member. But there is no evidence to support this explanation and it is not that given by the Secretary. Mr. Kalumal seeks to reconcile the list of the members with the rule: first, by suggesting that each firm had a right to appoint a representative who alone is a member; and secondly by suggesting that all the partners of the firm are members, but that only one partner is an active member while the other members are passive members. With reference to Mr. Kalumal's first explanation if only the representatives were members, their names would appear in the list. But the names of no representatives appear either in the list or in the report of the proceedings. And with reference to Mr. Kalumal's second explanation the rules make no distinction between the active members and the passive members. These different explanations show that Mr. Kalumal himself is in doubt as to who the members are. They also introduce further elements of uncertainty. Who are the representatives whose names are not recorded anywhere? Are the passive members qualified to act as arbitrators, or to take part in the appointment of the Managing Committee? Again if all partners of the firms are members, the very fact of partnership might be a source of dispute for the constitutions of the firms vary from time to time. This uncertainty as to the membership reflects on the constitution of the Managing Committee, for if that membership is in doubt then the membership of the Managing Committee which is selected by the Association must be equally doubtful. R. 2 (e) of the rules providing for the appointment of the successor to a member of the Managing Committee appears to assume that all partners of the firms are members and conflicts with R. 1 (2) which provides that only one partner can be a member.

It is no answer to these objections that

the contracting parties are bound by the rules and that their agreement should be construed as referring to de facto members, for the doubt arises as to the meaning of the rules and the fact of membership. It may be that the members are capable of being made certain and that the agreement of reference is not void, but the plaintiffs' case is that the rules are so imperfectly drafted and the Association so loosely constituted that the establishment of a valid tribunal of arbitration would be a matter of considerable difficulty and that the Court should for that reason hesitate to enforce arbitrations. On this ground also it seems to me that plaintiffs have made out a *prima facie* case against stay. I would also observe that the order of stay made by the lower Court for a period of two months is an order which is not contemplated by S. 19, Arbitration Act. An order of stay for a limited time involves this difficulty that at the expiry of that time the suit automatically revives although the arbitration may still be pending. There is thus the conflict of jurisdiction which, as pointed out in the case of *Deoteman v. Orest Corporation* (1), the provision for stay of suit is designed to obviate. The Judge has to decide whether the Court or the arbitrator should exercise jurisdiction. If he decides in favour of the arbitrator he declines jurisdiction; and any future revival of the suit should depend on a future order on proper cause being shown. I would, therefore, remand the appeal to the lower Court with the direction to record the evidence cited by the respondent. This evidence is embodied in a list of witnesses and documents to be put in by Mr. Kalumal to-day. Evidence to be certified to this Court within a week.

Fawcett, A. J. C.—There can be no doubt that there is a considerable divergence between the Association Rules, as to membership both of the Association and its Managing Committee, and the practice which appears to have been generally followed. It would certainly seem advisable for the Association to take steps to make either the practice conform with the rules or the rules conform with the practice. But I think it is important to bear in mind that we are not now considering the validity of some act either of the Association or its Managing Committee.

1. (1912) 3 K B 257=81 L J K B 1092.

mittee to which the doctrine of ultra vires would be applicable. The question of the validity of the present practice arises only incidentally in connexion with Cl. 17 of the contract, and the first thing to be decided is the meaning to be assigned to the words "members of the Karachi Indian Merchants Association" and "the Managing Committee of the Karachi Indian Merchants Association." It is at the present stage desirable to say as little as possible on the main point in controversy and to avoid prejudging any of them. But I think it may safely be said that, at any rate, in my opinion, there are grounds for the contention that what the parties in making this contract had in contemplation was the actual Association and its managing committee, as constituted in practice, whether that constitution was actually valid or invalid. If so, the most that could be said is, I think, that both parties were under a mistake of fact as to the validity of their constitution. But unless it was an implied term of this contract that the members of the Association and its Managing Committee had been validly appointed in accordance with the rules of the Association, I do not think that the Court could hold that the matter, on which there was this mutual mistake, was one essential to the agreement, so as to make it void under S. 20, Contract Act. In support of this I may refer to *Debendra Nath Dutt v. Administrator-General of Bengal* (2). There the sureties who had given a bond for due administration of the estate in a case where the Letters of Administration had been obtained by fraud, were held bound by their bond, although the sureties were unaware of this fraud and were under the mistaken belief that the Letters of Administration had been validly granted. It was held that the liability of the sureties under the administration bond did not depend on the validity or the invalidity of the grant; and this decision was upheld by the Privy Council on appeal, *Debendra Nath Dutt v. Administrator-General of Bengal* (3).

If the real agreement was what I have already stated, then I do not think that this objection is one which can be raised by the plaintiff's especially as all except one are members of the Association and

some of them are also members of the Managing Committee. I am not disposed, therefore, as things stand, to interfere on this particular ground with the discretion exercised by the lower Court. I also do not think that the plaintiffs have shown that it is impossible in any case to obtain two arbitrators, and if necessary an Umpire, from among the members of the Association or the Managing Committee who had been validly appointed under the rules of the Association. I know of no warrant for saying that a mere possible difficulty on this point would justify the Court in refusing to stay the suit. It is, I think, on a very similar footing to the question of bias, and it has often been held that a mere suspicion of possibility of bias is not sufficient to justify interference with an agreement for arbitration. Similarly, I think that a mere possibility in a technical point of this description is not ordinarily sufficient to justify the Court in refusing to stay a suit under S. 19, Arbitration Act.

But the other objection raised by the plaintiffs is, I think, on a more substantial basis, and I concur generally with what the Judicial Commissioner has said on that point. I do not think that the assumptions made by the Court below are justifiable in the circumstances of this case. They might be justifiable, if the arbitrators had to be chosen from a body of archangels. But the Court cannot rightly lose sight of the fact that they have to come from a body of traders, with whom their financial interests would generally outweigh any other factor likely to influence them. We have the main fact established that the majority of the Managing Committee are in favour of a lower rate in the neighbourhood of Rs. 40 as opposed to a higher rate in the neighbourhood of Rs. 59, which the plaintiffs say is the proper rate to be fixed. It is, I think, at any rate at the present stage, unnecessary to decide which is the proper rate; that is more for the Court or arbitrators or Umpire who may eventually have to deal with the dispute on its merits. But the fact that the majority of the Managing Committee are in favour of the defendant's contention certainly affords basis for bringing the case within the general rule that an order of stay will not be granted, if it can be shown that there is good

2. (1906) 33 Cal 718.

3. (1908) 35 Cal 955=35 I A 103 (P C).

ground for apprehending that the arbitrator will not act fairly in the matter (Halsbury's Laws of England, Vol. 1, p. 453). "There are no special circumstances in this case which differentiate it from the ordinary one, and I think that the plaintiffs have made out a prima facie case in regard to this point, which it is for the other side to rebut, if they can. I, therefore, concur in the order proposed by my learned colleague.

Pratt, J. C.—The evidence of the defendants has now been certified before us and on the question of bias it does not establish the contention raised at the last hearing that there is a different market rate for cotton purchased on Association terms. Such contracts had been settled in January at a lower rate, but a settlement rate is clearly not a market rate, for it is controlled by other factors such as the urgency of the seller or the urgency of the buyer's need for cash.

It is however contended that the market rate is for the arbitrator to decide and that if the Court considers the rate as affecting the question of bias it would be usurping the functions of the arbitrator. And further it is contended that the plaintiffs knew that members of the Managing Committee were dealers in cotton and that on the terms of the reference it was a reasonable expectation that a "bear" might be an Umpire and be in favour of a lower rate. As to these contentions I may remark incidentally that they are diametrically opposed to the defence raised in the lower Court. The defendants' case there was that the Managing Committee were either disinterested or were in favour of a higher rate. But apart from that I do not think the arguments now put forward are sound. It may be admitted that the same strict rule of bias which applies to a Judge does not apply to an arbitrator chosen by parties. If the plaintiff's only complaint was that a "bear" might be appointed Umpire, he would be estopped for it was a reasonable expectation on the terms of the contract that the "bear" might be so appointed. It might also have been anticipated that if a "bear" were appointed Umpire, he would be in favour of the lower rate if there were two market rates. But the defendants have failed to prove that there is a lower market rate and plain-

ly would not reasonably anticipate that the "bear" would be in favour of a lower rate. It is not a market rate at all. There is no dispute as to the fact that the plaintiffs are estopped from raising the question of bias as we are not usurping the functions of the arbitrator, for we do not decide which of two market rates is the proper one but merely that a particular rate is not a market rate at all. On this our conclusion is that the class from which the arbitrator is to be selected is interested in declaring that to be a market rate which is not a market rate.

An arbitration tribunal in which the ultimate decision rests with the members of the class having such an interest is not an impartial tribunal. The defendants attempt to meet this objection by undertaking that the members of the Managing Committee who have this pecuniary interest will not take part in the appointment of an Umpire. This tends to me to make their case worse. It is an attempt to improve upon the agreement of reference by amending the procedure for the appointment of an Umpire and it is therefore an admission that the arbitration under terms of the reference will not be impartial. It is also contended that the Court should not interfere unless and until the arbitrators disagree and the reference to an Umpire becomes necessary. But the Court must decide the question of stay when the application is made and on materials before it. When it finds that the agreement of reference to arbitration provides for the appointment of an Umpire who will most certainly tilt the scales against one party, the Court should retain its jurisdiction to try the suit.

It has also been said that it is a serious thing to interfere with a mercantile arbitration which, as Lord Sumner said in the case of *Produce Brokers Co. v. Olympia Oil & Cake Co.* (4), is a system devised by mercantile men to suit their needs and (which) has been found to be highly beneficial to business. There is a great force in this argument and the Court should always approach the question of stay with a bias in favour of keeping the parties to their agreement to refer to arbitration. But these considerations have less weight with me in this case, for I have great doubt as to whether the form of the contract used

here represents a legitimate and bona fide business. I am far from saying that the present contract was one of wager or that the parties had no intention to give or take delivery. That is a matter which may or may not be in issue. But the provision in the contract that the seller should offer delivery; the absence of any clear specification of the quality of cotton or of the place of delivery; the lower rate for which many theories have been advanced but for which no satisfactory explanation is supplied by the evidence; the admission of some dealers that delivery is not expected, all these circumstances do suggest that these contracts are primarily intended to meet the demand of a purely speculative business. And again the interest of the mercantile community cannot require that the settlement of business disputes should be by a tribunal that is not impartial. It seems to me, therefore, unnecessary to proceed with the consideration of the second point affecting the constitution of the Karachi Indian Merchants Association. In these circumstances I think the Court should exercise its discretion to refuse the application for stay. I would, therefore, reverse the order of the lower Court and allow this appeal. Costs to be costs in the cause.

Fawcett, A. J. C.—I concur that sufficient reason has been shown why the matter should not be referred in accordance with the submission in this case and that the lower Court should accordingly have exercised its discretion under S. 19, Act 9 of 1899, by refusing to stay the suit. In coming to this conclusion I see reason to modify the view expressed by me in my previous judgment as to the inadvisability of this Court entering into the question whether the rate contended for by the respondents is a proper one or not. For the evidence since obtained and certified makes it clear that prior to July 1917 it had never been suggested that there should be different market rates of settlement at due date for the two kinds of contracts, viz., those on European office terms and those on Association terms. And with regard to the subsequent period no evidence has been adduced by the respondents to show that as a matter of fact, where damages have been duly paid under Cl. 4 of the Association contract they have been fixed at a rate differing from the market rate for

ready cotton with anything like the wide divergence now contended for by the respondents; while in regard to contracts for future delivery in January 1918 (like the contracts in suit) the only evidence adduced relates to cases of "settlement" to which other considerations apply. For the respondents Mr. Deverteuil has not relied on any of the additional evidence that has been adduced as rebutting the appellants' case, but has put forward arguments, which would more appropriately have been addressed to us at the previous hearing. His strongest point is that for the plaintiffs to succeed it must be established there is a definite probability that the Umpire appointed will, in fact, be biased, and that until he is appointed any interference with the arbitration is premature.

He urges that the most the appellants have done is to show a probability that the electors of the Umpire will be biased and that it cannot properly be assumed that, even if they appoint a nominee, he will misconduct himself. It is no doubt the ordinary rule that bias is not lightly to be presumed, and that there is a primary presumption in favour of honesty. But in this case there has been an unusually full enquiry in which both sides have had ample opportunity of placing every material consideration before the Court. If, as the result of that inquiry, it could be said that the appointment of a biased Umpire was improbable or of little probability, then Mr. Deverteuil's argument would, I think, be sound. But in my opinion it has been clearly shown that the probability of a biased Umpire being appointed is so strong that it amounts to a practical certainty. In forming this opinion I have not overlooked the offer of some 12 interested members of the Managing Committee not to vote in the election of an Umpire. This goes, however, very little way towards securing a really unbiased Umpire. It would obviously not be difficult to arrange that under a specious display of a fair and proper election of an independent Umpire one really biased in favour of respondents should be appointed. And such a course is one that respondents might naturally try to take in order to make interference with the appointment of the Umpire or the upsetting of his award as difficult as possible. The Court should, of course, be reluctant

to suspect a dishonest intention of this kind; but I am very unfavourably impressed by the shuffling and far from straightforward attitude adopted by the respondents in this case. Not only has there been a complete change of ground from that pleaded in the first affidavits, but there is also a significant refusal to listen to any proposal that the appointment of an Umpire should, in the special circumstances of this case, be made by the Court or otherwise taken out of the hands of the Managing Committee of the Association. It certainly looks as if the respondents are anxious to keep the appointment in the hands of the Managing Committee, because by these means they believe that they can secure the appointment of an Umpire who has a bias in their favour. In all the circumstances, I think that there is "adequate and reasonable" ground for appellants' anticipation of bias and that (in regard to the offer already mentioned) they may well say, "*Timeo Danaos et dona ferentes*." The case is quite different from that of *Messrs. Volkart Bros. v. Firm of Kodumal Kalumal* (5) referred to by Mr. Devereux. The contract in that case provided for the appointment of an Umpire by the two arbitrators, in case they were unable to agree on an award; and under S. 8, Arbitration Act, this appointment could, if the arbitrators failed to make it, be made by the Court.

The circumstances there were also quite different from those established in this case. Moreover, a case like this appears to me to be on quite a different footing to one where the submission clause in the contract appoints a named arbitrator, who is in the employ of one of the parties and, therefore, known by the other party to be likely to be biased in favour of his employer. Though under the present contract the right of appointing an Umpire is vested in the Managing Committee of the Association, yet it would surely be within the contemplation of the parties that an unbiased Umpire should be so appointed. I do not, therefore, think there is any good ground for respondents' contention that the appellants are estopped from showing that circumstances have arisen which make the appointment of an Umpire by the Managing Committee objectionable and likely to result in failure of justice. To sum up, I think it

is a case where the Court has a duty to weigh the real probabilities and act on them, if it considers they outweigh the initial presumption in favour of honesty and freedom from bias. I think there is no reasonable doubt on the evidence and arguments in this case that each party will appoint an arbitrator thought to be safe on his side, and that, with such a wide difference between the two opposing rates, there will be disagreement both as to the award and the person to be appointed Umpire. In my opinion, therefore, it is a practical certainty that an Umpire will have to be appointed by the Managing Committee, and in that event, I think, there is a strong probability that an Umpire biased in favour of respondents will be appointed. The Court should, of course, exercise its discretion, in refusing to stay a suit or granting leave to revoke a submission, in a sparing and cautious manner and should not do so, unless the applicant can establish that there is good ground for apprehending that there will be a failure of justice. If the reference to arbitration is allowed to proceed (Halsbury's Laws of England, Vol. 1, Arts. 951 and 959 at pp. 449 and 453). But in the proved circumstances of this case I am clearly of opinion that sufficient ground has been shown for the Court's interference under S. 19, Arbitration Act. I, therefore, concur in the proposed order.

V.R./R.K.

Order reversed.

A. I. R. 1918 Sind 47

PRATT, J. C. AND FAWCETT, A. J. C.

Hotchand Atmaram—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. Application No. 15 of 1918, Decided on 5th April 1918, from order of Cantonment Magistrate, Hyderabad.

Cantonment Code S. 231 (2)—"Absence"—Meaning explained—Absence of nine days from cantonment renders delinquent liable to conviction.

In construing the word "absence" as used in S. 231 (2) the word should receive a larger or more restricted meaning according to what the Court believes to be the intention of the legislature in framing the particular provision in which the word is used. [P 48 C 1]

An absence of nine days from a Cantonment is such absence as is contemplated by S. 231 (2) of the Code and would render the delinquent liable to conviction and punishment under the section. [P 48 C 1]

N. J. De Verteuil—for Applicant.

V. G. Elphinstone—for the Crown.

Judgment.—This is an application for revision of an order of the Cantonment Magistrate, Hyderabad, convicting the applicant under S. 231 (2) of the Cantonment Code for failing to appoint an agent during a period when he was absent from the cantonment in which he owned a bungalow. The applicant admitted that he did remain absent for nine days at Karachi. He was convicted on that plea and sentenced to pay a fine of Rs. 20 or in default to suffer one week's simple imprisonment. Mr. De Verteuil for the applicant states that the absence of nine days is too short a period to constitute absence within the meaning of S. 231 (2) of the Cantonment Code. But this section does not specify any period of absence and we think, the same rule must be applied to the construction of the word "absence" as was applied in the case of *Mahomed Shuffli v. Laldin Abdula* (1) to the word "residence". It is there said that the word may receive a larger or more restricted meaning according to what the Court believes the intention of the legislature had been in framing the particular provision in which the word was used. The intention of the legislature in this case was, no doubt, that the owner when absent should be represented by an agent to receive notices and otherwise to assist the cantonment authority in the performance of the sanitary and municipal duties imposed upon it by the rules made under the Cantonment Act. If the absence is of such a period as to cause inconvenience to the Cantonment authority in performance of its duties, the accused must be considered to have been absent within the meaning of S. 231 of the Cantonment Code. In this view we think the absence of nine days at Karachi was such absence as was contemplated by S. 231 (2) of the Cantonment Code. We, therefore, reject this application.

V.R./R.K. *Application rejected.*

1. (1878-79) 3 Bom 217.

A. I. R. 1918 Sind 48

PRATT, J. C. AND HAYWARD, A. J. C.

Mulchand Tilokchand—Appellant.

v.

Muradali Shermohmed and others—Respondents.

First Appeal No. 5 of 1915, Decided on 21st September 1917.

Bombay Land Revenue Code (1879), S. 203—Executive order of Revenue Officer—Person aggrieved can appeal though no party to inquiry—Bombay Revenue Jurisdiction Act (1876), S. 10.

Under S. 203, the right of appeal against an executive order of a Revenue Officer is vested in every person aggrieved by the order, irrespective of his being a party to the inquiry wherein the order was passed. [P 48 C 2]

Kewatram Jethanand—for Appellant.

E. Raymond—for Respondents.

Judgment.—The plaintiff-appellant sues defendant 1 and the Secretary of State, alleging that the land to the north of his shop over which he had frontage rights and, therefore, as he says, a right of prior grant, had been wrongly sold by the Deputy Collector to defendant 1. His prayer is that the land should be granted to him on payment of Rupees 13-14-0. This prayer makes the Deputy Collector's order the cause of action and is equivalent to prayer for an injunction on the Secretary of State to grant the land to himself. The District Judge held the suit barred by S. 11, Bombay Revenue Jurisdiction Act, 1876, on the ground that there had been no appeal from the Deputy Collector to the Collector or at any rate from the Collector to the Commissioner. The contention of the plaintiff in this Court is that he was not a party to the proceeding before the Deputy Collector and had, therefore, no right of appeal under S. 203, Bombay Land Revenue Code.

Section 203, Bombay Land Revenue Code provides for an appeal from "any decision or order passed by a Revenue Officer." The words "any order" are very wide and include orders that are either executive or judicial or quasi-judicial. The latter class of order should be passed by the Collector after an inquiry which may be formal or summary or ordinary (Ss. 193, 195 and 197). In such a case there would be a judicial or quasi-judicial inquiry and it might be contended that the right of appeal was limited to a party to that inquiry. But if the order is, as in the present case, a mere executive order professing to dispose of Government land, there would be no inquiry or proceeding, to which the appellant could be a party. In such a case it seems to us that the right of appeal is vested in the person aggrieved by the order. This seems to be in consonance with the language and intention of S. 203 and apparently it was the view taken of the sec-

tion in the case of *Natha v. Secy. of State* (1) and *Government of Bombay v. Bhimhai Sandarji* (2). This construction involves no hardship for if the Collector has put defendant 1 into possession or done a physical act that violates plaintiff's right, that would supply a cause of action to which S. 11, Bombay Revenue Jurisdiction Act would be no bar: *Sultan Mahomed Shah v. Secy. of State* (3). There is moreover another fatal objection to plaintiff's suit, for it affects to control the disposal by Government of waste land and is, therefore, barred by S. 1 of the Act. We, therefore, confirm the decree of the lower Court and dismiss this appeal with costs.

AYE, BAK.

Appeal dismissed.

1. (1906) F J 211.

2. (1879) F J 321.

3. (1911) 5 S L R 16=10 I C 225.

A. I. R. 1918 Sind 49

PROTTE, J. C. AND HAYWARD, A. J. C.
Dharmibai—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 115 of 1917, Decided on 30th August 1917, against order of the Dist. Magistrate, Larkana.

(a) Bombay District Police Act (1890), Ss. 43, 13 (2) and 50—Order by District Magistrate under S. 43 is not open to revision by High Court—Remedy is under Ss. 13 (2) and 50.

An order passed by a District Magistrate under S. 43 is an executive order and not the order of an inferior criminal Court, and consequently cannot be interfered with by the High Court in revision even though it is ultra vires.

[P 50 C 1; P 49 C 2]

The aggrieved party has in such a case a remedy under Ss. 13 (2) and 50 by petition to the Commissioner.

[P 50 C 2, 1]

(b) Bombay District Police Act (1890), S. 43—Person cannot be ejected by District Magistrate without first taking temporary possession himself.

A District Magistrate has no jurisdiction to eject any person from property under S. 43 without first taking temporary possession himself and his order of ejection or exclusion can only operate for the period of his temporary possession.

[P 49 C 2]

Lal Chand Hassomal—for Applicant.

E. Raymond—for the Crown.

Judgment.—This is an application for revision of an order made by the District Magistrate, Larkana, under S. 43, Bombay District Police Act 4 of 1890. The applicant *Dharmibai* is or claims to be the widow of *Bawa Jeramdass*, the *Bawa* of a

"*Tikana*" at Larkana. The *Bawa* died on 25th March 1917 and the applicant remained in possession of the premises. Her possession was resented by certain persons who claim to represent the Hindu Panchayat of Larkana and the District Magistrate, apprehending a disturbance, made orders first on 6th July 1917 prohibiting her from entering the temple, and again on 18th July 1917 directing her to remove from the premises of the temple and the "*Tikana*." A preliminary objection is raised to the jurisdiction of this Court to interfere with the order made by the District Magistrate, and this objection we must uphold. It has been held in the case of *Panchayat Shirdap, In re* (1) that a District Magistrate acting under this chapter of the Bombay District Police Act is acting in his executive capacity and not as an inferior criminal Court and that, therefore, his order is not subject to the revisional jurisdiction of a High Court. This ruling has been approved in the case of *Imperator v. Jaro* (2). That was a case under the Sind Frontier Regulation. But there, as here, the orders of the Magistrate are made subject to appeal not to this Court but to the Commissioner. It is, however, urged that the order is in excess of the jurisdiction conferred by the section and this Court has the same power of revision as it has in respect of orders purporting to be made under Ss. 143 and 144, Criminal P. C., but in excess of the powers conferred by those sections.

Now it must be admitted that the order made by the District Magistrate is not an order which the section empowers him to make. The procedure enjoined by the section is that he should first take temporary possession of the place which is the subject of the dispute, and then by virtue of that possession make orders excluding certain persons or allowing access to certain other persons. He has no jurisdiction to eject any person without first taking temporary possession himself and his order of ejection or exclusion would only operate for the period of his temporary possession. Here the Magistrate has not taken possession and is, therefore, not authorized to eject the applicant; and secondly, he has put no term upon his order of ejection to indicate that it was to operate temporarily. This

1. (1910) 8 I C 747.

2. (1911) 5 S L R 51=12 I C 646.

is a serious prejudice to the applicant, for it casts upon her the onus of resort to the civil Court. This would not have been the case if the District Magistrate had taken a limited period of possession, say, two months, and excluded her for that period only in order to give the Panchayet an opportunity of recourse to the civil Court. This would have been sufficient reason to justify our interference in revision if the order had been made under S. 143 or 144, Criminal P. C., for then it would be the order of an inferior Court. But the orders being under S. 43, Bombay District Police Act, are not orders of an inferior Court and we, therefore, are unable to interfere in revision even though we think them to be ultra vires. The applicant has a remedy under S. 13 (2) and S. 50 by petition to the Commissioner.

Probably the District Magistrate may think it advisable to amend his order and bring it in accord with the terms of S. 43, Bombay District Police Act, and with this remark we can do nothing further but reject the application.

V.R./R.K. *Application rejected.*

A. I. R. 1918 Sind 50

HAYWARD, A. J. C.

Moosaji Ahmed and Co. . . . Plaintiffs.

v.

Asiatic Steam Navigation Co. Ltd.
and another—Defendants.

Original Civil Suit No. 198 of 1916,
Decided on 8th May 1917.

(a) Bill of lading—Carrier by sea can limit his liability by bill of lading.

According to English law it is open to a carrier by sea to limit his liability by a writing such as the bill of lading. Consequently the following conditions in a bill of lading are perfectly valid: (a) that the Company shall not be liable for any damage caused by sweating, fermenting, heat, boilers, or storage, whether arising or not from the negligence of the persons in the service of the company; (b) that the liability of the Company shall absolutely cease when the goods are over or beyond the side of the Company's own ship level with the rail; (c) that the Company shall not be liable for any damage capable of being covered by insurance. [P 51 C 1]

(b) Limitation Act (1908), S. 3—Special period of limitation for suits against Karachi Port Trust are not subject to general provisions of Limitation Act—Karachi Port Trust Act (1886), S. 87.

The general provisions of the Limitation Act regarding the exclusion of holidays and Court vacations in computing the period of limitation have no application to any special period of limitation prescribed by any special or local law, e. g. the Karachi Port Trust Act. [P 52 C 2]

A suit against the Karachi Port Trust filed beyond the period of six months allowed by S. 87, Karachi Port Trust Act, owing to the intervention of Easter holidays and vacation of the Court is barred by limitation. The maxim *lex non cogit ad impossibilia* has no application to such a case as the suit could have been filed earlier. [P 51 C 2]

Dipchand T. Ojha—for Plaintiffs.

Rupchand Bilaram and T. G. Elphinstone—for Defendants.

Judgment.—The plaintiff firm, Moosaji Ahmed and Company, claims compensation from defendant 1, the Asiatic Steam Navigation Company, or from defendant 2, the Karachi Port Trust, for damage alleged to have been caused by the negligence of one or other of the defendants to a cargo of molasses shipped from Sourabaya to Karachi. Defendant 1 pleads *inter alia* exemption from liability under the terms of the bill of lading. Defendant 2 pleads *inter alia* the bar of limitation under S. 87, Karachi Port Trust Act. With regard to defendant's plea it appears there are two branches, the one on the assumption that the damage to the cargo was caused by the negligence of the servants of defendant 1, and the other on the assumption that the damage was caused subsequently by the negligence of defendant 2. It has been contended in respect of the first branch, that defendant 1's liability is excluded by the condition contained in the bill of lading which has been admitted as Ex. 8, to the following effect:

"The Company is not liable for any damage caused by . . . sweating . . . fermenting . . . heat . . . boilers . . . or storage . . . whether arising or not from the negligence of the persons in the service of the Company."

It has been contended in respect of the second branch that defendant 1's liability is excluded by the condition in the bill of lading to the following effect:

"The liability of this company shall absolutely cease when the goods are over or beyond the side of the Company's own ship level with the rail."

It has been argued on the other side, in respect of the first branch, that the condition excluding liability of defendant 1 was not clear and that in any case it related only to such negligence as could be covered by insurance in view of the subsequent condition in the bill of lading to this effect:

"The Company is not liable for any damage capable of being covered by insurance."

It is difficult to understand how it could seriously be argued that the con-

dition excluding the liability of defendant 1 for damage caused by the negligence of their servants was not sufficiently clear. The terms of the condition could hardly, in my opinion, have been clearer or more comprehensive and it does not appear to me that the condition is in any way limited by the subsequent condition regarding insurances. The plain meaning of the subsequent condition, in my opinion, is that the company is not to be held liable in any case for damages which could be recovered from the Insurance Company. There is no reasonable doubt that the condition excluding the liability of defendant 1 for damage by negligence of their servants, is a perfectly clear and valid condition, as would appear from the remarks on the subject to be found in paras 186, 197, 232 and 234, Vol. 26, Halsbury's Laws of England. It does not appear to me in respect of the second branch that any serious argument has been adduced to show that the condition excluding the liability of defendant 1 after the goods had left the ship's tackle was also not a perfectly valid condition, as would appear from the remarks on the subject to be found in paras. 361 and 366 Vol. 26, Halsbury's Laws of England. It has not been disputed that the English Law must be applied in this case according to the agreement between the parties contained in the last clause of the bill of lading, and that is also in accordance with the remarks on the subject which will be found in paras. 356 and 357, Vol. 26, Halsbury's Laws of England. It, finally, cannot be disputed that, under the English Law, it would be open to the defendant 1, as common carriers by sea, to limit their liability by a writing such as the bill of lading, as will appear from the remarks on the subject in para. 445, Vol. 26 Halsbury's Laws of England.

Defendant 1 must, therefore, be held on either branch of the case to have been fully protected from liability for the damage caused by the express conditions of the bill of lading. The suit, therefore, as against defendant 1 must be dismissed with costs. With regard to defendant 2's plea, it would appear that the cargo arrived on 26th October 1915 and it has been alleged that the final failure to deliver the cargo undamaged, occurred in the month of November 1915. Notice was given of suit on 8th March 1916. The Easter holidays and vacation inter-

vened from 20th April 1916 to 25th May 1916, and the suit was, consequently, not filed until 26th May 1916. It is clear, therefore, and it was admitted in the plaint, that, whether the proposed action be taken from 26th October 1915 or from the beginning of November 1915 the suit was filed beyond the period of six months' limitation allowed by S. 87, Karachi Port Trust Act, 1886, unless the Easter holidays and vacation could be excluded from the computation under S. 4, Lim. Act, 1908. No such right of exclusion was recognized under the Bombay General Clauses Act, 1886, and, looking to the year of Karachi Port Trust Act, 1886, recourse cannot be had to the provision of S. 11, Bombay General Clauses Act, 1904. It was suggested that recourse might be had, failing other remedies, to the general maxim "*Lux non cogit ad impossibilia*" but that maxim cannot, in my opinion, be applied here, because there was no absolute impossibility in filing the suit before the Easter holidays and vacation. There was no doubt increased difficulty in filing it within the period of limitation owing to the intervention of Easter holidays and vacation but their intervention did not render it absolutely impossible. The maxim, therefore, could not properly be applied as observed by Jenkins, C. J. in the case of *Ahad Baksh Molla v. Balar Ali* (1).

It has, however, further been argued that recourse could be had to the general provisions of the Limitation Act, 1908. That argument has turned mainly on the question whether the general rules contained in Ss. 4 to 25 could properly be applied in view of the language of Ss. 3 and 29 (b). These latter sections would appear to imply that the general provisions were intended only to apply to suits falling within the schedule of the Limitation Act, 1908. The main difficulty in answering this question arises not so much from the words used by the legislature as from the numerous and somewhat conflicting decisions of the Courts. It was held so long ago as 1872 that the Bengal Rent Recovery Act, was an Act, complete in itself and not subject in the matter of limitation to S. 14, Lim. Act, 1859, That was a decision by the Privy Council reported as *Unnoda Persaud Mookerjee v. Kristo Coomar Moitra* (2). It was followed after

1. (1912) 14 I C 178.

2. (1873) 19 W R 5=15 B L R 60 n (P C).

a number of conflicting decisions in respect of the Limitation Act of 1877 by a Full Bench of the Calcutta High Court reported as *Nayendra Nath Mullick v. Mathura Mohun Parhi* (3).

It was held that the Registration Act was an Act complete in itself and not subject to the matter of limitation to S. 7, Lim. Act 1877, by a Full Bench of the Madras High Court in *Veeramma v. Abbiah* (4). It would appear however that a number of conflicting decisions were subsequently passed on this subject by different Benches of the Madras High Court. Thus the Forest Act was held not to be subject to the terms of S. 12, Lim. Act by the Full Bench of the Madras High Court reported as *Abu Baker Sahib v. Secy. of State* (5); while the Madras Revenue Recovery Act was held not to contain a complete body of rules of limitation and to be subject to the provisions of S. 15 (2), Lim. Act, by the Full Bench of the Madras High Court in *Srinivasa Aiyangar v. Secy. of State* (6). It was similarly held by a Full Bench of the Allahabad High Court that the Provincial Insolvency Act did not contain a complete body of rules of limitation and was subject to the general provisions of the Limitation Act. It was there considered that the general provisions of the Limitation Act could not be said to "affect" the special period of limitation prescribed by the Insolvency Act. The case is reported as *Dropadi v. Hira Lal* (7). It is certainly hard to understand how it could be said that the general provisions of Limitation Act did not at least "affect" the special period prescribed by the Provincial Insolvency Act and it is not surprising therefore to find a difference of opinion arising subsequently on the question whether the Provincial Insolvency Act was subject to the general provisions of the Limitation Act in the subsequent case before a Bench of the Madras High Court reported as *Munjaluri Sivaramayya v. Singumahanti Bhujanga Rao* (8).

The only decisions on this much vexed question on this side, appear to have been those which decided that the Bagdari Act was not subject in the matter of

limitation to the Limitation Act. The latest decision upon that point is reported as *Adam Umar Sale v. Dapu Bawaji* (9). It seems to me in this conflict of authority necessary to return to the actual words of the Limitation Act. It will then be seen that S. 3, provides that:

"Every suit instituted after the period of limitation prescribed therefor by Sch. 1, shall be dismissed"

subject always to the provisions contained in Ss. 4 to 25. That looks as though these latter sections were intended to apply merely to the periods of limitation prescribed by Sch. 1, Lim. Act. Then these sections follow and refer in almost all cases expressly to the period of limitation "prescribed." Thus the word "prescribed" occurs in Ss. 4 and 5 and again in Ss. 9, 12 to 16, 19 and 20. That surely means "prescribed" in Sch. 1, of the Act. The word also occurs in S. 6 and where reference is required to something else, it is made clear in that section by express words "prescribed thereby in Col. 3, Sch. 3," of the Act. So again S. 11 refers expressly to periods prescribed by foreign rules of limitation. It is again indicated that all these sections contemplate merely the periods prescribed by the Limitation Act by the provision in S. 25 that all instruments shall be interpreted in a particular manner "for the purpose of this Act." It has finally been made quite clear to my mind that these sections contemplated nothing else by the provisions of S. 29, (1) (b), where it is stated that:

"nothing in this Act shall affect or alter any period of limitation specially pre-cribed by any special or local law now or hereafter in force in British India."

There may no doubt be weighty considerations in favour of applying to the special periods of limitation prescribed by the various special or local laws the general rules of the Limitation Act. But such application is, in my opinion, a matter for the legislature and not warranted, with due deference to the views of certain of the Judges of the Madras and Allahabad High Courts by the wording of the Limitation Act. If such application had been intended, it is difficult, moreover, to explain the object of the legislature in enacting S. 10, General Clauses Act of 1897 and S. 11 of the Bombay General Clauses Act of 1904 and thereby apply-

3. (1891) 18 Cal 368.

4. (1895) 18 Mad 99 (FB).

5. (1911) 34 Mad 505=5 I C 884.

6. (1915) 38 Mad 52=18 I C 617.

7. (1912) 34 All 496=16 I C 119.

8. (1916) 39 Mad 593=30 I C 703.

9. (1909) 32 Bom 116=1 I C 663.

ing generally to all periods of limitation thereafter prescribed the provisions regarding holidays and vacations of Courts contained in the Limitation Act of 1877 and 1908. This suit therefore must also be dismissed as against defendant 2 with costs.

V.R. R.K.

Suit dismissed.

A. I. R. 1918 Sind 53 (1)

PRATT, J. C. AND HAYWARD, A. J. C.
Khusabhis Moolchand—Applicant.

v.

Banyer—Opposite Party.

Criminal Reven. Appln. No. 64 of 1917,
Decided on 24th May 1917, against order
of Resident Magistrate, Talca.

(a) Bombay District Municipal Act (1901)
Ss. 92 and 96 (1)—Notice or permission is
required in cases of all buildings whether
on public road or in private mahalla.

The object of the Act is to secure the
general safety and sanitation of buildings
in respect of which the Municipality is re-
sponsible, and that notice or permission is
required in cases of all buildings whether
on public road or in private mahalla.

(b) Bombay District Municipal Act (1901)
S. 96—S. 96 confers on Municipality wide
power of regulating buildings.

S. 96 does not empower the Municipality to
deprive owners of the legitimate use of their land
or to refuse permission to build at all, but it does
confer on the Municipality a very wide power of
regulating buildings. The object of the power
is to secure the safety and sanitation of buildings
to be newly erected. This power, though an en-
croachment on private rights, is not inconsistent
with the Act. [P 53 C 2]

G. A. Kikla—for Applicant.

E. Raymond—for the Crown.

Pratt, J. C.—The applicant has been
convicted under S. 96 (5), Bombay Dis-
trict Municipal Act, 1901, of erecting a
building without giving the notice to the
Municipality required by S. 96 (1) and
fined Rs. 10. The applicant contends
that he has only re-constructed an old
building, but under the explanation to the
section the reconstruction of an old build-
ing is included in the phrase "erect a
building." It is next contended that the
reference to S. 92 in S. 96 (1) governs the
whole clause and that notice or permission
is only requisite in cases of building on a
public street and that applicant's build-
ing is in a private mahalla. But the sec-
tion is perfectly plain and does not bear
this construction. S. 92 only refers to
the clause describing projecting portions
of buildings in respect of which the

Municipality are empowered by that sec-
tion to enforce a removal or set-back.
The very wide words "Any building" also
forbid this construction which is opposed
to the plain words of the section. Lastly,
it is contended that it is inconsistent with
the Act that the Municipality should pass
orders in respect of private buildings and
so interfere with private rights. The
section does not empower the Muni-
cipality to deprive owners of the legitimate
use of their land.

It does not empower the Municipality
to refuse permission to build at all, but it
does confer on the Municipality a very
wide power of regulating buildings. This
was recognized in *Nagar Valah Nara v.*
Municipality of Bhambhuka (1), *Muni-
cipality of Khana v. Fazal Kerim* (2),
Chhambha Council v. Ahmedabad
Municipality (3), and *Municipality of*
Karachi v. Mahomed Ali Tasaji (4) and
in respect of a similar section of the
Madras Act in *Queen Empress v. Taram-*
mal (5). The object of the power is, as
indicated in the section itself, to secure
the safety and sanitation of buildings to
be newly erected. This power, though
an encroachment on private rights, is not
inconsistent with the Act. The section,
therefore, applies in the present case and
the conviction is legal. We, therefore,
reject this application.

V.R. R.K. *Application rejected.*

1. (1858) 12 Bom 430.
2. (1901) 3 Bom L R 842.
3. (1903) 27 Bom 221.
4. (1915) 2 S J. R 126=33 I C 675.
5. (1893) 16 Mad 230.

A. I. R. 1918 Sind 53 (2)

PRATT, J. C. AND HAYWARD, A. J. C.
Umermal Jaimal—Appellant.

v.

Firm of Bhojraj Hassomal and another
—Respondents.

Misc. Civil Appeal No. 2 of 1915,
Decided on 14th September 1917, against
decision of Crouch, A. J. C., Sind.

Civil P. C. (1908), O. 38, R. 5 and Sch. 2,
para. 16—Surety bond, for value of property
sought to be attached before judgment—
Suit referred to arbitration—Decree in
terms of award—Surety is liable—Contract
Act (1872), S. 133.

When a suit is referred to arbitration and the
Court pronounces judgement for the amount of
the award, the amount is "adjudged" by the
Court. [P 54 C 1]

A surety gave security under O. 38, R. 5, for
the value of the property sought to be attached
before judgment. The suit was referred to

arbitration and a decree having been made in the terms of the award, it was sought to be executed against the surety:

Held: that the reference to arbitration was an ordinary incident in the suit and the amount awarded was in a judgment against the defendant and was one for which the surety was liable. [P 54 C 2]

Kalumal Pahloomal—for Appellant.

Isardas Oodharam—for Respondents.

Pratt, J. C.—This is an appeal from an order passed by this Court in its District Court Jurisdiction allowing execution to proceed against the surety. The appellant Umer had given security under O. 38, R. 5, for Rs 1,800, the value of the property sought to be attached before judgment. The suit between the parties was referred to arbitration and a decree was made in the terms of the award, and it is this decree of which execution is sought against the appellant surety.

The surety contends that he is not liable to satisfy the amount of that decree, firstly, because that amount has not been "adjudged" by the Court as provided by the terms of his bond, see Form 6 of Appx. F, Civil P. C.; and secondly, because the reference to arbitration was not contemplated by him when he executed the bond. There is no force in either of these objections. When a suit is referred to arbitration, the Court pronounces judgment for the amount of the award; see para. 16 of the arbitration schedule. The amount is, therefore, adjudged by the Court. The second objection proceeds on the assumption that the liability of the surety is affected by S. 133, Contract Act. But that section has no application, for, as pointed out by the lower Court, the relation of the debtor and creditor did not exist between plaintiff and defendant at the time the bond was executed. The utmost that the appellant can contend is that he bound himself to pay what the Court adjudged, and not what the parties settled between themselves as the result of a compromise which might be collusive and in fraud of him. But that is not the case here. The reference to arbitration is a proceeding incidental to the conduct of the suit and this has been decided in the case of *Srikishen Rochumal v. Relumal Pariomal* (1) following the case reported as *Faviell v. Eastern Counties Rly Co.* (2).

Whether an amount arrived at by a

1. (1915) 9 S L R 183=34 I C 845.

2. (1848) 17 L J Ex 297=2 Ex 344.

compromise between the parties is an amount which the surety is liable to pay under the terms of this bond is not a question which arises in this appeal. Mr. Kalumal refers to the case of *Tatum v. Evans* (3). But that was a very special case, for the compromise decree was a consolidated decree in two suits; the surety had given a bond in one not only; the decree made an order affecting the sureties' liability and it was, therefore, held that looking at the substance of the thing there was not an awarding of such sum as the Court should think fit. Further, the Judge took care to say that he would not go to the length of laying down that in no case, where a person gives security as a surety, is he liable when the judgment is obtained by consent. On the whole I am of opinion that the reference to arbitration in this case was an ordinary incident in the suit and the amount awarded was in a judgment passed against the defendant and is one for which the surety is bound. I would confirm the decree of the lower Court and dismiss this appeal with costs.

Hayward, A. J. C.—I concur. I think no sufficient ground has been shown in this case to justify our holding that the surety was released by the award decree between the parties. But I desire to guard myself against holding that in no case would a surety be entitled to claim the application of the equitable principles underlying S. 133, Contract Act, in respect of a bond given under the Civil Procedure Code.

V.B./R.K. *Appeal dismissed.*

2. (1886) 54 L T 336.

A. I. R. 1918 Sind 54

Special Bench

PRATT, J. C., CROUCH AND HAYWARD,
A. J. Cs.

Re Inquiry against Mr. Ma., Pleader.

(a) Sind Courts Act (1866), S 16—Jurisdiction of Court extends even to general misbehaviour—But Court is reluctant ordinarily to take cognizance of misconduct not connected with office of pleader.

The jurisdiction of the Judicial Commissioner under S. 16 extends not only to professional misbehaviour but to general misbehaviour, but while this jurisdiction is unlimited, the Court is reluctant to take cognizance of misconduct not connected with the office of pleader unless it is morally disgraceful or shows that the individual is not a proper person to hold that office. [P 56 C 1]

(b) Sind Courts Act (1866), S. 16 — Pleader is not chartered libertine though he has certain privileges in virtue of sanad.

A pleader by virtue of his sanad has certain rights and privileges, but he is not a chartered libertine and those rights and privileges carry with them corresponding duties and restraints.

[P 57 C 1]

(c) Sind Courts Act (1866), S. 16 — Letter containing personal attack on Judge is misbehaviour.

A pleader is an officer of the Court and is bound to assist the Court in the administration of justice. Criticism which is permissible to a private individual is not permissible to a pleader. The co-operation of pleader and Judge would be impossible if the pleader were attacking the Judge in the public press. Nor would it be possible for the business of the Court to be conducted with dignity, decorum and impartiality when the pleader is posing in public as the chastiser of the Judge. Such conduct is not only a breach of the pleader's duty to the Court, but must also result in an actual obstruction to the administration of justice.

[P 57 C 2]

A letter published by a pleader, alleging that a certain Judge is indolent and takes credit for cases not tried but compromised, even if written in good faith, and even if it does not constitute the offence of libel, amounts to misbehaviour under S. 16.

[P 58 C 1]

E. Raymond—for the Crown.

T. G. Elphinstone—for Opponent.

Judgment.— This is a rule to M, pleader, to show cause why he should not be dealt with under S. 16, Sind Courts Act, for misbehaviour on the following charge:

"That you wrote and published in the name of the Hindvasi newspaper of the 21st January last a letter calculated to bring into contempt the administration of justice in the Court of the Sub-Judge, First Class, Hyderabad."

The rule was granted on a report by the District Judge, Hyderabad, that M had published a letter in a newspaper scandalizing the Court of the First Class Sub-Judge. The letter runs thus:

"But it is your duty not only to bring to the notice of the superior officers, but also to the notice of the litigants, how much and what work is daily done in this Judge's Court. On several occasions daily those who come to Court return disappointed in the evening without any work being done, after sitting in Court the whole day and having wandered and spent money. If all men knew properly, they would not file suits nor wander nor incur unnecessary expenses and would privately settle with defendants. I give you the account of one case from which it will be seen that it is useless to file suits in this Court during the time of this Judge. Parties wander and incur expenses and settle between themselves and then the Judge Sahib reports that he has decided those cases."

Then follows the statement of a case in which M's firm represented one of the parties. This statement is admittedly inaccurate and was corrected in a

subsequent letter. From this statement Mr. M. deduced the conclusion stated in the last paragraph of his letter, which is as follows:

"You will see from the above table what ill-fated men will file a suit in this Court, and which pleader will get proper remuneration that he will be wasting his time in Court the whole day on so many hearings. It is hoped that superior officers will give full consideration to this subject and make such arrangement that Hyderabad should get proper justice at proper expense."

In this letter Mr. M. puts aside all words of glozing courtesy at once without any equivocation and informs the public that it is useless to file suits in this Court. These words carry their own condemnation, for they are calculated to bring the administration of justice in that Court into contempt. The letter is signed by Mr. M. and he admits having written it. Mr. Elphinstone who appeared for Mr. M. began by tendering an apology but when asked whether his client pleaded guilty he replied he did not. An apology coupled with words of justification is not only ungracious but insincere. It is not a token of repentance but a subterfuge to escape punishment. We therefore declined to accept the apology and called upon Mr. Elphinstone to enter upon his defence. Mr. Elphinstone then sought to repel our jurisdiction over Mr. M. and to justify the writing of the letter. We shall now deal with the points raised. Our jurisdiction is conferred by S. 16, Sind Courts Act, which is as follows:

"It shall be competent to the Court of the Judicial Commissioner with the sanction of the Local Government to make rules for the qualification and admission of proper persons to be pleaders in any Court in the Province of Sind and it shall also be competent to the Court of the Judicial Commissioner to remove or to suspend from practice for misbehaviour any person so admitted to be a pleader."

We have therefore to see that proper persons are admitted to be pleaders and after they have been so admitted, we have to supervise their conduct and in case of misbehaviour to suspend or remove them from practice. The intention of the legislature was expressed by Sir Comer Petheram in the case of *Khuda Bux Khan, In re*, (1) in words which I quote:

—"Now it is clear that so far as the Courts are concerned, the legislature has to a great extent made these persons (pleaders) officers of the Court, and of course the object of doing that is

that the Courts may have a control over them as their own officers, and may see that in their dealings with the public they were fit to be entrusted with the responsible duties which they had to perform."

We cannot therefore admit the construction which seeks to limit the word misbehaviour to conduct in the strict course of the pleader's professional duties. A similar contention was raised in *Weare, In re*, (2) and was characterised by Lord Esher as a monstrous doctrine, for it would appear to lead to this conclusion that however disgraceful be the conduct of a pleader, yet if that conduct were unconnected with his professional duties he might continue to be a member of a profession which, Lord Mansfield, said "should stand free from all suspicion." Lord Esher referred to the case of *Brounsall, In re*, (3), where in the case of an attorney who had been convicted of felony it was said that the whole question was whether he was a proper person to be continued on the roll or not. These two cases were cited with approval by the Privy Council in the case of *Rajendro Nath Mukerji, In re*, (4). There can be no doubt therefore that our jurisdiction extends not only to professional misbehaviour but to general misbehaviour. A similar construction has been put by the Bombay High Court on the almost identical words occurring in S. 56, Bombay Pleaders' Regulation, 2 of 1827—*Government Pleader v. Annaji Narayan Deshpande* (5) and by a Full Bench of the Calcutta High Court on S. 14, Legal Practitioners Act, 27 of 1879—*Le Mesurier v. Wajid Hossain* (6). But while our jurisdiction is unlimited it may be conceded that we should be reluctant to take cognizance of misconduct not connected with the office of pleader, unless it were morally disgraceful or showed that the individual was not a proper person to hold that office. It was on this ground that Lord Westbury based his judgment in the case of *Wallace, In re* (7), where an attorney who was a suitor wrote a letter to the Chief Justice reflecting on the other Judges of the Court. But here Mr. M. was not himself a party to any proceeding in the Court of the Sub-Judge. He did not

write as an aggrieved suitor, but on knowledge acquired during the course of his practice as a pleader. His letter was an attack by a pleader on a Judge. The case of *Wallace, In re* (7) was distinguished on this ground by the Privy Council in a case similar in many respects to the present one: *Sashi Bhushan Sarbadhary, In re* (8).

In justification of the letter Mr. Elphinstone argues that it does not constitute the criminal offence of contempt of Court punishable by summary procedure and that it is not a libel on the Sub-Judge, for the administration of justice is a fit subject for public criticism. Hence he contends that not being an offence if written by a private individual it cannot be an offence if written by a pleader, for the rights of a pleader, he says, are at least as high as those of any other citizen. Now the reference to the jurisdiction to commit for contempt seems quite irrelevant. It is true that this Court has no jurisdiction to commit for contempt except contempts in its immediate presence. The power is sparingly used and only when the contempt is such as to cause an actual obstruction of public justice. But these proceedings have not been taken by way of contempt. Whether or not it is a libel on the Sub-Judge is not a matter for decision on the hearing of this Rule.

The administration of justice is, no doubt, a matter of public interest and criticisms in good faith on a Judge are entitled to the privilege of exceptions 1 and 2, S. 499, I. P. C. The latest pronouncement on this point is that of the Privy Council in *Channing Arnold v. Emperor* (9) and is expressed in no ambiguous language. Lord Shaw said:

"Upon the other side it would appear from certain observations of the learned Judge that this false and dangerous doctrine may have been hinted at, that some privilege or protection attaches to the public acts of a Judge which exempts him, in regard to these, from free and adverse comment. He is not above criticism, his conduct and utterances may demand it. Freedom would be seriously impaired if the judicial tribunals were outside of the range of such comment."

But the vital condition of this privilege is that the criticism should be in "good faith." Considering the letter written by Mr. M. as a statement of fact

2. (1893) 2 Q B 429=62 L J Q B 595.

3. (1778) 2 Cowp 829=98 E R 1355.

4. (1900) 22 All 49=26 I A 212 (P C).

5. (1918) 37 Bom 351=19 I C 529.

6. (1902) 29 Cal 890.

7. (1866) L R 1 P C 258=4 Moore P C 140.

8. (1907) 29 All 95=34 I A 51 (P C).

9. A I R 1914 P C 116=41 Cal 1023=23 I C 661=41 I A 149 (P C).

comments on the cases before them or on themselves in connexion with these cases."

Blackburn, J., in *Skipworth's case* (15) said:

"It is not right that a Judge, when personal attacks are made on him, should come forward and meet them and explain them and that is well known to those who make the attack, and certainly that knowledge does in any mind render the conduct of those who attack a Judge in that way to use the mildest term, neither just nor decorous."

The learned Judge was speaking of those who could in some measure protect themselves; how much more forcibly do his words apply to those who have not the power.

Mr. Elphinstone admits that his client committed an error of judgment in writing to the public press, but urges that he acted in "good faith" and with an honest desire to expedite the business of the Court. But if Mr. M. really desired to improve the conduct of business in the Court he would have made a representation first to the District Judge and next to the Judicial Commissioner and in the last resort to the Local Government by whom the Sub-Judge was appointed. Mr. M. made an incidental reference to the conduct of business in the Court to the District Judge on 15th January, but before orders were passed in that matter the letter appeared in the newspaper on 21st January. He made no complaint to the Judicial Commissioner or to the Commissioner in Sind. Mr. M. as his letter shows, was aware that his grievance—real or imaginary—could only be remedied by the superior officers of the Sub-Judge, for he asks the newspaper to bring the matter to their notice. Why does he address the superior officers through a public press? Why does he appeal to the public? Was it necessary to bring the administration of justice into contempt by warning the public not to file suits in that Court? The mode in which he sought redress, the inaccuracy of statements, the excessive language, all repel the notion of "good faith" or honesty of purpose, and seem to us to indicate a spirit radically opposed to that required of a pleader whose duty it is to co-operate with the Court in the orderly and pure administration of justice. We, therefore, find Mr. M. guilty of misbehaviour under S. 16, Sind Courts Act.

In awarding punishment we cannot but feel that leniency would be misplaced.

15. (1874) 9 Q B 290.

Mr. M. cannot plead youth or inexperience and this is not the first time that he has been before us for misbehaviour. In *Varanbai's case* (16) he was reprimanded for breach of duty to a client. He has now been guilty of a breach of duty to the Court. His offence is not mitigated by his insincere apology and his attempted justification. He claims to have the approval of other pleaders. We are glad to be assured by the Government Pleader, who represents the Bar in this proceeding, that that is not the case. And indeed if it were, we should with regret consider that a reason for making the punishment exemplary. We also think that another reprimand would not suffice to mark our sense of the gravity of Mr. M.'s misconduct. The least sentence that we can pass is that Mr. M. should be suspended from practice for a period of three months. He should deliver up his sanad to the Registrar of this Court or to the District Judge, Hyderabad, and may apply for it again after three months.

V.B./R.K. Pleader suspended.

16. (1911) 5 S L R 292=15 I C 785.

A. I. R. 1918 Sind 58

HAYWARD, A. J. C.

Louis Dreyfus & Co.—Plaintiffs.

v.

Secy. of State—Defendant.

Original Civil Suit No. 327 of 1914

Decided on 11th April 1917.

(a) Limitation Act (1908), Art. 30—Suit against carrier for injury to goods carried is governed by Art. 30.

A suit for compensation for injury to goods while in the possession of a carrier, e. g., a Railway Company, falls under Art. 30, and must be filed within one year from the date when the injury occurs. [P 60 C 1]

(b) Civil P. C. (1903), O. 6, R. 17—Altering nature of suit—Amendment should not be allowed.

An amendment which would have the effect of altering the nature of the suit, cannot be allowed upon a verbal suggestion made in final reply. [P 60 C 1]

Isardas Oodharam—for Plaintiffs.

T. G. Elphinstone—for Defendant.

Judgment.—The plaintiffs sued the defendant for compensation for injury to certain goods which had been carried from Sobhago Station to Karachi by the North Western Railway. The defendant denied his liability for the injury which, he pleaded, had been caused while the goods were under arrest by the police; and, shortly before the case came on for trial,

he pleaded further, that the claim was barred by the law of limitation. The plaintiffs admittedly received delivery of the goods on 4th September 1913 and the injury must have occurred before that date, but they did not file their plaint until more than a year after 5th September 1914. Their claim was patently for compensation for injury to the goods while in the possession of the defendant, as carrier, and an issue has accordingly been allowed on the defendant's further pleading as to the claim being time-barred under Art. 30 of the schedule of the Limitation Act. The plaintiffs have, in the first place, contended that the apparent loss has been saved by a number of acknowledgments of liability in their favour by the officers of the defendant. They call as the first witness one James, alias Sgt. August 1913 from the Station Master, Sobbingo, stating that the goods had, on the evening before being loaded, been damaged on the police (Ex. 25) and on the telegram, dated 9th September 1913 from the Station Master, Sobbingo, informing them that a part of the goods was damaged by rainwater (Ex. 24).

Next upon a letter, dated 25th October 1913, from the Station Superintendent, Kennerly, stating that he had written about early claim to the District Traffic Superintendent, (Ex. 18). Other acknowledgments have been alleged to be contained in a letter, dated 10th September 1913, also from the Station Superintendent, Kennerly, stating that he had referred the matter to the District Traffic Superintendent (Ex. 19); in a letter, dated 23rd December, from the District Traffic Superintendent, Karachi Port, stating that he had referred the matter to the Traffic Manager, Lahore, (Ex. 20); in a letter, dated 22nd January 1914, also from the District Traffic Superintendent, stating that he was still awaiting orders (Ex. 20); in a letter, dated 4th April 1914, also from the District Traffic Superintendent stating that he would reply in a few days (Ex. 21), and finally in a letter, dated 15th April 1914, also from the District Traffic Superintendent, denying all liability on behalf of the Railway Co. (Ex. 23). It is difficult to understand how any of these letters could possibly be interpreted into acknowledgments of liability of the injury caused to the goods. It has been urged that

they were acknowledgments of liability in that they were acknowledgments of liability to deliver the goods. But the goods were delivered and it seems to me impossible to spell out of these letters any acknowledgment whatever for the injury which might have been caused to the goods before their delivery by the defendant.

The plaintiffs have, in the next place, contended that, in any case, their claim is not barred because the proper article applicable is not Art. 30, but either Art. 40 or Art. 115 of the Schedule of the Limitation Act. They have relied on a decision of the Calcutta High Court in the case of *Danmull v. British India Steam Navigation Co.* (1), which was approved in the recent case of *Radha Sham Basak v. Secy. of State* (2). It appears to me, however, that their claim does clearly come within the meaning of the words "against a carrier for injuring goods" contained in Art. 30, and is not governed by the words "for wrongfully injuring other specific moveable property" contained in Art. 40 of the Schedule of the Limitation Act. Their claim is equally clearly excluded by the words "not herein specially provided for" from being governed by Art. 115 of the Schedule of the Limitation Act. And this has been the view of the clear wording of the articles taken in the similar context between Arts. 31 and 115 of the Schedule of the Limitation Act by the Bombay High Court in the case of the *Great Indian Peninsula Railway Co. v. Rattray Chaudmull* (3) and *Abu, Ajam Goolam Hossain v. Bombay and Persia Steam Navigation Co.* (4). It will be noticed that the ruling of the Calcutta High Court in the case of *Danmull v. British India Steam Navigation Co.* (1) was not followed by the Bombay High Court. And it is further to be observed in regard to the more recent ruling of the Calcutta High Court in *Radha Sham Basak v. Secy. of State* (2) that there was no proof there as to when the goods ought to have been delivered within the meaning of Art. 31 and that was the reason why recourse was had to Art. 115 of the Schedule of the Limitation Act. The plaintiffs have finally contended

1. (1886) 12 Cal 477.
2. (1917) 44 Cal 16=34 I C 130.
3. (1895) 19 Bom 165.
4. (1902) 26 Bom 562.

that, in any case, they are entitled to recover compensation against the defendant if not as carrier then as ordinary bailee, and that in this view at all events they would be entitled to 3 years' limitation either under Art. 49 or 115 of the Schedule of the Limitation Act. Their plaint, however, is patently against the defendant as a carrier. It makes no reference whatever to the defendant being liable as an ordinary bailee. Nor has any application for amendment for charging defendant with liability as an ordinary bailee been filed notwithstanding that the basis for such liability, namely, the injury to the goods while under arrest of the police, was alleged in defendant's written statement so long ago as 6th October 1914. It is true that issue 4, deals with the question of injury or no while under arrest of the Police. But it was raised apparently with reference to defendant's liability as a carrier and made no mention of his possible liability as an ordinary bailee. That liability could not, in my opinion, be properly considered without express amendment and it is doubtful if that could, in any case, be allowed as it would have the effect of altering the nature of the suit against the defendant. It certainly could not, in my opinion, be allowed upon a verbal suggestion made only in final reply to the arguments on the issue of limitation. It follows, therefore, that the suit must be dismissed with costs as barred by Art. 30 and that recourse cannot be had, in any case, to Art. 49 or 115 of the Schedule of the Limitation Act. It has been brought to my notice that a similar conclusion was arrived at by Fawcett, A. J. C., in Suit No. 248 of 1916 of this Court.

V.R./R.K.

*Suit dismissed.***A. I. R. 1918 Sind 60**

PRATT, J. C. AND HAYWARD, A. J. C.

Emperor.

v.

Ismail—Accused—Respondent.

Criminal Report No. 12 of 1917, Decided on 1st March 1917, made by S. Judge, Hyderabad.

(a) Penal Code (1860). S. 299, Expl. (1) and S. 300 (2)—Injury accelerating death of person suffering from disorder—Offender is not responsible unless he knew that condition of deceased was such that his act is likely to cause death.

Explanation 1 to S. 299, assumes that the

bodily injury was inflicted with the intention of causing death or the knowledge that it would be likely to cause death. It was intended to repeat the English rule that an injury which accelerates the death of a dying man is deemed to be the cause of it, and where death has been caused it is no defence that the deceased was suffering from a complaint which would have caused his death in any event. S. 300 (2), makes it clear that the offender is not responsible for death in such a case unless he knew that the condition of the deceased was such that his act was likely to cause death. [P 60 C 2; P 61 C 1]

(b) Criminal P. C. (1898), S. 207—Expression "ought to be tried by such Court" is limited to cases which Magistrate is not competent to try or cases in which he is unable to inflict adequate punishment.

The Code does not require that all cases of assault ending in death should be committed to the Court of Session. The expression "ought to be tried by such Court" in S. 207, is limited to cases which the Magistrate is not competent to try or cases in which he is unable to inflict an adequate punishment. [P 61 C 1]

E. Raymond—for the Crown.

Judgment.—This is a reference by the Sessions Judge, Hyderabad, asking us to quash the commitment made to him by the First Class Magistrate, Chachro, of the accused on a charge of culpable homicide not amounting to murder under S. 304, I. P. C. No question of appreciation of evidence is involved, because the facts are simple. The accused was annoyed with the deceased because his cattle trespassed into his land and beat him with a stick and kicked him. The deceased died a few hours later and the medical evidence makes it clear that the injuries inflicted were slight and only amounted to simple hurt, but that death had ensued because the heart of the deceased was weak and dilated and the shock of the assault had stopped its beating. On these facts the Magistrate considered that the accused was guilty of culpable homicide because he had accelerated the death of the accused. The Magistrate apparently had in mind explanation (1), S. 299, I. P. C., that:

"a person who causes bodily injury to another who is labouring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that other shall be deemed to have caused his death."

This explanation, however, assumes that the bodily injury was inflicted with the intention of causing death or the knowledge that it would be likely to cause death. It was only intended to repeat the English rule that an injury which accelerates the death of a dying man is deemed to be the cause of it and where death has been caused, it is no defence.

that the deceased was suffering from a complaint which would have caused his death in any event. S. 300 (2), I. P. C., makes it clear that the offender is not responsible for death in such a case, unless he knows that the condition of the deceased was such that his act was likely to cause death. Here it is not suggested that the accused knew that the deceased was suffering from heart disease and, therefore, when he assaulted him he had no intention either to cause death or to cause such bodily injury as is likely to cause death. The offence, therefore, does not amount to culpable homicide and does not fall under S. 299, I. P. C. The Public Prosecutor suggests that all cases of assault ending in death should be committed to the Court of Session. But the only case he has been able to cite in support of his proposition is that of *Queen Empress v. Rupaia* (1). But that case does not support the inference the Public Prosecutor seeks to draw from it. The accused had violently assaulted his wife and caused her death and there was no evidence in support of Magistrate's assumption that the death was due to a diseased spleen. The Bombay High Court, therefore, on these facts reversed the conviction under S. 323, I. P. C., and directed the accused to be committed to the Court of Session on charges of culpable homicide and voluntarily causing grievous hurt.

On the other hand, Criminal Procedure Code makes no such distinction and the expression "ought to be tried by such Court" in S. 207, Criminal P. C., is limited to (1), cases which the Magistrate is not competent to try or (2), cases in which he is unable to inflict an adequate punishment. This is the view taken by the Bombay High Court in the case of *Porna Ranchod* (2), where a commitment for an assault which had caused death was quashed. The present case is one of simple hurt under S. 323, I. P. C., and that is an offence which the Magistrate was competent to try and to punish adequately. He has, therefore, erred in law in committing the accused to the Court of Session. We accordingly quash the commitment under S. 215, Criminal P. C., and direct the Magistrate to proceed with the trial himself.

V.R./R.K. *Commitment quashed.*

1. Ratanlal's Unrep. Cas. page 282.
2. B H C Cr Rulings Jan. 23, 1902.

A. I. R. 1918 Sind 61

PRATT, J. C. AND HAYWARD, A. J. C.

Mt. Mikanbai—Appellant.

v.

Dassimal Gangaram and others—Respondents.

Misc. Civil Appeal No. 2 of 1917, Decided on 31st August 1917.

(a) Civil P. C. (1908), O. 40, R. 1—Effect of substitution of words "just and convenient" is to bring law in India into conformity with that in England.

The intension of the legislature in substituting the words "just and convenient" in place of the phrase "necessary for the realisation, preservation, or better custody or management, of any property moveable or immovable the subject of a suit or attachment," in O. 40, R. 1, of the new Civil Procedure Code, was to bring the law in India into conformity with that in England.

[P 68 C 1]

(b) Civil P. C. (1908), O. 40, R. 1—Principles followed in appointment of receivers indicated.

The power of appointing a receiver should be exercised in India in accordance with principles already settled by the Court of Chancery in England, subject to such modification as conditions peculiar to India may suggest. These principles are the preservation of the estate pending litigation on a consideration of the merits of the conflicting titles, the right to the tenants and other circumstances of the case. The Court however is always reluctant to dispossess a party in actual possession under a prima facie title.

[P 68 C 1]

(c) Civil P. C. (1908), O. 40, R. 1—Scope.

An order directing a receiver to manage a partnership business where all the partners are not parties to the suit is ultra vires.

[P 62 C 2]

(d) Civil P. C. (1908), O. 40, R. 1—Discretion in appointment of receivers not exercised in accordance with settled principles of law—Appellate Court will interfere.

A Court of Appeal, though slow to interfere with the discretion of the lower Court in the appointment of a receiver, would interfere if satisfied that that discretion has not been exercised in accordance with settled principles of law. It would be mischievous to appoint a receiver as a matter of course without regard to the principles governing such appointments.

[P 63 C 2]

(e) Civil P. C. (1908), O. 40, R. 1—No allegation of waste or mismanagement—Appointment of receiver is unnecessary.

The appointment of a receiver is unnecessary where there is no allegation of any act of waste or mismanagement but on the contrary there are partners in the estate other than the litigating parties who are interested in seeing that the property is kept safe and regular accounts are kept of the business.

[P 62 C 2]

Lalchand Hasomal—for Appellant.

Wadhmal Oodharam—for Respondents.

Pratt, J. C.—This is an appeal under O. 43, R. 1 (s), against an order made in the District Court jurisdiction appointing a receiver before decree. The parties to the suit are the descendants of Gopaldas, Gangaram and Nihalchand, three sons of

Hundaldas. Plaintiff 1 Dassimal is a son of Gangaram and plaintiffs 2 and 3 his (Dassimal's) sons. Defendant 2 is the son of Gopaldas. Defendant 3 is also a descendant of Gangaram, being the son of a brother of Dassimal. Defendant 1, the principal defendant, is the widow of Deomal the son of Nihalchand. The suit was a suit for partition and the property alleged to be joint family property consists of lands and a business. Most of the land is in the name of Deomal Nihalchand, who died three months before the institution of the suit and the business was conducted in his name. Thus the main issue in the suit is, whether the land and business of Deomal Nihalchand was joint family property. The application for the appointment of the receiver was made the day on which the plaint was filed and was supported by only two affidavits, that of plaintiff 1 Dassimal and plaintiff 2 his son, Santumal.

In neither of these affidavits is there an allegation of acts of waste or mismanagement. Dassimal says in para. 15 of his affidavit that Tolaram the brother of the widow is now attempting to interfere with the management of the properties; in para. 30 he "apprehends" that Tolaram will forcibly remove the crop. Santumal in para. 3 of his affidavit says that he was manager in Deomal's lifetime and at para. 20 that Tolaram is attempting to take forcible possession. Tolaram is the brother of defendant 1 and is acting on her behalf. The phrase "interfere" therefore begs the question and assumes that Deomal's widow has no right to possession. There is no definition of the attempt to take forcible possession referred to in Santumal's affidavit. Dassimal refers to no such attempt and is only under an apprehension that force will be used. On the other hand, several affidavits were filed for the defence. These are of partners both in the lands and in the business. Jethanand Tanumal (P. 25), a partner in the land, says that regular accounts are kept of the estate for the information of the partners and that there were several partners in the business who all managed in the lifetime of Deomal. Khajuriomal (P. 30) is the principal surviving partner of the business. He says he manages it now and during Deomal's lifetime he also denies that Santumal was sole manager and avers that all

the partners managed the business. He also says that regular accounts are kept of the business.

On the affidavits it is difficult to understand what reason there was for appointing a receiver. There is no allegation of waste and in so far as there was a vague allegation of an apprehended waste, that is completely met by the affidavits of the partners who are interested in seeking that the property is kept safe. Again a receiver would only represent the interests of the litigating partners. He would not be competent to dispossess the other partners who claim to be in possession and to be managing the business and the land. These other partners cannot be compelled to continue the partnership with the receiver and it is foreign to the functions of a Court to carry on a partnership business. The utmost the receiver could do would be to demand an account and receive the profits from the other partners as in the case referred to in O. 21, R. 49 (2). The order of the lower Court directing the receiver to manage the business is "ultra vires" in regard to those other partners. Many affidavits have been filed as to events that occurred since the order under appeal. These we need not refer to for they complain that the appointment has paralysed the business, for the Judge appointed as co-receivers two persons who are at daggers drawn, plaintiff Santumal and Tolaram, the brother of the widow.

Mr. Wadhupal admits the confusion caused by this joint appointment and suggests that this Court should substitute an independent single individual. But is it a case where any receiver should be appointed? On this point Mr. Wadhupal argues that the discretion to appoint a receiver has been enlarged by the new Code of Civil Procedure which has substituted the words "just and convenient" for the more particular phrase in the Code of 1882:

"necessary for the realization, preservation or better custody or management of any property, moveable or immovable, the subject of a suit or attachment."

He further contends that the lower Court having exercised this discretion, this Court should be slow to interfere in view of the dictum of the Privy Council in *Jaipal Kunwar v. Indar Bahadur Singh* (1), followed by this Court in *Shiv-*

andas v. Pamanmal Mangharam (2). I do not however think that the effect of the amended section in the new Civil Procedure Code is to give the Court a wider discretion than that exercised by the Courts in England. The appointment of a receiver is a form of equitable relief given for the protection of the property and in aid of the legal right. This relief was originally granted by the Court of Chancery in accordance with certain well settled principles. When that equitable relief received statutory recognition in the Judicature Act it was expressed in the words:

"A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made."

This statutory power has been held in a series of cases, of which it is only necessary to refer to the most recent case of *Morgan v. Hart* (3), to be limited to cases where the Court of Chancery could have appointed a receiver before the Judicature Act. The words "just or convenient" in S. 25 (8), Judicature Act, have been held to mean just and convenient. *Beddow v. Beddow* (4). The Civil Procedure Code was therefore amended to bring the law in India into conformity with that in England. The power must be exercised in India in accordance with principles already settled by the Court of Chancery, subject of course to such modifications as conditions peculiar to India may suggest (*Woodroffe*, p. 28). These principles have been set forth in the case of *Owen v. Homan* (5), followed in *Sidheswari Dabi v. Abhoyeswari Dabi* (6), and *John v. John* (7). They are the preservation of the estate pending litigation on a consideration of the merits of the conflicting titles (for the Court is always slow to dispossess a party in possession under a prima facie title), the risk to the tenants and other circumstances of the case. It does not appear that these principles have been considered by the lower Court. The party in possession is widow of the last holder who has a prima facie title, and as the property is the partnership property there are partners who have an in-

terest in the preservation of the estate. It is true that the Court of Appeal is slow to interfere with the discretion deliberately exercised by a lower Court, but it must interfere when it is satisfied that that discretion has not been exercised in accordance with settled principles of law. I am satisfied that this is such a case. The mischief of appointing a receiver as a matter of course and without regard to these principles has been pointed out by Straight, J., in a similar case of *Prasannomoyi Devi v. Beni Mahab Rai* (8). I would accordingly reverse the order of the lower Court and allow this appeal with costs.

Hayward, A. J. C.—I concur in the order proposed by the learned Judicial Commissioner, briefly for the reasons that plaintiff has no clear right to the property; that the association of plaintiff with the defendants' representative Tolaram in the management of the property has led to confusion; that serious practical difficulties exist in the way of effective official supervision of the working of a business firm while the land is sufficiently protected by the pendency of the suit; and that there are other partners both in the business and the land interested in the preservation of the property. These circumstances which have now become plain were not, it would seem, fully apprehended at the time the order for a receiver was granted by the learned Judge of the lower Court.

V.R./R.K.

Order reversed.

S. (1893) 5 All 556.

A. I. R. 1918 Sind 63

PRATT, J. C. AND CROUCH, A. J. C.

Khan Mahomed Gulam Mahomed—Appellant.

V.

Chellaram and another—Respondents.

Civil Misc. Appeal No. 11. of 1915, Decided on 27th April 1917, from order of Sub-Judge, Sukkur.

Civil P. C. (1908), S. 47—Order on questions between party and his representative is not appealable though made under S. 47.

Section 47 does not cover questions between a party and that party's representative, e. g. a decree-holder and his transferee: 25 Bom. 631, *Folk*; 82 I C 524, *Diss. from*. [P 64 C 12]

In such cases the order passed, though made under S. 47, is only an interlocutory order and not a decree and is not appealable. [P 64 C 2]

Per Crouch, A. J. C.—The question whether any particular person is or is not the representative of a party can be determined under S. 47

2. A I R 1914 Sind 105=27 I C 942=8 S L R 275.

3. (1914) 2 K B 183=83 L J K B 782.

4. (1879) 9 Ch D 89=47 L J Ch 583.

5. (1853) 4 H L C 997.

6. (1898) 16 Cal 818.

7. (1898) 2 Ch 573=67 L J Ch 616.

but only for a limited purpose. Under that section the Court does not purport to conclusively determine the controversy. Such an order, therefore though within S. 47 is not a decree and is not appealable. [P 64 C 2]

Isardas Udharan—for Appellant.

Dipchand Chandumal—for Respondents.

Pratt, J. C.—This appeal is filed as from an order in execution under S. 47, Civil P. C. Ghulam Mahomed, his mother and sister and two persons, Kundal Khan and Mohandas, who financed the litigation, obtained a decree for possession of land and mesne profits in 1910. Kundal Khan assigned his interest in the decree to Mohandas. Chellaram claims to have got an assignment of the interest in the decree of Ghulam Mahomed, his mother and sister by deed in 1911. Chellaram in 1918 filed an execution application under O. 21, Rs. 15 and 16. The application was on behalf of himself as transferee of Ghulam Mahomed, his mother and sister and for the benefit of the other decree holder, Mohandas. The lower Court found that the interest of the sister had not been transferred and made an order for execution of the whole decree requiring Chellaram to give security for the sister's interest. This is an appeal from that order filed on behalf of Ghulam Mahomed and on the ground that Chellaram is not a transferee of the decree but of the land. We do not decide this point, for even assuming that the appeal has been properly instituted on behalf of Ghulam Mahomed it must fail on the preliminary objection that no appeal lies.

The question arising by the appeal is between the decree-holder Ghulam Mahomed and his transferee Chellaram. It is between a party and that party's representative. S. 47, like S. 244 of the Code of 1882 does not cover such a question. We agree with the decision in *Maganlal v. Mulji* (1), which has been followed in *Anand Kunwari v. Ajudhia Nath* (2). The contrary observation in *Bommanapati Veerappa v. Chintakunta Srinivasa Rau* (3) is only an obiter dictum. We differ from the view expressed recently by a Bench of the Calcutta High Court in *Mohini Mohan Mozumdar v. Surendra Chandra Dey* (4) that the separate numbering of Sub-S. (3), S. 47, makes a difference in

the construction. That sub-section expressly says that the question as to who is the representative is to be determined "for the purposes of this section." It is clear, therefore, that it is only a subsidiary matter and that the right of suit of the decree-holder or the transferee adversely affected is not taken away. In such cases the order is indeed an interlocutory order and there is no decision of the rights of the parties to the suit in which the decree was passed. Interlocutory orders, though made under S. 47, are not appealable, *Saraswati Barmonya v. Moti Barmonya* (5). Different considerations of course apply when the transfer is impeached by the judgment-debtor, as in *Ganga Das Seal v. Yakub Ali Dobashi* (6). We confirm the order of the lower Court and dismiss this appeal with costs.

Crouch, A. J. C.—I concur. S. 47 (1) declares that, where a question arises as to whether any person is or is not the representative of a party, such question shall be determined by the Court executing the decree—but only for the purposes of the section that is to say, in order to enable the Court to determine any question arising between the judgment-creditor on the one hand and the judgment-debtor on the other, and relating to the execution, discharge or satisfaction of the decree. It is necessary to have each side adequately represented in order that the matter in controversy may be satisfactorily contested and finally disposed of. But the question whether any particular person is or is not the representative of a party is determined only for a limited and fugitive purpose. The Court does not purport to conclusively determine the controversy. The order, therefore, though within S. 47, is not a decree. S. 2 (2) must be read as a whole. "Decree" cannot be taken to include an order which does not purport to come within the definition of one, and in which the essential elements are wanting. Appeal dismissed with costs.

V.R./R.K.

Appeal dismissed.

5. A I R 1914 Cal 149=20 I C 72=41 Cal 160.
5. (1900) 27 Cal 670.

1. (1901) 25 Bom 621.
2. (1908) 30 All 379.
3. (1908) 26 Mad 264.
4. (1916) 32 I C 524.

S. N. D.
Advocate High Court
Jammu & Kashmir

A. I. R. 1918 Sind 65

PRATT, J. C. AND CROUCH, A. J. C.

Hyderabad Municipality—Applicant.

v.

Moorjimal Mushtakram—Opponent.

Civil Revn. Appln. No. 17 of 1917.
Decided on 1st June 1917, against order
of Joint Judge, Hyderabad.

(a) *Bombay District Municipal Act (1901)*,
S. 160 (3)—Determination of compensation
by District Judge is subject to revision under
Civil P. C. (1908), S. 115.

Under S. 160 (3), Municipal Act, the matter of
compensation is to be determined by the Dis-
trict Court, which decides the question in the
exercise of its jurisdiction as a civil Court. Its
proceedings are therefore subject to revision by
the Judicial Commissioner's Court under S. 115,
Civil P. C. [P 66 C 1, P 67 C 2]

(b) *Bombay District Municipal Act (1901)*,
S. 160 (3)—District Judge can award 15 p. c.
of market value in addition to sale value.

The word "proceedings" in S. 160 (3), is used
in its popular and not in its strictly legal sense,
and a District Court in awarding compensation
under that section has power to award 15 per
cent. of the market value in addition to such
value. [P 68 C 4]

Hyderam Menaram—for Applicant.

Kimatrai Bhojra—for Opponent.

Crouch, A. J. C.—This is an applica-
tion under S. 115, Civil P. C., against an
order of the Joint Judge, Hyderabad,
under S. 160, District Municipal Act,
awarding 15 per cent. of the amount of
the market value for compulsory acqui-
sition. The learned Judge made it clear in
his judgment that, in his opinion, it was
not lawful to give the 15 per cent. com-
pensation; in previous cases he had refused
it, but in this case he gave it out of de-
ference to this Court which had, on its
original side, awarded such compensation
in a case where the point was not in
issue. Applicant contends that the case
is a fit one for the exercise of this Court's
extraordinary power of revision, inasmuch
as the point decided is one of great and
general importance, that the law is clear,
and that the learned Judge has acted im-
properly in deciding contrary to what he
believed to be the law. If there be no
obstacle in the way of applying the pro-
visions of S. 115, I am of opinion that
the case is a fit one for revision, assuming
that the applicant can satisfy the Court
that the 15 per cent. compensation can-
not be lawfully awarded. But Mr. Kima-
trai, for the opponent, raises the prelimi-
nary objection that S. 115 has no appli-
cation to an award under S. 160, District
Municipal Act. It is necessary to decide

this objection before hearing arguments
on the merits. The history of S. 115 is
well known. In the Code of 1859 no re-
visional powers were conferred on the
Courts. Under Act 23 of 1861, the Sudder
Court might call for the record of any
case decided on appeal in which no further
appeal lay. If the subordinate Court, on
hearing the appeal, appeared to have exer-
cised a jurisdiction not vested in it by the
law. By S. 222 of the Code of 1877 the
words "or to have failed to exercise a
jurisdiction so vested" were added; and
lastly, by S. 92 of Act 19 of 1874 the
power of revision was extended to cases
where the Court has acted in the exercise
of its jurisdiction illegally or with mate-
rial irregularity.

It is clear that it was the intention of
the legislature, in framing this section,
to give to the High Court powers of
supervision and superintendence. The
powers, as originally conferred, differed
materially from those of an appellate
Court; and though, as enlarged, they ap-
proximate to those of an appellate Court,
yet the scope and intention of the section
remain distinct. The High Court is to
see that its subordinate Courts do not in-
terfere in matters of which they have no
cognizance, that they do not fail to exer-
cise their jurisdiction and that they do
not abuse their powers or act illegally in
the exercise of them. It was held in
*Chunilal Virchand v. Ahmedabad Muni-
cipality* (1) that no appeal lies from the
decision of a District Court under Cl. (3),
S. 160, Bombay District Municipal Act,
and this decision has not been questioned
by the applicant. For his contention that
no application under S. 115 is competent,
Mr. Kimatrai relies on *Balaji Sakharani
v. Merwanji Nowroji* (2) and *Munici-
pality of Belgaum v. Rudappa Subrao
Sutar* (3). In the former case, the District
Judge, in an order passed under S. 23,
District Municipal Act, 1884, had made
an order for the payment of certain costs.
In an application to the High Court under
S. 622, Civil P. C., it was held that a
District Judge acting under S. 23, Bom-
bay Act 2 of 1884 was not a Court within
the meaning of the word in S. 622, Civil
P. C., that he was merely a persona desig-
nata and, if he had jurisdiction to award
costs at all, there was nothing to prevent

1. (1912) 36 Bom 47=12 I C 540.

2. (1897) 21 Bom 279.

3. (1916) 40 Bom 509=34 I C 21.

him from awarding them on the scale he did. It appears that this was a case in which the High Court would not properly have exercised its powers under S. 622, even if there had been no doubt as to its competency to do so.

In the latter case the District Judge had found on a preliminary issue that the Court could not proceed with the suit without the claims of defendants 2 and 3 being first submitted to arbitration, and had dismissed the suit. In his order discharging the rule Batchelor, J., stated:

"The object of this application is to obtain from the Court a decision that although no appeal would lie, yet an application in revision does lie."

Such a decision would, in our opinion, be seriously anomalous, and we do not think that the words of the Statute require us to make such a pronouncement. In *Balaji Sakharani v. Merwanji Nowroji* (2) the Court had held that it has no jurisdiction to revise the order of a District Judge acting under S. 23, Bombay District Municipal Act, 1884. And although the words occurring in that section are "District Judge" whereas the words occurring in S. 160, last clause, are "District Court," we do not think that the distinction is sufficient to support the argument that an application for revision is competent, although admittedly no appeal would lie. A comparison of S. 23 of Act 2 of 1884, with S. 160, Bombay District Municipal Act of 1901, discloses some important distinctions. S. 23 runs as follows:

"If the validity of any election of Municipal Commissioner is brought in question by any person qualified either to be elected or to vote at the election to which such question refers, such person may, at any time within ten days after the date of the declaration of the result of the election, apply to the District Judge of the District within which the election has been or should have been held."

The District Judge may, after such inquiry as he deems necessary, pass an order for confirmation or amending the declared result of the election, or for setting the election aside. For the purposes of the said inquiry the District Judge may exercise any of the powers of a civil Court, and his decision shall be conclusive. S. 160 (3) runs thus:

"In the event of the Panchayet not giving a decision within one month from the date of the selection of the Sir Panch, or of the appointment by the District Court of such members as may be necessary to constitute the Panchayet, the matter shall, on application by either party, be determined by the District Court, which shall in cases in which the compensation is claimed in

respect of land, follow as far as may be the procedure provided by the Land Acquisition Act, 1894, for proceedings in matters referred for the determination of the Court."

In the former case, the application is to be made to the District Judge, that is, to the Presiding Officer of the District Court; in the latter the application is to the District Court, that is, the principal civil Court of original jurisdiction within the district: Ss. 2 (4) and (8), Civil P. C. Any presumption that District Judge is intended to be synonymous with District Court in the earlier Act is rebutted by the declaration that he is, for the purposes of the said inquiry, vested with the powers of a civil Court.

The decision, therefore, in *Balaji's* case (2) did not cover the facts with which the Court had to deal in the *Belgaum* case (3); nor need it embarrass us in deciding this one. It has been argued that if no appeal lies, it would be anomalous to hold that relief can be given under S. 115, and reliance is placed on the judgment of Batchelor, J., above cited. But the question whether or not there would be any anomaly in entertaining an application under S. 115 in this case depends on whether or not the District Court acted illegally or with material irregularity. There can be no anomaly in exercising the powers conferred by the section even though there be no appeal, if the conditions of the section be fulfilled. As the case in which our interference is sought was decided by the District Court as such, *prima facie* this Court can call for it under S. 115.

It has been suggested that the Court in making its award acts in an executive or administrative capacity. But the terms of the Act do not support this view. A perusal of S. 160, Bombay District Municipal Act, 1884, discloses that, while no instructions are given to the Panchayet as to the lines which they are to follow in assessing the compensation, detailed instructions are given to the District Court. The members of the Panchayet are expected to assess the compensation as arbitrators, not as legal experts or as men accustomed to adjudicate on complicated questions of fact. But, as soon as the matter is vested in the District Court, a detailed procedure is laid down for its guidance; the Civil Procedure Code, applies to all proceedings

before the Court. There can be no doubt that the legislature contemplated that there would be a judicial proceeding and the object of handing over the determination of any case, which a Panchayet is unable to dispose of, to the District Court is to ensure that there shall be such a proceeding. The Court is not given the wide powers of the Panchayet, but its procedure is strictly defined and its discretion in assessing the compensation is carefully restricted.

There are good reasons why the award of the District Court should not be the subject of appeal. It is most desirable that the owner of property who is compelled to come to Court merely that a sale transaction may be carried through should not be dragged into lengthy litigation. Provided that the District Judge follows the elaborate procedure laid down for his guidance, the margin of possible error is not very wide. But what reason is there to suppose that the legislature contemplated that the District Court, when exercising its judicial authority under S. 160, would be exempted of all control and superintendence by the High Court? Surely, one of the reasons that influenced the legislature in entrusting the final decision of the question of compensation to the District Court was that the Court formed part of a well administered system. There is no anomaly whatever in conferring on a Court the power to give a final decision on any matter so long as it observes certain well defined rules, and yet making such Court subject to control whenever it transgresses those limits. The District Court of Hyderabad is a Court subordinate to this Court; the case, the record of which we are asked to call for, was a case decided by the District Court. We are asked to call for the record because the Judge gave a decision which he admitted to be, in his opinion, contrary to law, a decision which is likely to result in grave and irreparable injury to the applicant if not remedied. I consider that the case is one with which we are competent to deal. But I see no reason for interference with the order of the lower Court.

Section 160, Bombay District Municipal Act, declares that the District Court shall follow, as far as may be, the procedure provided by the Land Acquisition Act, 1894, for proceedings in matters referred for the determination of the Court

On reference to that Act we find the heading to part 3 "Reference to Court and procedure thereon", and it seems obvious that the intention of the legislature was that the Court should follow the procedure laid down in part 3. Further, it is to be noted that both the Panchayet and the Court have to determine what compensation should be awarded to the owner. Compensation is not the same as market value; it is the equivalent in money of the value of land to the owner. The old Common Law rule for ascertaining compensation for expulsion was that it should be determined on the same principles as damages in an action of trespass; and it was the usual practice to add a certain percentage to the market value for compulsory purchase (Halsbury's Laws of England Vol. 6, paras. 36 and 42.)

Section 23, Land Acquisition Act, lays down the lines which the Court should follow in determining the amount of compensation and in doing so it follows closely the English practice; the Court has to ascertain the market value and then add a percentage. Under S. 41, Bombay District Municipal Act, when there is any hindrance to the acquisition of any land, the Government may acquire under the Land Acquisition Act and vest it, when so acquired, in the Municipality. It is wholly unlikely that the legislature intended that the amount of compensation payable under S. 41 should differ materially from that payable under S. 160, notwithstanding that the procedure to be followed for ascertaining such compensation was to be the same under each section. The procedure followed in the case reported as *Karachi Municipality v. Khatammal Hiranand* (4) both by the Municipality and this Court was correct. The Municipality had offered compensation which included a percentage on the market value; the Court awarded the market value and 15 per cent. thereon in addition. I would dismiss this application with costs.

Pratt, J. C.—I concur.

Under S. 160, Cl. (3), Bombay District Municipal Act, 1901, the matter of the compensation is to be determined by the District Court. This distinguishes the case from S. 23, Bombay District Municipal Act, 1884, where the matter there

referred to is decided by the District Judge as a persona designata and the High Court has, therefore, no jurisdiction: *Balaji Saktharam v. Merwanji Nowron* (2). It seems to me clear that under S. 160 (3), the District Court decides the question in the exercise of its jurisdiction as a Civil Court. Its proceedings are, therefore, subject to revision by this Court. I differ from the case of *Municipality of Belgaum v. Rudrapa Subrao Sutar* (3), for I see no anomaly in the High Court revising an order or decree that is not appealable. The case of S. 5, Religious Endowments Act 20, of 1863, presents a very close analogy. That section confers on the Civil Court jurisdiction to appoint a manager of a religious establishment. The Privy Council held in *Minakshie Naidu v. Subramanya Sastri* (5) that no appeal lay from the order. Nevertheless the Madras High Court held in *Gopala Ayyar v. Arunachalam Chetty* (6) that an application for revision to the High Court was competent. I also agree that there is no ground for our interfering in revision.

I do not think the District Judge erred in awarding 15 per cent. over the market value. It is said that the right to this 15 per cent. is a matter of substantive right and not of procedure. Possibly the word procedure, in S. 160 (3) is not very felicitous, but I think it is used in its popular and not in its strictly legal sense. I am quite clear that it does not mean procedure in the sense of the adjective law enacted in the Code of Civil Procedure. S. 53, Land Acquisition Act applies that law to proceedings in Court under the Act. If S. 160 (3) referred to this only, it would have mentioned the Civil Procedure Code and not the Land Acquisition Act. What was meant was that the District Court should frame the same issues and be guided by the same considerations as it would under the Land Acquisition Act. Under that Act it has to decide the market value under Ss. 23 and 24 and then add 15 per cent. to arrive at the compensation to be awarded. It is no great strain on the word "procedure" to say that the District Court under S. 160 (3) should follow this procedure and assess compensation by the same method of valuation.

V.R./R.K. *Application dismissed.*

5. (1898) 11 Mad 26=14 I A 160 (P C).

6. (1903) 26 Mad 85.

A. I. R. 1918 Sind 68

PRATT, J. C. AND HAYWARD, A. J. C.

Firm of Bhawandas Ferroomal—Appellants.

v.

Menghraj and others—Respondents.

Second Appeal No. 29 of 1915, Decided on 14th September 1917, against decision of Joint Judge, Hyderabad.

(a) Execution—Waiver—Instalment decree providing for immediate payment on failure to pay instalments regularly—Acceptance of overdue instalments is not evidence of waiver.

Where a decree provides for payment by instalments subject to the condition of the entire decretal amount becoming payable at once on failure to pay any fixed number of instalments regularly, the mere acceptance of overdue instalments by the decree holder is not of itself sufficient proof of waiver on his part to execute the decree for the entire amount. [P 68 C 2]

(b) Civil P. C. (1908), S. 100 —Payment whether sufficient to extend period of limitation is question of fact.

Where a decree provides for payments by instalments subject to the condition of the entire decretal amount becoming payable at once on failure to pay any fixed number of instalments regularly and whether the payment and acceptance of an overdue instalment is to be treated as a payment regularly made in satisfaction of the instalments due, so as to extend the period of limitation for execution of the decree, is a question of fact. [P 69 C 1]

Fatehchand Asudomal—for Appellants.

Tejumul Hassomal—for Respondents

Pratt, J. C.—This is a second appeal from an order made in appeal by the Joint Judge of Hyderabad, dismissing the appellants' application for execution of an instalment decree made on 5th November 1909. The decree provided for payment of a decretal sum of Rs. 1,800 by instalments of Rs. 35 per mensem, the first instalment being payable on 13th November 1909. The appellant alleged that he had received the sum of Rs. 300 by 9 different payments of Rs. 30, Rs. 40, and Rs. 50 between 2nd January 1911 and 24th December 1912. The application was dismissed as time-barred because the decree provided that when 3 consecutive instalments fell due the defendant should pay the decretal money at once. This default had, on the appellants own showing, occurred in January 1910. The point raised in appeal is that the appellants had waived their right to enforce the default provision in the decree. It has been held that the mere acceptance of overdue instalments is not of itself sufficient proof of waiver: see the case of

Kashiram v. Pandu (1) and *Kimatrai v. Wadero Sher Mahomed Khan* (2). There is on other evidence of waiver in this case beyond the acceptance of overdue instalments and the fact that the appellants are now seeking to enforce the same provision in the decree is not consistent with the plea that they had waived it.

The question whether the acceptance of overdue instalments has the effect of extending the period of limitation is one which was decided here as in the High Court of Bombay on the doctrine of mutual estoppel and and the question here is, whether by paying and accepting these instalments, parties understood that they were to proceed on the footing that those Rs.300 were to be treated as having been paid regularly in satisfaction of the first eight or nine instalments. This is really a question of fact. The lower Courts have come to the conclusion that no such estoppel was worked because the first payment was made 14 months after the first instalment was due and the payments were not made regularly or in sums which were equivalent of any one instalment or a multiple of any one instalment. This is a finding of fact with which we cannot interfere in second appeal. We accordingly confirm the decree of the lower Court and dismiss this appeal with costs.

V.R./H.K. *Appeal dismissed.*

1. (1909) 27 Bom L.

2. A.C.R. 1911 Sind 60=23. I.C.D.S.=S 21, P 23

A.I.R. 1918 Sind 69

CHOUCH AND FAWCETT, A.J. Cs.

Emperor

v.

Ramlo and others—Accused—Opposite parties.

Criminal Acquittal Appeal No. 59/3 of 1917. Decided on 22nd March 1918 against order of acquittal passed by the Addl. S. Judge of Hyderabad.

Penal Code (1860), Ss. 79, 147 and 448—Husband carrying away wife by force against her will is guilty under Ss. 147 and 448.

Both under the English and Indian Law, although it is the duty of a wife to reside and cohabit with her husband, the husband has no right to use force or violence to enforce this right even when the wife's refusal to live with him is without any reasonable cause. [P 70 C 1]

There is nothing in Hindu or Mahomedan Law to justify a husband in using force or restraint to compel his wife to live with him, instead of having resort to a Civil Court for restitution of conjugal rights. Nor can such action be justified under S. 79, I. P. C. [P 70 C 1]

Where a Hindu husband in company of several

associates forcibly entered the house of a third person and took away by force his married wife from there against her will:

Held: that the husband and his associates were guilty of offences under Ss. 147 and 448, I. P. C. [P 71 C 2]

E. Raymond—for the Crown.

Lalchand Hassomal—for the Accused.

Judgment.—This is an appeal by the Local Government against an order of acquittal under Ss. 147 and 448, I. P. C. in respect of accused Nos. 3 (Ramlo), 3 (Nanji), 4 (Gaju) and 7 (Pitho) passed by the Additional Sessions Judge of Hyderabad in an appeal against their convictions under those sections by the Sub-Divisional Magistrate, Mirpur Khas. Notices have not yet been served on Gaju and Pitho and the appeal has, therefore, been heard only in respect of the other two.

The facts alleged are as follows: Pitho's wife Jivat was said to have been enticed away by two men against whom Pitho filed a complaint under S. 498, I. P. C. in the Court of the First Class Magistrate, Jamesabad. On 11th September 1916, there was a hearing of that case at which Jivat was present, having been called as a witness. After her examination she applied to the Court for Police protection on the ground that the complainant and his party were going to take her away by force. The Magistrate wrote a letter to the Sub-Inspector asking him to see that no force was used to her and ordered a Police constable by name Mahomad Parial to escort her to the Sub-Inspector or wherever she wanted to go. In accordance with her desire he went with her to the house of a P. W. D. Overseer Allahbux, where the then accused's Counsel, Mirza Farukhbeg, had put up. He refused to keep her with him as he feared serious consequences, seeing a crowd of Kolhis, to which community the present accused belong, had collected and assumed a threatening attitude. The policeman, however, asked Mirza to let her remain in the house until he got more police from the Thana to assist him and Mirza assented to this. As soon as the Policeman left, a large number of Kolhis (among whom the accused are said to have been) rushed into the house. Jivat thereupon ran into an inner apartment and closed its door from inside. The Kolhi offenders, however, broke it open and forcibly removed her with them. Some of them were armed with hatchets, some with lathis and some with sticks.

The accused Ramlo and Nanji with 12 others were accordingly charged with rioting under S. 147, I. P. C., and house trespass under S. 448, I. P. C.

The Additional Sessions Judge did not upset the conviction on the only grounds specified in the memorandum of appeal to him, viz., that the identity of the appellants was not satisfactorily established and that it was proved that they were elsewhere at the time; but did so on the ground that Pittho had the right to compel his wife to accompany him even though it was against her will and that he was justified in calling upon his associates to help him in removing the woman from what he calls the "wrongful custody" of Mirza and Allabbux. He gives no authority for this view and is clearly wrong. Mr. Lalchand who represented Ramlo and Nanji admitted he could not support it, at any rate as regards the offence under S. 147, I. P. C.

The general English law is that though it is the duty of a wife to reside and cohabit with her husband, yet the husband is not entitled if his wife refuses to live with him, even without any reasonable cause, to restrain her by force or to keep her in confinement: Halsbury's Laws of England, Vol. 16, p. 318, Art. 627. This was established by the case of *Reg. v. Jackson* (1), overruling a supposition to the contrary which previously existed and which has probably led to the Additional Sessions Judge's decision. The law in India is clearly the same. Ss. 339, 340 and 350, I. P. C., make no exception in favour of force or restraint by a husband to his wife such as is provided for in the case of rape (S. 375); and the only possible exception applicable is S. 79, I. P. C. To fall under this, it would have to be shown that a husband is, under Hindu or Mahomedan law, justified in using force or restraint to compel his wife to live with him in spite of the general English law and the provisions of the Penal Code already mentioned. This point is discussed in Wilson's Digest of Anglo-Mahomedan Law, Edn. 1895, pp. 48-50, and Edn. 2, p. 154, and his conclusion is against any such exception in favour of a Mahomedan husband. In the present case the husband is a Hindu and no greater protection from the ordinary criminal law can be claimed for him.

No doubt, as ruled in *Tekait Mon Mohini Jemadai v. Basanta Kumar Singh* (2), Hindu law (as does English law) imposes on a wife the duty of residing with her husband wherever he may choose to reside; but there is certainly no authority for the proposition that he can enforce his right to demand that his wife shall live with him by violence instead of by resort to a civil Court for restitution of conjugal rights.

As regards the offence under S. 448, I. P. C., Mr. Lalchand submitted that the primary intention of the trespassers was not to intimidate, insult or annoy any person in possession of the property but to carry away the woman. Her forcible removal was, however, an offence and the trespass was, therefore, done with intent to commit an offence and so falls under the definition of criminal trespass. In the cases: *Queen-Empress v. Rayapadayachi* (3) and *Gaya Bhar v. Emperor* (4), which are relied on by the Additional Sessions Judge, the intent was to do an act which was not an offence (viz., sexual intercourse with an adult unmarried woman) and these consequently have no application to the present case. The main facts alleged which have been recapitulated above are clearly proved by the evidence in the case and have not been questioned by Mr. Lalchand or by the Additional Sessions Judge in his judgment. The only remaining question is whether it is proved that Ramlo and Nanji were among the persons who entered the house and took part in the forcible removal of Jivat.

Against them is the evidence of Jivat, who was in the best position to identify her assailants as the affair happened about sunset. She states that they and two others, named by her, broke open the door of the room in which she was and took her out. She further says that Ramlo had a knife in his hand. We are asked to discredit her testimony on two grounds. The first is that according to the record of her statement to the police she said that all the Kolhis entered the room. Jivat as to this explains that what she really said was that all the Kolhis entered the house and that she did not say that all entered the room, but only some came

2. (1901) 28 Cal 751.

3. (1896) 19 Mad 240.

4. (1916) 38 All 517=35 I C 979.

1. (1891) 1 Q B 671=50 L J Q B 246.

there. This is certainly more probable for, as the number of Kolhis who entered the house is alleged to have been 40 or 50, it would be almost a physical impossibility for all of them to enter the room without impeding the ones who took an active part in the removal of the woman. Having regard to the informal way in which police statements are recorded it is not unlikely that a mistake was made of the kind alleged by Jivat, and this cannot be taken as a discrepancy which really discredits her subsequent testimony. Secondly, reliance is placed on the defence evidence of the Honourable Mr. Bhurgri and Mr. Nur Mahomed as to the alleged statement of Jivat to them.

The former states that she said that "Pitha and two others whose names she did not know had carried her away from the house", while the latter deposes that she said Pitha had taken her away and there were two other Kolhis with him whom she did not name. But Mr. Bhurgri's statement that she said she could not name the two others is not supported by Mr. Nur Mahomed and it is very unlikely that she would not know the Kolhis in question. She might have said that Pitha had taken her away because she knew it was done at his instigation and as in the number who took her from the room it is only a reduction by one of the number stated at the trial. Thus even accepting the evidence of the Honourable Mr. Bhurgri and Mr. Nur Mahomed the woman is not seriously discredited, and the discrepancy in their evidence is sufficient to throw doubt on the accuracy of their memories. Jivat's testimony is corroborated by Allahito, who says he saw Nanji and three other men carrying away Jivat and by Mirza and Allahbux who both name Ramlo as known to them previously and having been among the Kolhis who entered the house. No substantial reason for discrediting them on this point has, in our opinion, been advanced by Mr. Lalchand. They appear to be disinterested witnesses who have given their evidence without any bias either against accused or in favour of the police case.

In addition there is the testimony of a large number of prosecution witnesses who merely said they identified all the accused as present without naming any particular ones. This evidence is not so trustworthy and has not been much relied on by the

Public Prosecutor. According to Jivat, whose evidence on the point is not contradicted, Ramlo is a brother-in-law and Nanji a cousin of Pitha. Nanji is also Patel of the Kolhis and Ramlo is the Kamdar of the honourable Mr. Bhurgri. It is, therefore, not unlikely that they would assist Pitha and take a leading part in this organised attempt of the Kolhis there to get forcible possession of Jivat's person. No identification test was held by the police, but as remarked in *Pandit v. Emperor* (5) the weight to be attached to the identification of an accused by any particular witness essentially depends on the opportunities he had to observe him and on his general credibility than on the evidence that he actually picked out the accused from a number of other men. In this case we think Jivat's identification of Ramlo and Nanji corroborated by the other evidence mentioned is amply sufficient to prove that they took part in the victim and house trespass charged against them. We, therefore, reverse the acquittal and convict them under Ss. 147 and 148, I. P. C. The two accused took a leading part in an organized criminal act of defiance to the authorities which calls for a deterrent punishment. We restore the concurrent sentences of six months' rigorous imprisonment passed on them by the First Class Magistrate. Order of acquittal reversed.

V.R./R.K.

Order reversed.

S. A. I. R. 1914 Sind 117=271 C 905=3
S L R 204.

A. I. R. 1918 Sind 71

PRATT, J. C. AND CROUCH, A. J. C.

Moosaji Ahmed & Co.—Applicants.

v.

The Karachi Port Trust—Opponents.

Civil Revn. Appln. No. 38 of 1915, Decided on 22nd November 1917.

(a) Karachi Port Trust Act (1886), S. 87—"Person" includes Board.

The word "person" in S. 87 technically includes and was intended to include the Board.

[P 72 C 2]

(b) Karachi Port Trust Act (1886), Ss. 87 and 88—Scope of Ss. 87 and 88 indicated.

Sections 87 and 88 do not distinguish suits against private individuals from suits against the Board, but S. 87 deals with the intention of suits against the Board or any servant or officer of the Board, while S. 88 defines the responsibility of the Board for acts of their officers and servants.

[P 72 C 2]

C. M. Lobo—for Appellants.

T. G. Elphinstone—for Opponents.

N. DAR. A. L. L.

Vakil H. Jurt.

SRINAGAR, Kashmir

Judgment. — This is an application under S. 25, Provincial Small Causes Court Acts. In December 1912 a large consignment of molasses arrived in Karachi for the applicant, and, on being landed, were deposited in the Import Yard. He commenced to take delivery on 7th January, but a very large number of the 10,000 odd baskets continued to remain in the Port Trust sheds for a considerable time after the expiration of the five free days allowed. Demurrage, at the ordinary rate, was demanded by the officers of the Trust and on the 13th January applicant paid Rs. 500 on protest. In response to his application for a return of the money the Secretary replied on 8th March 1913 that he was not prepared to recommend a return of the money, and suggested an appeal to the Chairman. On 9th May the Chairman wrote refusing to interfere, and mentioned that applicant might refer his grievance to the Board. On 20th June 1913 the Board affirmed the decision of the Secretary and Chairman. On 10th September 1913, applicant filed a suit in the Court of Small Causes claiming Rs. 500 and interest.

The only question dealt with in the judgment was, whether the suit was not time barred under S. 87, Karachi Port Trust Act. The Court held for reasons orally given that it was time-barred and dismissed the suit. Mr. Lobo contends that the word "person" in S. 87 does not include the Board, and that the suit is not one for anything done or purporting to have been done in pursuance of the Karachi Port Trust Act, 1886. He suggests that S. 88 deals with suits against the Board, and S. 87 with those against individuals acting within the scope of the Act, and that the brief period of limitation prescribed by S. 87 confers no special privilege on the Board. Ss. 87 and 88 were taken from S. 87, Bombay Port Trust Act, 1879, para. 2, S. 87 and the last one of S. 88 being new. By S. 3 (3), Bombay Act 3 of 1886, which was in force when the Karachi Port

Trust Act 6 of 1886 was passed, "person" is declared to include "a company or association or body of individuals whether incorporated or not," and there can be no doubt that "person" in S. 80 technically includes, and was intended to include, the Board. Ss. 87 and 88 do not distinguish suits against private individuals from suits against the Board, but S. 87 deals with the limitation of suits against the Board or any servant or officer of the Board, and S. 88 defines the responsibility of the Board for acts of their officers and servants. The same question was dealt with in the case of *Prag Narain v. Karachi Port Trust* (1) by Leggatt, A. J. C., and again by myself in *Ralli Bros. v. The Asiatic Steam Navigation Company* (2), and in each case it was held that S. 87 had application to suits against the Board. No instance has been brought to our notice of the contrary view having been expressed.

The cause of action if any arose when the applicant paid the Rs. 500 under threat of having his goods detained. If the officers of the Board refused to deliver the goods without payment of the demurrage incurred, with the bona fide intention of acting in the performance of duties imposed by the Act, they would be entitled to the protection of S. 87. It has not been suggested that they acted under improper motives or outside the scope of their duties. Mr. Lobo has argued that the cause of action should be taken to have arisen in June 1913 when the Board refused to return the Rs. 500; but the refusal to return the money constituted no cause of action unless there was an agreement, express or implied, to return it, and such agreement is not alleged. I would hold that the six months limit applies and dismiss the application with costs. Application dismissed with costs.

V.R./R.K. Application dismissed.

1. (1910) 4 S L R 236=10 I C 972.

2. Suit No. 412 of 1916.

END

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